UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

435

REFERENCE ONLY

346.4 Mx Nott

UNIVERSITY OF LONDON
LIBRARY

- 4 JUN 1991

Digitized by the Internet Archive
in 2026

https://archive.org/details/all-england-law-reports-reprint_1946_1

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS THE PRIVY COUNCIL
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1946

VOLUME 1

Consulting Editor:
Sir ROLAND BURROWS, K.C.
Recorder of Cambridge.
Managing Editor of Halsbury's Laws of England, Hailsham Edition.

Consulting Editor for Chancery Cases:
HAROLD CHRISTIE, K.C.
Bencher of Lincoln's Inn.

Consulting Editor for Taxation Cases:
CYRIL KING, K.C.
Bencher of Middle Temple.

General Editor:
P. F. SKOTTOWE, LL.B.
of Middle Temple, Barrister-at-Law.

[*For full list of Editors and Reporters see overleaf*]

Published by the Proprietors of
THE LAW JOURNAL, 11 & 12 BELL YARD, TEMPLE BAR,
LONDON, W.C.2.

BIBL.
LONDIN
UNIV

ALL ENGLAND LAW REPORTS ANNOTATED

CONSULTING EDITOR:
SIR ROLAND BURROWS, LL.D., K.C.,
Recorder of Cambridge.
MANAGING EDITOR OF HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITI

CONSULTING EDITOR FOR CHANCERY CASES:
HAROLD CHRISTIE, ESQ., K.C.,
Bencher of Lincoln's Inn.

CONSULTING EDITOR FOR TAXATION CASES:
CYRIL KING, ESQ., K.C.,
Bencher of Middle Temple.

GENERAL EDITOR:
P. F. SKOTTOWE, ESQ., LL.B.,
of Middle Temple, Barrister-at-Law.

REPORTERS:

House of Lords	C. St. John W. Nicholson, B.A. (Oxon.)	*Barrister-at-L*
Privy Council	Hubert B. Figg	*Barrister-at-L*
Court of Appeal, No. 1 ..	F. Guttman	*Barrister-at-L*
Court of Appeal, No. 2 ..	C. St. John W. Nicholson, B.A. (Oxon.)	*Barrister-at-L*
Chancery Division ..	B. Ashkenazi	*Barrister-at-L*
King's Bench Division ..	C. St. John W. Nicholson, B.A. (Oxon.) M. D. Chorlton, M.A. (Oxon.) W. J. Alderman P. J. Johnson R. L. Ziar Gwynedd Lewis	*Barristers-at-L*
Court of Criminal Appeal, and Railway and Canal Commission Cases	R. Hendry White	*Barrister-at-L*
Probate and Divorce ..	R. Hendry White	*Barrister-at-L*
Ecclesiastical Cases ..	R. Hendry White	*Barrister-at-L*

BIBL.
LONDIN

These reports are cited thus:
## [1946] 1 All E. R.

CASES REPORTED IN VOLUME I

PAGE
AINLEY *v.* AINLEY [C.A.] .. 311
ALDERTON AND SONS, LTD., ROSENTHAL *v.* [C.A.] 583
AMALGAMATED ANTHRACITE COLLIERIES, LTD. *v.* CORY BROTHERS AND CO., LTD. [C.A.] .. 232
AMES' SETTLEMENT, *Re*, DINWIDDY *v.* AMES .. 689
ANGLO-AMERICAN OIL CO., LTD., ATTORNEY-GENERAL *v.* THE "F. J. WOLFE" [C.A.] .. 359
ARDERNE CINEMAS, LTD., GREENHALGH *v.* [C.A.] 512
ASSOCIATED LONDON PROPERTIES, LTD. *v.* SHERIDAN [K.B.D.] .. 20
ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. *v.* INLAND REVENUE COMRS. ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. *v.* KERR (INSPECTOR OF TAXES) [C.A.] .. 68
ATKIN, DAY *v.* *Re* JACKSON [CH.D.] .. 327
ATTORNEY-GENERAL *v.* ANGLO-AMERICAN OIL CO., LTD., THE "F. J. WOLFE" [C.A.] .. 359
ATTORNEY-GENERAL, PUBLIC TRUSTEE *v.*, *Re* CASSEL'S WILL TRUSTS [CH.D.] .. 32
ATTORNEY-GENERAL, PUBLIC TRUSTEE *v.*, *Re* CASSEL'S WILL TRUSTS (NO. 2) .. 704
AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* INLAND REVENUE COMRS. INLAND REVENUE COMRS. *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY [K.B.D.] .. 236
——, [C.A.] .. 528
AYRSHIRE EMPLOYERS MUTUAL INSURANCE ASSOCIATION, LTD., INLAND REVENUE COMRS. *v.* [H.L.] .. 637
BAINDAIL (OTHERWISE LAWSON) *v.* BAINDAIL [C.A.] 342
BAKER *v.* MATHESON, *Re* PRINGLE [CH.D.] .. 88
BARBER, WALKER & CO., LTD., HALLIDAY *v.* [C.A.] 471
BARCLAY, WILKINSON *v.* [K.B.D.] .. 387
BATTERY (VICTOR) CO., LTD. *v.* CURRY'S, LTD. [CH.D.] .. 519
BEAN (INSPECTOR OF TAXES), DONCASTER AMALGAMATED COLLIERIES, LTD. *v.* [H.L.] .. 642
BEAN'S EXPRESS, LTD., TWINE *v.* [K.B.D.] .. 202
BEAUFRONT, LTD., HAWTREY *v.* [K.B.D.] .. 296
BECKER, EKER *v.* [K.B.D.] .. 721
BENDALL *v.* COOPER, *Re* COOPER'S ESTATE [CH.D.] 28
BERRIMAN, LONDON & NORTH EASTERN RY., CO. *v.* [H.L.] .. 255
BICESTER (LORD), HERBERT *v.*, *Re* HERBERT [CH.D.] .. 421
BOARLAND (INSPECTOR OF TAXES), LEELAND *v.* [K.B.D.] .. 13
BOTTRILL, R. *v.*, *Ex parte* KUECHENMEISTER [K.B.D. DIVL. CT.] .. 635
BOURNE *v.* MINISTER OF PENSIONS [K.B.D.] .. 400
BOURNE'S SETTLEMENT TRUSTS, *Re*, BOURNE *v.* MACKAY [C.A.] .. 411
BOYNE, KRAUSS *v.* [K.B.D.] .. 543
BRIDDON *v.* GEORGE [C.A.] .. 609
BRISTOW (W.) (H.M. INSPECTOR OF TAXES), DICKINSON (WILLIAM) & CO., LTD. *v.* [C.A.] .. 448
BRITISH ARC WELDING CO., LTD., AND B. & N. GREEN & SILLEY WEIR, LTD., HODGSON *v.* [K.B.D.] .. 95
BRITISH IRON & STEEL CORPORATION, LTD. *v.* HALPERN [K.B.D.] .. 408
BRISTOL AEROPLANE CO., LTD., YOUNG *v.* [H.L.] 98
BROMHAM *v.* WILKINS. STACEY *v.* WILKINS [K.B.D. DIVL. CT.] .. 293
C. *v.* C. [DIV. BIRMINGHAM WINTER ASSIZES] .. 562
CAMMELL LAIRD & CO., LTD., DUNCAN *v.*, WOODS *v.* DUNCAN. DUNCAN *v.* HAMBROOK [H.L.] .. 420
CARRERAS, MILMO *v.* [C.A.] .. 288
CASSEL'S WILL TRUSTS, *Re*, PUBLIC TRUSTEE *v.* H.M. ATTORNEY-GENERAL [CH.D.] .. 32
CASSEL'S WILL TRUSTS, *Re*, PUBLIC TRUSTEE *v.* ATTORNEY-GENERAL (NO. 2) [CH.D.] .. 704
CHATTERTON, WILSON *v.* [C.A.] .. 431
CHICHESTER'S (EARL OF) WILL TRUSTS, *Re*, PELHAM *v.* COUNTESS OF CHICHESTER [CH.D.] 722
COMPTON, *Re*, POWELL *v.* COMPTON (NO. 2) [CH.D.] 117
COOMBER *v.* GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE MAINTENANCE AND EDUCATION OF EXPOSED AND DESERTED YOUNG CHILDREN, *Re* FOSTER [CH.D.] .. 333
COOPER, PARRY *v.*, *Re* LITT'S WILL TRUSTS [C.A.] 314
COOPER'S ESTATE, *Re*, BENDALL *v.* COOPER [CH.D.] 28

PAGE
COOTE & WARREN, LTD. (THIRD PARTY) AND LONDON & NORTH EASTERN RY. CO., HENSON *v.* [C.A.] .. 653
CORY BROTHERS AND CO., LTD., AMALGAMATED ANTHRACITE COLLIERIES, LTD. *v.* [C.A.] .. 232
COVENTRY AND DISTRICT CO-OPERATIVE SOCIETY, LTD., PRESTON *v.* [K.B.D. DIVL. CT.] .. 694
COX *v.* PARROTT, *Re* PARROTT'S WILL TRUSTS [CH.D.] .. 321
CRADDOCK (INSPECTOR OF TAXES) *v.* ZEVO FINANCE CO., LTD. [H.L.] .. 523
CROWN BEDDING CO., LTD. *v.* INLAND REVENUE COMRS. [C.A.] .. 452
CROYDON GAS CO. *v.* CROYDON COUNTY BOROUGH RATING AUTHORITY [K.B.D. DIVL. CT.] .. 384
CUMBERLAND CONSOLIDATED HOLDINGS, LTD. *v.* IRELAND [C.A.] .. 284
CUNARD, TRUSTEES OF THE WILL OF, *v.* INLAND REVENUE COMRS. MCPHEETERS *v.* INLAND REVENUE COMRS. [C.A.] .. 159
CURRY'S, LTD., VICTOR BATTERY CO., LTD. *v.* [CH.D.] .. 519
DAGGER *v.* SHEPHERD [C.A.] .. 133
DAVIDSON *v.* DAVIDSON, *Re* WELFORD'S WILL TRUSTS [CH.D.] .. 23
DAY *v.* ATKIN, *Re* JACKSON [CH.D.] .. 327
DE JONG (F.) & CO., LTD., *Re* [C.A.] .. 556
DESOUTTER BROTHERS, LTD., INLAND REVENUE COMRS. *v.* [C.A.] .. 58
DEYONG *v.* SHENBURN [C.A.] .. 226
DICKINSON (WILLIAM) & CO., LTD. *v.* BRISTOW (W.) (H.M. INSPECTOR OF TAXES) [C.A.] .. 448
DINWIDDY *v.* AMES, *Re* AMES' SETTLEMENT [CH.D.] 689
DIRECTOR OF PUBLIC PROSECUTIONS, JOYCE *v.* [H.L.] .. 186
DONCASTER AMALGAMATED COLLIERIES, LTD. *v.* BEAN (INSPECTOR OF TAXES) [H.L.] .. 642
DUFFRYN (POWELL), LTD. *v.* RHODES [K.B.D. DIVL. CT.] .. 666
DUNCAN *v.* HAMBROOK. WOODS *v.* DUNCAN. DUNCAN *v.* CAMMELL LAIRD & CO., LTD. [H.L.] 420
EDE, P.C. (RT. HON. CHUTER), H.M. SECRETARY OF STATE FOR HOME AFFAIRS, NETZ *v.* [CH.D.] 628
EKER *v.* BECKER [K.B.D.] .. 721
EMERY, PHILLIPS (INSPECTOR OF TAXES) *v.* [K.B.D.] .. 144
EPPS *v.* ROTHNIE [C.A.] .. 146
EYRE *v.* HAYNES [C.A.] .. 225
EYRE *v.* JOHNSON [K.B.D.] .. 719
FFRENCH, MINISTRY OF PENSIONS *v.* [K.B.D.] .. 272
FINK, SZALATNAY-STACHO *v.* [K.B.D.] .. 303
FITZSIMONS *v.* FORD MOTOR CO., LTD. (AERO ENGINES) [C.A.] .. 429
FORD MOTOR CO., LTD. (AERO ENGINES), FITZSIMONS *v.* [C.A.] .. 429
FORREST, RYAN *v.*, *Re* TRUSTS OF HOBOURN AERO COMPONENTS, LTD.'S AIR-RAID DISTRESS FUND [C.A.] .. 501
FOSTER, *Re*, COOMBER *v.* GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE MAINTENANCE AND EDUCATION OF EXPOSED AND DESERTED YOUNG CHILDREN [CH.D.] .. 333
FRODINGHAM IRONSTONE MINES, LTD. *v.* INLAND REVENUE COMRS. [K.B.D.] .. 168
FYFE *v.* GARDEN [H.L.] .. 366
G—— *(deceased), In the Estate of,* M—— *v.* L—— [PROB.] .. 579
GABBITAS, *Ex parte*, R. *v.* LEICESTER RECORDER [K.B.D. DIVL. CT.] .. 615
GARDEN, FYFE *v.* [H.L.] .. 366
GEORGE, BRIDDON *v.* [C.A.] .. 609
GILBERT *v.* MCKAY [K.B.D. DIVL. CT.] .. 458
GORDON *v.* GORDON [C.A.] .. 247
GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE MAINTENANCE AND EDUCATION OF EXPOSED AND DESERTED YOUNG CHILDREN, COOMBER *v.*, *Re* FOSTER [CH.D.] .. 333
GRANT (ADMIRAL HENRY WILLIAM) AND RT. HON. LORD PENDER, SHADBOLT (INSPECTOR OF TAXES) *v.* [K.B.D.] .. 16
GREAT WESTERN RY. CO., LIDDIATT *v.* [C.A.] .. 731
GREEN *v.* GREEN [DIV.] .. 308

PAGE
Green (B. & N.) & Silley Weir, Ltd., and British Arc Welding Co., Ltd., Hodgson *v.* [K.B.D.] .. 95
Green (E.) & Son, Ltd., Foster Wheeler, Ltd. *v.* [C.A.] .. 63
Greenhalgh *v.* Arderne Cinemas, Ltd. [C.A.] 512
Greycaine, Ltd., *Re* [Ch.D.] .. 329
Grondkowski and Malinowski, *R.* *v.* [C.C.A.] 559
Halliday *v.* Barber, Walker & Co., Ltd. [C.A.] 471
Halpern, British Iron & Steel Corporation, Ltd. *v.* [K.B.D.] .. 408
Hambrook, Duncan *v.* Woods *v.* Duncan. Duncan *v.* Cammell Laird & Co., Ltd. [H.L.] 420
Harrison *v.* Metropolitan Plywood Co [K.B.D.] .. 243
Hawtrey *v.* Beaufront, Ltd. [K.B.D.] .. 296
Hayes, Langstone *v.* [C.A.] .. 114
Haynes, Eyre *v.* [C.A.] .. 225
Heaven and Governors and Guardians of the National Gallery of Ireland, Meagher *v.*, *Re* Lane's Estate [Ch.D.] .. 735
Henson *v.* London & North Eastern Ry. Co. and Coote & Warner, Ltd. (Third Party) [C.A.] .. 653
Herbert, *Re*, Herbert *v.* Bicester (Lord) [Ch.D.] .. 421
Hivac, Ltd. *v.* Park Royal Scientific Instruments, Ltd. [C.A.] .. 350
Hobourn Aero Components, Ltd.'s Air-Raid Distress Fund, *Re* Trusts of, Ryan *v.* Forrest [C.A.] .. 501
Hodgson *v.* British Arc Welding Co., Ltd., and B. & N. Green & Silley Weir, Ltd. [K.B.D.] 95
Holmes, R. *v.* [C.C.A.] .. 524
Hopwood *v.* Textile Paper Tube Co., Ltd. [C.A.] 618
Humphrey, Johnson *v.* [Ch.D.] .. 460
Inland Revenue Comrs., Associated Portland Cement Manufacturers, Ltd. *v.*, Associated Portland Cement Manufacturers, Ltd. *v.* Kerr (Inspector of Taxes) [C.A.] .. 68
Inland Revenue Comrs. *v.* Australian Mutual Provident Society. Australian Mutual Provident Society *v.* Inland Revenue Comrs. [K.B.D.] .. 236
——, [C.A.] .. 528
Inland Revenue Comrs. *v.* Ayrshire Employers Mutual Insurance Association, Ltd. [H.L.] 637
Inland Revenue Comrs., Crown Bedding Co., Ltd. *v.* [C.A.] .. 452
Inland Revenue Comrs., Cunard, Trustees of the Will of, *v.* McPheeters *v.* Inland Revenue Comrs. [C.A.] .. 159
Inland Revenue Comrs. *v.* Desoutter Brothers, Ltd. [C.A.] .. 58
Inland Revenue Comrs., Frodingham Ironstone Mines, Ltd. *v.* [K.B.D.] .. 168
Inland Revenue Comrs. *v.* L.B. (Holdings), Ltd. (In Liquidation) [H.L.] .. 598
Inland Revenue Comrs. *v.* Lebus [K.B.D. & C.A.] .. 476
Inland Revenue Comrs., Lever Bros. and Unilever, Ltd. *v.* [H.L.] .. 486
Inland Revenue Comrs. *v.* National Anti-Vivisection Society [C.A.] .. 205
Inland Revenue Comrs., Northern Aluminium Co., Ltd. *v.* [K.B.D. & C.A.] .. 546
Inland Revenue Comrs., Taylor *v.* [C.A.] .. 488
Inland Revenue Comrs., Trinidad Petroleum Development Co., Ltd. *v.* [H.L.] .. 497
Ireland, Cumberland Consolidated Holdings, Ltd. *v.* [C.A.] .. 284
Ireland, Governors and Guardians of the National Gallery of, and Heaven, Meagher *v.*, *Re* Lane's Estate [Ch.D.] .. 735
Jackson, *Re*, Day *v.* Atkin [Ch.D.] .. 327
Jacob (Inspector of Taxes), Nugent-Head *v.* [K.B.D.] .. 198
Jay (William A.) & Sons *v.* Veevers (J. S.), Ltd. [Manchester Winter Assizes] .. 646
Jennings, Neale *v.* [C.A.] .. 224
Johnson, Eyre *v.* [K.B.D.] .. 719
Johnson *v.* Humphrey [Ch.D.] .. 460
Johnson *v.* Johnson [Div.] .. 573
Johnson (Inspector of Taxes) *v.* W. S. Try, Ltd. [K.B.D.] .. 169
——, [C.A.] .. 532
Jones *v.* Minister of Pensions [K.B.D.] .. 312
Jordan *v.* Limmer & Trinidad Lake Asphalt Co., Ltd. [K.B.D.] .. 527
Joyce *v.* Director of Public Prosecutions [H.L.] .. 186
Kanssen, Morris *v.* [H.L.] .. 586
Kerr (Inspector of Taxes), Associated Portland Cement Manufacturers, Ltd. *v.* Associated Portland Cement Manufacturers, Ltd. *v.* Inland Revenue Comrs. [C.A.] .. 68
King, Norman *v.* [C.A.] .. 339
Kitson & Co., Ltd., *Re* [C.A.] .. 435
Klass, Maddox Properties, Ltd. *v.* [K.B.D.] 487
Krauss *v.* Boyne [K.B.D.] .. 542
Kuechenmeister, *Ex parte*, R. *v.* Bottrill [K.B.D. Divl. Ct.] .. 635
L——, M—— *v.*, *In the Estate of* G—— (*deceased*) [Prob.] .. 579
"L" Hotel Co., Ltd., and Langham Hotel Co., Ltd., *Re* [Ch.D.] .. 319
Lane's Estate, *Re*, Meagher *v.* Governors and Guardians of the National Gallery of Ireland and Heaven [Ch.D.] .. 735
Langham Hotel Co., Ltd., and "L" Hotel Co., Ltd., *Re* [Ch.D.] .. 319
Langstone *v.* Hayes [C.A.] .. 114
L.B. (Holdings), Ltd. (In Liquidation), Inland Revenue Comrs. *v.* [H.L.] .. 598
Lebus, Inland Revenue Comrs. *v.* [K.B.D. & C.A.] .. 476
Leeland *v.* Boarland (Inspector of Taxes) [K.B.D.] .. 13
Leicester City Council, Mills & Rockleys, Ltd. *v.* [K.B.D. Divl. Ct.] .. 424
Leicester Recorder, R. *v.*, *Ex parte* Gabbitas [K.B.D. Divl. Ct.] .. 615
Lever Bros., and Unilever, Ltd. *v.* Inland Revenue Comrs. [H.L.] .. 486
Liddiatt *v.* Great Western Ry. Co. [C.A.] .. 733
Lilley, Pettit *v.* [K.B.D. Divl. Ct.] .. 593
Limmer & Trinidad Lake Ashphalt Co., Ltd., Jordan *v.* [K.B.D.] .. 527
Linnett *v.* Commissioner of Police for the Metropolis [K.B.D. Divl. Ct.] .. 380
Litt's Will Trusts, *Re*, Parry *v.* Cooper [C.A.] 314
Liverpool and London War Risks Association, Ltd., Ocean Steamship Co., Ltd. *v.* [K.B.D.] 122
London & North Eastern Ry. Co. *v.* Berriman [H.L.] .. 255
London & North Eastern Ry. Co., and Coote & Warren, Ltd. (Third Party), Henson *v.* [C.A.] .. 653
London Justices, R. *v.* [C.A.] .. 129
London Passenger Transport Board, Wilkie *v.* [K.B.D.] .. 656
Luton Corporation, Morris *v.* [C.A.] .. 1
M—— *v.* L——, *In the Estate of* G—— (*deceased*) [Prob.] .. 579
Macintyre *v.* Macintyre and Moppett [Div.] .. 122
MacKay, Bourne *v.*, *Re* Bourne's Settlement Trusts [C.A.] .. 411
McKay, Gilbert *v.* [K.B.D. Divl. Ct.] .. 455
Macmillan & Co., Ltd. *v.* Rees [C.A.] .. 678
McPheeters *v.* Inland Revenue Comrs., Trustees of the Will of Cunard *v.* Inland Revenue Comrs. [C.A.] .. 159
Maddox Properties, Ltd. *v.* Klass [K.B.D.] .. 487
Malinowski and Grondkowski, R. *v.* [C.C.A.] 559
Manchester Corpn., Twyford *v.* [Ch.D.] .. 622
Matheson, Baker *v.*, *Re* Pringle [Ch.D.] .. 88
May, Powell, *v.* [K.B.D. Divl. Ct.] .. 444
Meagher *v.* Governors and Guardians of the National Gallery of Ireland and Heaven, *Re* Lane's Estate [Ch.D.] .. 735
Metropolitan Plywood Co., Harrison *v.* [K.B.D.] .. 243
Millenium Productions, Ltd. *v.* Winter Garden Theatre (London), Ltd. [C.A.] .. 678
Mills & Rockleys, Ltd. *v.* Leicester City Council [K.B.D. Divl. Ct.] .. 424
Milmo *v.* Carreras [C.A.] .. 288
Minister of Pensions, Bourne *v.* [K.B.D.] .. 400
Minister of Pensions *v.* Ffrench [K.B.D.] .. 273
Minister of Pensions, Jones *v.* [K.B.D.] .. 312
Minister of Pensions *v.* Nugent [K.B.D.] .. 273
Minister of Pensions, Nuttall *v.* [K.B.D.] .. 400
Minister of Pensions *v.* Pretty. Shipp *v.* Minister of Pensions [K.B.D.] .. 411
Minister of Pensions, Rowing *v.* [K.B.D.] .. 666
Minister of Pensions, Starr *v.* [K.B.D.] .. 400
Minister of Pensions *v.* Walton [K.B.D.] .. 310
Mischeff, Property Holding Co., Ltd. *v.* [K.B.D.] .. 400
Mist *v.* Tolman & Sons (A Firm) [C.A.] .. 139
Monmouth County *v.* Newport County Borough [K.B.D.] .. 270
Moppett and Macintyre, Macintyre *v.* [Div.] 122

Morris *v.* Kanssen [H.L.] .. 586
Morris *v.* Luton Corporation [C.A.] .. 1
National Anti-Vivisection Society, Inland Revenue Comrs. *v.* [C.A.] .. 205
Neale *v.* Jennings [C.A.] .. 224
Nethersole *v.* Withers (H.M. Inspector of Taxes) [C.A.] .. 711
Netz *v.* Ede, P.C. (Rt. Hon. Chuter), H.M. Secretary of State for Home Affairs [Ch.D.] 628
Newport County Borough, Monmouth County *v.* [K.B.D.] .. 276
Newton and Cattermoles (Transport), Ltd.'s Contract, *Re*, *Re* Northern Garage, Ltd. [Ch.D.] .. 566
No-Nail Boxes, Ltd., No-Nail Cases Proprietary, Ltd. *v.* [H.L.] .. 523
No-Nail Cases Proprietary, Ltd. *v.* No-Nail Boxes, Ltd. [H.L.] .. 523
Norman *v.* King [C.A.] .. 339
Norman *v.* Simpson [C.A.] .. 74
North West Norfolk Assessment Committee and County Valuation Committee for the County of Norfolk, Pratt *v.* [C.A.] .. 4
Northern Aluminium Co., Ltd. *v.* Inland Revenue Comrs. [K.B.D. & C.A.] .. 546
Northern Garage, Ltd., *Re*, *Re* Newton and Cattermoles (Transport), Ltd's Contract [Ch.D.] .. 566
Nugent, Ministry of Pensions *v.* [K.B.D.] .. 273
Nugent-Head *v.* Jacob (Inspector of Taxes) [K.B.D.] .. 198
Nuttall *v.* Minister of Pensions [K.B.D.] .. 400
Ocean Steamship Co., Ltd. *v.* Liverpool and London War Risks Association, Ltd. [K.B.D.] 123
Office Cleaning Services, Ltd. *v.* Westminster Window and General Cleaners, Ltd. [H.L.] 320
Ostime (Inspector of Taxes), Pontypridd and Rhondda Joint Water Board *v.* [H.L] .. 668
Pargeter *v.* Pargeter [C.A.] .. 570
Park Royal Scientific Instruments, Ltd., Hivac, Ltd. *v.* [C.A.] .. 350
Parrott's Will Trusts, *Re*, Cox *v.* Parrott [Ch.D.] .. 321
Parry *v.* Cooper, *Re* Litt's Will Trusts [C.A.] 314
Pelham *v.* Countess of Chichester, *Re* Earl of Chichester's Will Trusts [Ch.D.] .. 722
Pender (The Rt. Hon. Lord) and Admiral Henry William Grant, Shadbolt (Inspector of Taxes) *v.* [K.B.D.] .. 16
Pettit *v.* Lilley [K.B.D. Divl. Ct.] .. 593
Phillips (Inspector of Taxes) *v.* Emery [K.B.D.] 144
Pickering, Wilson & Meeson (a Firm) *v.* [C.A.] 394
Police Commissioner for the Metropolis, Linnett *v.* [K.B.D. Divl. Ct.] .. 380
Pontypridd and Rhondda Joint Water Board *v.* Ostime (Inspector of Taxes) [H.L.] 668
Powell *v.* Compton, *Re* Compton (No. 2) [Ch.D.] 117
Powell *v.* May [K.B.D. Divl. Ct.] .. 444
Pratt *v.* North West Norfolk Assessment Committee and County Valuation Committee for the County of Norfolk [C.A.] .. 4
Preston *v.* Coventry and District Co-operative Society, Ltd. [K.B.D. Divl. Ct.] .. 694
Pretty, Minister of Pensions *v.*, Shipp *v.* Minister of Pensions [K.B.D.] .. 417
Pringle, *Re*, Baker *v.* Matheson [Ch.D.] .. 88
Property Holding Co., Ltd. *v.* Mischeff [K.B.D.] .. 406
Public Trustee *v.* Attorney-General, *Re* Cassel's Will Trusts [Ch.D.] .. 32
Public Trustee *v.* Attorney-General, *Re* Cassel's Will Trusts (No. 2) [Ch.D.] .. 704
Putland and Sorrell, R. *v.* [C.C.A.] .. 85
Queen Anne's Bounty (The Governors of), Tithe Redemption Commission *v.* [Ch.D.] .. 148
Queskey, *Re*, Queskey *v.* Queskey [Ch.D.] .. 717
R. *v.* Bottrill, *Ex parte* Kuechenmeister [K.B.D. Divl. Ct.] .. 635
R. *v.* Grondkowski and Malinowski [C.C.A.] .. 559
R. *v.* Holmes [C.C.A.] .. 524
R. *v.* Leicester Recorder, *Ex parte* Gabbitas [K.B.D. Divl. Ct.] .. 615
R. *v.* London Justices [C.A.] .. 129
R. *v.* Putland and Sorrell [C.C.A.] .. 85
R. *v.* Sellars [C.C.A.] .. 82
R. *v.* Sims [C.C.A.] .. 697
Rees, Macmillan & Co., Ltd. *v.* [C.A.] .. 675
Rhodes, Duffryn (Powell), Ltd. *v.* [K.B.D. Divl. Ct.] .. 666

Robin, Somershield *v.* [C.A.] .. 218
Rosenthall *v.* Alderton and Sons, Ltd. [C.A.] 583
Rothnie, Epps *v.* [C.A.] .. 146
Rowing *v.* Minister of Pensions [K.B.D.] .. 664
Ryan *v.* Forrest, *Re* Trusts of Hobourn Aero Components, Ltd.'s Air-Raid Distress Fund [C.A.] .. 501
Schering, Ltd. (in Voluntary Liquidation) *v.* Stockholms Enskilda Bank Aktiebolag [H.L.] .. 36
Sellars, R. *v.* [C.C.A.] .. 82
Shadbolt (Inspector of Taxes) *v.* Pender (The Rt. Hon. Lord) and Admiral Henry William Grant [K.B.D.] .. 16
Shayler *v.* Woolf [Ch.D.] .. 464
Shenburn, Deyong *v.* [C.A.] .. 226
Shepherd, Dagger *v.* [C.A.] .. 133
Sheridan, Associated London Properties, Ltd. *v.* [K.B.D.] .. 20
Shipp *v.* Minister of Pensions. Minister of Pensions *v.* Pretty [K.B.D.] .. 417
Simpson, Norman *v.* [C.A.] .. 74
Sims, R. *v.* [C.C.A.] .. 697
Smee, Spicer *v.* [K.B.D.] .. 489
Somershield *v.* Robin [C.A.] .. 218
Sorrell and Putland, R. *v.* [C.C.A.] .. 85
Spawforth *v.* Spawforth [Div.] .. 379
Spicer *v.* Smee [K.B.D.] .. 489
Stacey *v.* Wilkins, Bromham *v.* Wilkins [K.B.D. Divl. Ct.] .. 293
Stapleton, *Re*, Stapleton *v.* Stapleton [Ch.D.] 323
Starr *v.* Minister of Pensions [K.B.D.] .. 400
Stenor, Ltd. *v.* Whitesides (Clitheroe), Ltd. [C.A.] .. 176
Stockholms Enskilda Bank Aktiebolag, Schering, Ltd. (in Voluntary Liquidation) *v.* [H.L.] .. 36
Szalatnay-Stacho *v.* Fink [K.B.D.] .. 303
Taylor *v.* Inland Revenue Comrs. [C.A.] .. 488
Textile Paper Tube Co., Ltd., Hopwood *v.* [C.A.] .. 618
Thomas *v.* Thomas [Div.] .. 170
Tithe Redemption Commission *v.* The Governors of the Bounty of Queen Anne [Ch.D.] .. 148
Toleman & Sons (a Firm), Mist *v.* [C.A.] .. 139
Tolten, The. United Africa Co., Ltd. *v.* Owners of M.V. Tolten [Adm.] .. 79
Trinidad Petroleum Development Co., Ltd. *v.* Inland Revenue Comrs. [H.L.] .. 497
Try (W. S.), Ltd., Johnson (Inspector of Taxes) *v.* [K.B.D.] .. 165
——, [C.A.] .. 532
Tweney *v.* Tweney [Div.] .. 564
Twine *v.* Bean's Express, Ltd. [K.B.D.] .. 202
Twyford *v.* Manchester Corpn. [Ch.D.] .. 621
Unilever, Ltd. and Lever Bros. *v.* Inland Revenue Comrs. [H.L.] .. 486
United Africa Co., Ltd. *v.* Owners of M.V. Tolten. The Tolten [Adm.] .. 79
Veevers (J. S.), Ltd., Jay (William A.) & Sons *v.* [Manchester Winter Assizes] .. 646
Walton, Minister of Pensions *v.* [K.B.D.] .. 310
Welford's Will Trusts, *Re*, Davidson *v.* Davidson [Ch.D.] .. 23
Westminster Window and General Cleaners, Ltd., Office Cleaning Services, Ltd. *v.* [H.L.] 320
Wheeler (Foster), Ltd. *v.* E. Green & Son, Ltd. [C.A.] .. 63
Whitesides (Clitheroes), Ltd., Stenor, Ltd. *v.* [C.A.] .. 176
Wilkie *v.* London Passenger Transport Board [K.B.D.] .. 650
Wilkins, Stacey *v.* Bromham *v.* Wilkins [K.B.D. Divl. Ct.] .. 293
Wilkinson *v.* Barclay [K.B.D.] .. 387
Wilson *v.* Chatterton [C.A.] .. 431
Wilson & Meeson (a Firm) *v.* Pickering [C.A.] 394
Winter *v.* Winter [C.A.] .. 686
Winter Garden Theatre (London), Ltd., Millenium Productions, Ltd. *v.* [C.A.] .. 678
Withers (H.M. Inspector of Taxes), Nethersole *v.* [C.A.] .. 711
Wolfe, The F. J., Attorney-General *v.* Anglo-American Oil Co., Ltd. [C.A.] .. 359
Woods *v.* Duncan. Duncan *v.* Hambrook. Duncan *v.* Cammell Laird & Co., Ltd. [H.L.] 420
Woolf, Shayler *v.* [Ch.D.] .. 464
Young *v.* Bristol Aeroplane Co., Ltd. [H.L.] 98
Zevo Finance Co., Ltd., Craddock (Inspector of Taxes) *v.* [H.L.] .. 523

INDEX

PAGE

Accommodation crossing, no duty on railway company to employ watchman 731

Actor, loss of goods from dressing room, rights against producer 226

ADMIRALTY

Jurisdiction—Action in rem—Damage by British ship to pier in Nigerian harbour—Admiralty jurisdiction in rem exercisable over British and foreign ships for damage in any waters—Admiralty Court Act, 1840 (*c*. 65), *s*. 6—*Admiralty Court Act*, 1861 (*c*. 10), *ss*. 7, 35—*Supreme Court of Judicature (Consolidation) Act*, 1925 (*c*. 49), *s*. 22 (1) (*a*) (iv) [UNITED AFRICA CO., LTD. *v*. OWNERS OF M.V. TOLTEN. THE TOLTEN] 79

Adultery confession of, as provocation 524

Advertisement, prohibition by local authority 424

Air-raid distress, fund for, as charity 501

Air-raid shelter, duty of corporation to light 1

Alien, liability for treasonable acts performed outside realm 186

ALIENS

Enemy alien—Deportation—Act of State—Licence allowing enemy alien to remain in the kingdom may be withdrawn at any time—Striking out statement of claim—R.S.C., Ord. 25, *r*. 4 [NETZ *v*. RT. HON. CHUTER EDE, P.C., H.M. SECRETARY OF STATE FOR HOME AFFAIRS] 628

Interned — Habeas corpus — Availability of writ [R. *v*. BOTTRILL, *Ex parte* KUECHENMEISTER] 635

Alternative accommodation, absence of garage, effect of 609

Annuity, cesser of, estate duty, burden of duty, how borne 704

Anti-vivisection Society, charity, as 205

Area, alteration of, financial adjustments .. 276

Attendance, for purpose of Rent Restrictions Act 406

Bad debts, recovery of, assessment to income tax 448

BILLS OF EXCHANGE

Signed blank crossed "not negotiable" cheque—Blanks fraudulently filled in by agent—Drawer not estopped—Payee a "person" within Bills of Exchange Act, 1882 (*c*. 61), *s*. 81 [WILSON & MEESON (A FIRM) *v*. PICKERING] 394

Bomb damage, effect of, whether new house within Rent Restrictions Acts 225

Broadcasting, propaganda, treason, as 186

BURIAL

Burial ground—Right of burial board to charge for permission to cut inscriptions on gravestones—"Monumental inscription"—Burial Act, 1852 (*c*. 85), *ss*. 33, 34, 38 [TWYFORD *v*. MANCHESTER CORPN.] 621

Bye-law, repugnant to general law, invalid .. 444

CHARITIES

Bequest of money on educational trusts—Asset consisting of debt payable to testator under agreement for dissolution of partnership—Business to be carried on by other partners—Testator entitled under agreement, on breach of certain conditions, to wind up business and repay himself his debt—Assets of business, at time of testator's death, including equity of redemption of business premises — Whether testator's rights under agreement "a charge or incumbrance affecting or to affect land"—Charitable Uses Act, 1735 (*c*. 36), *s*. 3 [FYFE *v*. GARDEN] 366

Charitable purposes — Fund raised by employees of a company to provide grants for contributors in respect of air-raid distress—No means test applied in considering claims—Claims by non-contributors not considered—Gift not for general public purposes nor within "poor relations" cases—Fund not subject to valid charitable trusts [*Re* TRUSTS OF HOBOURN AERO COMPONENTS, LTD.'S AIR-RAID DISTRESS FUND, RYAN *v*. FORREST] 501

COMPANIES

Directors—Failure to appoint—Allotment of shares by persons purporting to be directors—Distinction between defective appointment and no appointment—Rule in Turquand's case—Companies Act, 1929 (*c*. 23), *s*. 143, *Sched. I, Table A, art*. 88 [MORRIS *v*. KANSSEN] 586

Practice — Reconstruction — Transfer of property and liabilities to another company—Form of order—Companies Act, 1929 (*c*. 23), *s*. 154—*R.S.C., Ord*. 53B, *r*. 13—*Appendices to R.S.C.*, 1883, *App. L, No*. 37 [*Re* "L" HOTEL CO., LTD., AND LANGHAM HOTEL CO., LTD.] 319

Private company—Alteration of rights of a class of shareholders—Subdivision of shares—10*s. ordinary shares already issued, subdivided into* 2*s. ordinary shares ranking pari passu for all purposes with other* 2*s. ordinary shares already issued—Rights of original holders of* 2*s. shares not "varied"—Companies Act*, 1929 (*c*. 23), *s*. 50, *Sched. I, Table A, arts*. 3, 37, 54 [GREENHALGH *v*. ARDERNE CINEMAS, LTD.] .. 512

Receivers — Remuneration — Receiver appointed at agreed remuneration by trustees of trust deeds securing debentures—Compulsory winding up—Application by liquidator for remuneration of receiver to be fixed by the court—Jurisdiction of the court—Law of Property Act, 1925 (*c*. 20) *ss*. 101 (1) (iii), (3), 109 (6)—*Companies Act*, 1929 (*c*. 23), *s*. 309 [*Re* GREYCAINE, LTD.] 329

Shares—Purchase of shares with financial assistance of company—Validity of debenture issued in connection with purchase of shares—Companies Act, 1929 (*c*. 23), *s*. 45 [VICTOR BATTERY CO., LTD. *v*. CURRY'S, LTD.] 519

Winding up—Shareholder's petition—Company formed to take over a business—Business sold after 46 *years—Construction of memorandum of association—Whether substratum gone — Just and equitable—Companies Act*, 1929 (*c*. 23), *s*. 168 (6) [*Re* KITSON & CO., LTD.] 435

——, *Voluntary winding up—Cumulative preferential dividends in arrears—Surplus assets after payment of debts and repayment of preference capital—Rights of preference and ordinary shareholders—Construction of articles of association* [*Re* F. DE JONG & CO., LTD.] 556

CONFLICT OF LAWS

Libel — Privilege — Official communications on State matters [SZALATNAY-STACHO *v*. FINK] 303

CONTEMPT OF COURT

Attachment and committal—Order for custody of child—Failure to hand over child—Service of order—Order to be complied with on or before stated time—Order served out of time—Intention not to comply with order—Knowledge of order by person affected immaterial—Process of committal—Enforcement only if rules strictly complied with—R.S.C., Ord. 41, *r*. 5—*Matrimonial Causes Rules*, 1944, *r*. 62 (2) [GORDON *v*. GORDON] 247

CONTRACT

Illegality—Enemy debt to neutral country guaranteed by English company—Contract completely performed except for payment—Whether contract abrogated on *outbreak of war* [Schering, Ltd. (in Voluntary Liquidation) *v.* Stockholms Enskilda Bank Aktiebolag] 36

Contributory negligence, apportionment of liability 646

Convoy, vessels in, application of collision regulations 359

CORPORATIONS

Bye-laws—Validity—Repugnancy to general law—Bye-law prohibiting betting in public places—Street Betting Act, 1906 (*c.* 43), *ss.* 1 (1), (4), 2—*Betting and Lotteries Act*, 1934 (*c.* 58), *ss.* 2 (1), 20 [Powell *v.* May] 444

COUNTY COURTS

Appeal—Misdirection—Onus of proof—Judge's note ambiguous—Benefit of doubt [Norman *v.* King] 339

Jurisdiction—Action for recovery of possession—Limit of jurisdiction—Furnished house—Whether apportionment provisions of Rent Restrictions Acts apply—County Courts Act, 1934 (*c.* 53), *s.* 48 (1) —*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (*c.* 17), *s.* 12 (2), *proviso* (i)—*Rent and Mortgage Interest Restrictions Act*, 1923 (*c.* 32), *s.* 10 [Somershield *v.* Robin] 218

——, *Travelling expenses of workman attending for examination by medical referee—No arbitration actual or pending* [Halliday *v.* Barber, Walker & Co., Ltd.] 471

Court of Appeal, decisions of, inconsistent with decisions of House of Lords .. 429, 431

Criminal cause or matter, proceedings for recovery of excise penalties 129

CRIMINAL LAW

Appeal—Criminal cause or matter—Sale of intoxicating liquor without excise licence—Application for order of prohibition—Refusal—Appeal to Court of Appeal—Jurisdiction—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 31 (1) (*a*) [R. *v.* London Justices] .. 129

Burden of proof—Rationed goods acquired without surrendering coupons—Discharge of burden of proof if facts of acquisition constitute supply not prohibited by Order—Consumer Rationing (Consolidation) Order, 1944 (*S.R. & O.*, 1944, *No.* 800), *arts.* 3, 4 [R. *v.* Sellars] 82

Evidence—Rationed goods acquired without coupons—Onus of proof—Duty of prosecution to establish prima facie case—Consumer Rationing (Consolidation) Order, 1944 (*S.R. & O.*, 1944, *No.* 800), *arts.* 1, 2 (3), 4 [R. *v.* Putland and Sorrell] 85

Murder — Provocation — Wife's confession of adultery—Whether sufficient provocation to reduce murder to manslaughter [R. *v.* Holmes] 524

Separate trial—Common enterprise—Discretion of judge—Judicial exercise—Matters for consideration—Attack by one accused on another—Prejudice—Test applied on appeal—Whether exercise of discretion resulted in miscarriage of justice [R. *v.* Grondkowski and Malinowski] 559

Separate trials—Several counts alleging buggery with separate persons—Evidence admissible on one count but inadmissible on another—Evidence tending to show accused of bad disposition—Limits of exception—Interests of justice — Corroboration — Functions of judge and jury—Indictments Act, 1915 (*c.* 90), *s.* 5 (3), *Sched. I*, *r.* 3 [R. *v.* Sims] 697

Treason — Allegiance — Alien — Holder of British passport—Passport issued on alien's declaration of being British subject by birth—Alien broadcasting propaganda for the King's enemies—Adhering to the King's enemies without the realm—Whether alien owing allegiance to the Crown—Rights and obligations of the holder of a British passport—Jurisdiction of English court to try alien for treason committed abroad—Treason Act, 1351 [Joyce *v.* Director of Public Prosecutions] 186

CROWN PRACTICE

Habeas Corpus—Interned alien enemy—Availability of writ—Declaration of Government as to state of war—Whether conclusive [R. *v.* Bottrill, *Ex parte* Kuechenmeister] 635

DAMAGES

Special damage—Loss of earnings through injuries—No deduction in respect of income tax [Jordan *v.* Limmer and Trinidad Lake Asphalt Co., Ltd.] .. 527

Dangerous machinery, duty to guard 243

Desertion, failure to establish, whether curable by supplemental petition 379

——, period of, deletion of non-cohabitation clause 308

——, refusal to accept offer to resume cohabitation 171

DESIGNS

Registration—Design for fuse for use in vulcanising machine—Novelty claimed only for shape of fuse—Fuse only for use in a particular type of machine—Shape dictated solely by functional considerations—Whether "a mere mechanical device"—Size of article to which design has been applied not relevant—Patents and Designs Acts, 1907-1938, *ss.* 49 (1), 93—*Designs Rules*, 1932-1938, *r.* 17 [Stenor, Ltd. *v.* Whitesides (Clitheroe), Ltd.] 176

DIVORCE

Desertion—Continuation of desertion—Non-cohabitation clause — Subsequent deletion of clause—Previous period of desertion added to period subsequent to deletion of clause—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 6 (3) [Green *v.* Green] 308

——, *Failure to establish statutory period—Whether curable by supplemental petition—Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 176—*Matrimonial Causes Act*, 1937 (*c.* 57), *s.* 2 (*b*) [Spawforth *v.* Spawforth] .. 379

Evidence — Cross-examination — Husband's petition—Prayer for discretion inserted erroneously—Application to amend petition—Affidavit sworn by husband denying adultery—Wife's petition alleging different adultery without reference to adultery denied in affidavit—Husband's evidence confined only to matters in affidavit—Cross-examination restriction to charge specifically denied—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 198 [Macintyre *v.* Macintyre and Moppett] 121

Nullity—Marriage in England with Indian already lawfully married in India according to Hindu law—Hindu law permitting polygamy—Hindu marriage recognised as valid in English law—English ceremony of marriage a nullity [Baindail (otherwise Lawson) *v.* Baindail] .. 342

——, *Venereal disease—Doctor requested by patient to disclose confidential information to named person before presentation of petition—Duty of doctor—Matrimonial Causes Act*, 1937 (*c.* 57), *s.* 7 (1) (*c*) [C. *v.* C.] 562

Validity of marriage—Second marriage contracted ten years after disappearance of first husband—Exhaustive inquiries—No evidence that first husband dead at date of second marriage—Desertion by second husband [Tweney *v.* Tweney] 564

Dressing room, theft from, duty of producer 226

Duration of war, lease for 296

Dust, regulation for removal of, breach 139

ECCLESIASTICAL LAW

Cottage in rectory grounds—Whether necessary for convenient occupation of rectory—Whether Rent Restrictions Acts applicable—Pluralities Act, 1838 (*c.* 106), *s.* 59 [Neale *v.* Jennings] 224

Tithe rentcharge—Compensation payable in respect of extinguishment of tithe rentcharges—Deduction in respect of rates—No deduction to be made " in the case of a rentcharge created in lieu of any corn rent *which was free from rates, or a rentcharge which was otherwise free from rates*"—"*Was*" — "*Free from rates*" — *Only rentcharges free from legal liability to be rated at the time they were created to be free from rates—Tithe Act*, 1936 (*c*. 43), *Sched. I, Pt. I, paras*. 3 (*a*), 4 [TITHE REDEMPTION COMMISSION *v*. THE GOVERNORS OF THE BOUNTY OF QUEEN ANNE] 148

Electric lighting circuit, fire 489

EMERGENCY LEGISLATION

Company — Debenture — Winding-up order—Receiver appointed by debenture-holder with leave of court after winding-up order—Status of receiver—Whether application by receiver for leave to sell necessary—Courts (Emergency Powers) Act, 1943 (*c*. 19), *s*. 1 (2) (*a*) (*v*) [*Re* NORTHERN GARAGE, LTD., *Re* NEWTON AND CATTERMOLES (TRANSPORT), LTD.'S CONTRACT] 566

Compensation—Civil defence volunteer—Injuries sustained while proceeding to place of duty—Whether arising out of and in the course of performance of duty—Application of decisions under Workmen's Compensation Act — Personal Injuries (Emergency Provisions) Act, 1939 (*c*. 82), *s*. 8 (1) [MINISTER OF PENSIONS *v*. WALTON] 310

——, *Personal injuries — Factory worker injured on way to shelter during alarm—War injury—Reduction of lights—Enforcement of blackout—"Injurious act"—"Use of weapon"—Personal Injuries (Emergency Provisions) Act*, 1939 (*c*. 82), *s*. 8 (1) [MINISTRY OF PENSIONS *v*. FFRENCH] 272

Essential work—Reinstatement—Dismissal of employee for alleged serious misconduct—Direction to reinstate—Employee paid wages and offered similar employment at another colliery—"Reinstatement"—Defence (General) Regulations, 1939, *reg*. 58A — *Essential Work (Coalmining Industry) Order*, 1943 (*S.R. & O.*, 1943, *No*. 505), art 5 (3) [POWELL DUFFRYN, LTD. *v*. RHODES] 666

Pensions—Claims in respect of disablement or death attributed to war service—Pensions Appeal Tribunal—Appeal from decision of Minister—Burden of proof—Minister's reasons embodying medical opinion—Medical opinion conclusive only if authenticated by medical man—"Evidence"—Pensions Appeal Tribunals Act, 1943 (*c*. 43), *s*. 1, *Sched*., *para*. 5 (2), (3)—*Pensions Appeal Tribunals (England and Wales) Rules*, 1943 (*S.R. & O.*, 1943, *No*. 1757), *rr*. 12 (6), 13, 14, 15, 16—*Royal Warrant concerning Retired Pay, Pensions, etc., Dec*., 1943 (*Cmd*. 6489), *art*. 4 (1), (2), (3) [STARR *v*. MINISTER OF PENSIONS. NUTTALL *v*. SAME. BOURNE *v*. SAME] .. 400

——, *War risk injury—Coastguard employed at look-out hut on sea point—Whether propinquity to sea, tidal water or harbour sufficient for pension entitlement—Pensions (Mercantile Marine) Act*, 1942 (*c*. 26), *s*. 1 (2)—*War Pensions (Coastguards) Scheme*, 1944 (*S.R. & O.*, 1944, *No*. 500) [MINISTRY OF PENSIONS *v*. NUGENT] 273

Rationing—Rationed goods acquired without coupons—Burden of proof on person charged—Consumer Rationing (Consolidation) Order, 1944 (*S.R. & O.*, 1944, *No*. 800), *arts*. 3, 4 [R. *v*. SELLARS] 82

——, ——, *Onus of proof—Duty of prosecution to establish prima facie case—Consumer Rationing (Consolidation) Order*, 1944 (*S.R. & O.*, 1944, *No*. 800), *arts*. 1, 2 (3), 4 [*R*. *v*. PUTLAND AND SORRELL] .. 85

ESTATE DUTY

Assessment of duty—Property passing on death—Annuity—"To Mrs. E.J., and annuity of £5,000 and after her death an annuity of £5,000 to her two daughters, C. and N., and to the survivor of them"—Cesser of annuity on Mrs. J.'s death and springing-up of a new annuity—Finance Act, 1894 (*c*. 30), *ss*. 1, 2 (1) (*b*) [*Re* CASSEL'S WILL TRUSTS, PUBLIC TRUSTEE *v*. H.M. ATTORNEY-GENERAL] 32

Cesser of annuity—Annuity bequeathed by will—Annuity to annuitant and on her death to her daughters—How burden of duty to be borne—Finance Act, 1894 (*c*. 30), *ss*. 2 (1) (*b*), 7 (7), 8 (4), 9 (1), 14 (1) [*Re* CASSEL'S WILL TRUSTS, PUBLIC TRUSTEE *v*. ATTORNEY-GENERAL] 704

ESTOPPEL

Estoppel in pais—"Estoppel by negligence"—Signed blank crossed "not negotiable" cheque—Blanks fraudulently filled in by agent—Drawer not estopped from denying authority [WILSON & MEESON (A FIRM) *v*. PICKERING] 394

EVIDENCE

Admissibility — Documents — Regimental records—Confidential Crown documents—Not public documents—Inadmissible as evidence [PETTIT *v*. LILLEY] .. 593

FACTORIES AND WORKSHOPS

Dangerous machinery—Absolute duty—Cutter of spindle moulding machine—Whether guard provided most efficient guard—Whether duty extends to employee other than operator—Absolute liability under Factories Act, 1937, s. 14, modified by Woodworking Machinery Regulations, 1922, reg. 17—Factories Act, 1937 (*c*. 67), *ss*. 14, 60—*Woodworking Machinery Regulations*, 1922 (*S.R. & O.*, 1922, *No*. 1196), *reg*. 17 [HARRISON *v*. METROPOLITAN PLYWOOD CO.] 243

Dock—Ship under repair—Defective staging—Accident to workman employed by sub-contractors engaged for the electric arc welding—Contractors in occupation of ship—Staging provided by contractors—Sub-contractors not liable—Breach of statutory duty by contractors—Shipbuilding Regulations, 1931 (*S.R. & O.*, 1931, *No*. 133), *reg*. 11 (*b*) [HODGSON *v*. BRITISH ARC WELDING CO., LTD., AND B. & N. GREEN & SILLEY WEIR, LTD.] 95

Statutory duty—Breach—Health regulation for removal of dust—Tubercular condition of workman becoming active—Whether caused by breach of regulation—Onus of proof—Factories Act 1937 (*c*. 67), *s*. 47 (1) [MIST *v*. TOLEMAN & SONS (A FIRM)] 139

Food, sale of, misrepresentation as to weight 694

Film, rights, grant of, for lump sum, assessment to income tax 711

Furniture, for purposes of Rent Restrictions Act 406, 487

GAMING AND WAGERING

Betting in public place—Bye-law repugnant to general law—Street Betting Act, 1906 (*c*. 43), *ss*. 1 (1), (4), 2—*Betting and Lotteries Act* 1934 (*c*. 58), *ss*. 2 (1), 20 [POWELL *v*. MAY] 444

Private lottery—Promotion and conduct—Breach of statutory conditions—Names and addresses of promoters on tickets—Liability of printer—Betting and Lotteries Act, 1934 (*c*. 58), *ss*. 21, 22, 24 [STACEY *v*. WILKINS. BROMHAM *v*. WILKINS] 293

Gas company, assessment for rates 384

GUARANTEE

Indemnity—Railway company granting privilege to employees of wagon repairing company to enter on railway company's property—Repairing company undertaking to indemnify railway company against damages, etc., for injury to repairing company's employees—Requisition of railways and wagons by Government during war—Whether indemnity undertaking still effective [HENSON *v*. LONDON & NORTH EASTERN RY. CO., AND COOTE & WARREN, LTD. (THIRD PARTY)] 653

HIGHWAYS

Obstruction—Air-raid shelter erected in roadway by local authority—Lighting—Shelter not illuminated—Corners of shelter painted with white paint—Cyclist injured

PAGE

by colliding with shelter—Duty of local authority to give appropriate warning of danger [MORRIS *v.* LUTON CORPORATION] 1

Hindu, marriage of, validity in English law 342

HUSBAND AND WIFE

Desertion—Quarrels between parties—Wife's withdrawal from cohabitation—Wife's offer to resume cohabitation rejected by husband—Husband continuing in desertion by refusal of wife's offer—Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39), *s.* 4 [THOMAS *v.* THOMAS] .. 170

Legal proceedings—Claim for possession of house, the matrimonial home—No relationship of landlord and tenant—Proceedings not properly constituted—Married Women's Property Act, 1882 (*c.* 75), *s.* 17—*County Court Rules, Ord. VI, r.* 7 (1) [PARGETER *v.* PARGETER] 570

Separation agreement—Provision for payment of specific sum weekly—Payments without deduction of income tax—Stopping of weekly payments— Wife's action for wilful neglect to maintain—Order for maintenance—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 19 [JOHNSON *v.* JOHNSON] 573

Separation deed—Covenant by husband to pay annuity to wife—Term during which annuity payable not stated—Death of husband—Whether husband's estate liable for payments—Law of Property Act, 1925 (*c.* 20), *s.* 80 (1) [LANGSTONE *v.* HAYES] 114

INCOME TAX

Annual payments—Capital or income—Direction in will to make up deficiency of income out of capital—Payments made prior to ascertainment of residue—" Residuary estate "—Payments " in respect of income "—Irrelevant that payments made out of capital—Recurrent payments—" Annual payment "—Whether payments " in respect of " a limited interest in residue—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case III, r.* 1 (*a*), *Rule* 21, *All Schedules Rules—Finance Act,* 1938 (*c.* 46), *ss.* 30 (2), 35 (3) [TRUSTEES OF THE WILL OF FLORENCE CUNARD *v.* INLAND REVENUE COMRS. ELLA MCPHEETERS *v.* INLAND REVENUE COMRS.] 159

Appeal—Point of law not raised before Commissioners—Right to raise on appeal [W. S. TRY, LTD. *v.* JOHNSON (INSPECTOR OF TAXES)] 532

Capital or income—Isolated transaction—Grant of film and other rights in play for lump sum—Grant of licence for term of years—Whether related to " royalty " calculation—Whether casual profit of a revenue nature—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case VI* [NETHERSOLE *v.* WITHERS (INSPECTOR OF TAXES)] .. 711

Capital or revenue expenditure—Company directors retiring from office—Covenants in restraint of trade—Payments made by company to retiring directors in consideration of covenants—Payments not deductible from company's trading profits as revenue expenditure—Capital expenditure—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I* [ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. *v.* INLAND REVENUE COMRS. ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. *v.* KERR (INSPECTOR OF TAXES)] 68

Deduction against profits—Coal mine—Statutory obligation to remedy damage to district drainage system resulting from subsidence — Contribution to scheme releasing mine owner from statutory obligation—Contribution payable by instalments—Whether capital or revenue expense [DONCASTER AMALGAMATED COLLIERIES, LTD. *v.* BEAN (INSPECTOR OF TAXES)] .. 642

Exemption — Charity — Anti-Vivisection Society—Whether established for charitable purposes only—Admissibility of evidence as to detrimental effect of society's object—Income Tax Act, 1918 (*c.* 40), *ss.* 37 (1) (*b*), 40 [INLAND REVENUE COMRS. *v.* NATIONAL ANTI-VIVISECTION SOCIETY] 205

PAGE

——, *Income derived from investments of superannuation funds—Claims for repayment of tax deducted at the source—Two Finance Acts in respect of same financial year—Second Act increasing standard rate of tax imposed by the first Act—Increased rate payable in respect of whole financial year—Sale of investments by trustees before increase of standard rate—Deduction made at original rate—Deficiency in tax deduction to be made up by adding to deduction due on next payment—Purchase of investments by trustees after increase of standard rate—Income received on new investments not only less tax at increased rate but also less deficiency in tax arising through transferors having suffered tax only at former standard rate—Deficiency payment to be " accounted for and assessed in the same manner as the tax deducted from original payment "—Payments of tax in fact made by transferees—Transferors not to be treated as persons who made payments—Income Tax Act,* 1918 (*c.* 40), *s.* 27—*Finance Act,* 1921 (*c.* 32), *s.* 32—*Finance* (*No.* 2), *Act,* 1939 (*c.* 109), *s.* 7, *Sched.* 6, *paras.* 1, 2—*Finance* (*No.* 2) *Act,* 1940 (*c.* 48), *s.* 6, *Sched.* 5, *paras.* 1, 2 [SHADBOLT (INSPECTOR OF TAXES *v.* THE RT. HON. LORD PENDER AND ADMIRAL HENRY WILLIAM GRANT].. 16

Mutual insurance association—Surplus arising from transactions with members—Whether assessable—Finance Act, 1933 (*c.* 19), *s.* 31 (1) [INLAND REVENUE COMRS. *v.* AYRSHIRE EMPLOYERS MUTUAL INSURANCE ASSOCIATION, LTD.] 637

Profits from trade and trade receipts—Part recovery of debts previously written off as bad—Amounts so received to be included in computation of profits—Amounts taxable in year of receipt—Income Tax Act, 1918 (*c.* 40), *Sched. D, Cases I and II, r.* 3 (i) [WILLIAM DICKINSON & CO., LTD. *v.* W. BRISTOW (H.M. INSPECTOR OF TAXES)].. 448

Provident society — Non-resident — Head office in Australia, branch office in London—Income from investments of life assurance fund—Taxation of income from business carried on by London branch—Basis for ascertaining income so chargeable—Income from certain investments exempted from United Kingdom tax by statutory provision—Assessments to tax excessive by reason of error in returns—Relief—Method of computation to be followed in respect of portion of income specifically exempted from tax but included in income from investments chargeable to United Kingdom tax—Income Tax Act, 1918 (*c.* 40), *s.* 46, *Sched. C, r.* 2 (*d*), *Sched. D, Case III, r.* 3 (1), (2), (4), *Miscellaneous Rules, r.* 7—*Finance Act,* 1923 (*c.* 14), *s.* 24 [AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* INLAND REVENUE COMRS.] 528

——, ——, ——, ——, ——, ——,

——, *Relief from United Kingdom tax of balance of income already charged with Dominion tax—Assessment to tax excessive by reason of error in returns—Relief—Method of computation to be followed in respect of portion of income specifically exempted from tax but included in income from investments chargeable to United Kingdom tax—Income Tax Act,* 1918 (*c.* 40), *s.* 46, *Sched. C, r.* 2 (*d*), *Sched. D, Case III r.* 3 (1), (2), (4), *Miscellaneous Rules, r.* 7—*Finance Act,* 1920 (*c.* 18), *s.* 27—*Finance Act,* 1923 (*c.* 14), *s.* 24 [INLAND REVENUE COMRS. *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY. AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* INLAND REVENUE COMRS.] 236

Sched. D—Income arising from foreign possessions — Married woman — " Living with her husband "—" Living . . . separate from her husband "—Assessment on wife as feme sole—Husband on military service abroad—Wife entitled in her own right to income from abroad—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 16 [NUGENT-HEAD *v.* JACOB (INSPECTOR OF TAXES)] 198

PAGE

Sched. E—Payment of lump sum to company director in consideration of acceptance of reduced salary and alteration of director's tenure of office—Compensation not in nature of a capital receipt—Income Tax Act, 1918 (*c.* 40), *Sched. E* [LEELAND *v.* BOARLAND (INSPECTOR OF TAXES)] .. 13

——, *Weekly wage earner—Housewife directed to work in factory—Travelling expenses—Whether claim for deduction admissible—Income Tax Act*, 1918 (*c.* 40), *Sched. E, r.* 9—*Finance Act*, 1941 (*c.* 30), *s.* 23 [PHILLIPS (INSPECTOR OF TAXES) *v.* EMERY] 144

Sur-tax—Undistributed income—Apportionment according to member's interest in assets—" Able to secure "—" Any means whatsoever "—Whether limited to lawful means—Finance Act, 1922 (*c.* 17), *s.* 21—*Finance Act*, 1939 (*c.* 41), *s.* 15 [INLAND REVENUE COMRS. *v.* L.B. (HOLDINGS), LTD. (IN LIQUIDATION)] 598

——, *Widow of deceased partner entitled under his will to share profits—Continuing partners unable to pay share of profits during year of assessment—Widow not liable—Income Tax Act*, 1918 (*c.* 40), *Sched. D, Case III, r.* 1 (*a*), *All Schedules Rules, r.* 19 [INLAND REVENUE COMRS. *v.* LEBUS] 476

Trade receipt—Company engaged in ribbon development—Compensation paid to company—Appropriate year of assessment—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I—Restriction of Ribbon Development Act*, 1935 (*c.* 47), *ss.* 1, 2, 7, 9 [W. S. TRY, LTD. *v.* JOHNSON (INSPECTOR OF TAXES)] 532

——, ——, ——, *Income Tax Act*, 1918 (*c.* 40), *Sched. D, Case I—Restriction of Ribbon Development Act*, 1935 (*c.* 47), *s.* 9 [JOHNSON (INSPECTOR OF TAXES) *v.* W. S. TRY, LTD.] 165

——, *Sums received by water board under precepts issued to constituent authorities—Sums provided out of general rate—Whether trade receipt—Income Tax Act*, 1918 (*c.* 40), *Sched. D, Case I* [PONTYPRIDD AND RHONDDA JOINT WATER BOARD *v.* OSTIME (INSPECTOR OF TAXES)] 668

INFANTS

Maintenance — Statutory power of maintenance—Contingent interest in income of residuary estate—Direction to accumulate intermediate income—Statutory power not available—Trustee Act, 1925 (*c.* 19), *ss.* 31 (1), (3), 69 (2) [*Re* STAPLETON, STAPLETON *v.* STAPLETON] 323

Marriage—Refusal of consent by justices—Appeal—No jurisdiction in High Court to hear appeal—Marriage Act, 1823 (*c.* 76)—*Guardianship of Infants Act*, 1886 (*c.* 27)—*Guardianship of Infants Act*, 1925 (*c.* 45), *ss.* 7 (3), 9 (1) (*a*), (4), 11 (2) [*Re* QUESKEY, QUESKEY *v.* QUESKEY] 717

INJUNCTION

Breach of contract—Grant of irrevocable licence to use theatre—Negative covenant by licensor not to revoke implied in grant—Right of licencees to injunction to restrain licensor from acting on purported revocation [MILLENIUM PRODUCTIONS, LTD. *v.* WINTER GARDEN THEATRE (LONDON), LTD.] 678

Interlocutory—Procuring breach of service contract—Servant not party to proceedings—Alternative remedy dismissal of servant—Balance of convenience [HIVAC, LTD. *v.* PARK ROYAL SCIENTIFIC INSTRUMENTS, LTD.] 350

Injurious act, provision of black-out not amounting to 272

INSURANCE

Marine insurance—War risks—Warlike operations—Ship carrying urgently needed war material including deck cargo—Damage caused by effect of heavy seas on deck cargo and aggravated by reason of speed of ship—Damage resulting from additional risks incurred by reason of warlike operation—Damage consequence of warlike operation [OCEAN STEAMSHIP CO., LTD. *v.* LIVERPOOL AND LONDON WAR RISKS ASSOCIATION, LTD.] 123

INTOXICATING LIQUORS

Licensed premises — Co-licensees — " Keepers "—Management and sole control in one of two co-licensees—Knowingly permitting disorderly conduct on premises—Liability—Metropolitan Police Act, 1839 (*c.* 47), *s.* 44 [LINNETT *v.* COMMISSIONER OF POLICE FOR THE METROPOLIS] 380

JUDGMENTS

Judicial decisions as authorities—Decision of Court of Appeal inconsistent with the decision of House of Lords [FITZSIMONS *v.* FORD MOTOR CO., LTD. (AERO ENGINES)] 429

——, *Previous decisions of Court of Appeal inconsistent with general principles laid down by House of Lords* [WILSON *v.* CHATTERTON] 431

Keeper, co-licensee as 380

LANDLORD AND TENANT

Covenant not to sub-let—Breach by tenant—Landlord aware of continuing breach—Rent restriction—Sale of premises—Claim for possession against sub-tenant " Lawfully or unlawfully sub-let "—Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1920 (*c.* 17), *ss.* 5 (5), 15 (3)—*Rent and Mortgage Interest Restrictions Act*, 1923 (*c.* 32), *s.* 7 (1) [NORMAN *v.* SIMPSON] 74

Husband and Wife—Claim for possession of house, the matrimional home—No relationship of landlord and tenant [PARGETER *v.* PARGETER] 570

Lease of premises by railway company to wagon repairing company—Indemnity clause against damages, etc., for injury to repairing company's employees—Employee injured away from demised premises—Whether indemnity restricted to injury connected with demised premises—Construction [HENSON *v.* LONDON & NORTH EASTERN RY. CO., AND COOTE & WARREN, LTD. (THIRD PARTY)] 653

Licence — Revocation — Licence for use of theatre—Express term entitling licencee to determine licence—No provision for determination by licensor—No right in licensor to revoke licence [MILLENIUM PRODUCTIONS, LTD. *v.* WINTER GARDEN THEATRE (LONDON), LTD.] 678

Notice to quit—Construction—Lease for two years and thereafter for consecutive periods of two quarters—Lease determinable on or after given date by two quarters' previous notice in writing—Lease determined by landlords by notice expiring on given date—Notice invalid [ASSOCIATED LONDON PROPERTIES, LTD. *v.* SHERIDAN] 20

——, *Lease for fixed term then quarterly—Notice served before expiration of fixed term—Validity* [BRITISH IRON & STEEL CORPORATION, LTD. *v.* HALPERN] 408

——, " *On or before* "—*Construction—Rent and Mortgage Interest Restrictions* (*Amendment*) *Act*, 1933 (*c.* 32), *s.* 3, *Sched.* 1 (*h*) [DAGGER *v.* SHEPHERD] 133

Recovery of possession—Lease continuing until cessation of hostilities—Actual day of cease fire order—Uncertainty—Validation of War-time Leases Act, 1944 (*c.* 34), *s.* 1 [EKER *v.* BECKER] 721

Rent restriction—Cottage in rectory grounds—Claim for possession by rector—Whether necessary for convenient occupation of rectory—Question of fact—Pluralities Act, 1838 (*c.* 106), *s.* 59 [NEALE *v.* JENNINGS] 224

——, *Furnished letting—" Attendance " — " Furniture " — Whether substantial part of rent for attendance and use of furniture—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act*, 1920 (*c.* 17), *s.* 12 (2), *proviso* (i)—*Rent and Mortgage Interest Restrictions Act*, 1923 (*c.* 32), *s.* 10 [PROPERTY HOLDING CO., LTD. *v.* MISCHEFF] 406

——, ——, *Whether substantial portion of rent for use of furniture—Increase of Rent and Mortgage Interest (Restrictions) Act,* (*c.* 17), *s.* 2 (1), *proviso* (i)*—Rent and Mortgage Interest Restrictions Act,* 1923 (*c.* 32), *s.* 10 (1) [MADDOX PROPERTIES, LTD. *v.* KLASS] 487

——, *House originally not within 1939 Act—Subsequent damage by enemy action—Rateable value reduced—Whether brought within the protection of the Act—New house—Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 17), *ss.* 3 (1), 7 (1) [EYRE *v.* HAYNES] 225

——, *Recovery of possession—Alternative accommodation offered — Relevant matters for consideration—" Reasonable to make order "—Misdirection—" Suitable alternative accommodation "—Absence of garage irrelevant—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (*c.* 32), *s.* 3 (1), *Sched. I, para.* (*h*) [BRIDDON *v.* GEORGE] 609

——, ——, *Plaintiff claiming as landlord—" Not being a landlord who has become landlord by purchasing the dwelling-house after Dec. 6, 1937 "—Unoccupied house purchased by plaintiff after statutory date—Subsequent tenancy agreement—" Landlord "—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (*c.* 32), *Sched. I* (*h*)*—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1938 (*c.* 26), *Sched. II* [EPPS *v.* ROTHNIE] 146

——, ——, *Sole use of three unfurnished rooms and joint use of other rooms—" Part of a house let as a separate dwelling "* [KRAUSS *v.* BOYNE] 543

——, *Standard rent—Premises let as dwelling-house in* 1940*—Same premises let in* 1938, *at high rent, as business offices with licence for tenant to sleep on premises—Claim by landlord to fix standard rent by reference to* 1938 *letting—" Dwelling-house"—*1938 *letting not as a dwelling-house—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (*c.* 17), *s.* 12 (1) (*a*)*—Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71) [MACMILLAN & CO., LTD. *v.* REES] 675

Repair—Covenant to repair and yield up in repair—Whether breach excused by regulations prohibiting repair above certain cost without licence—Defence (General) Regulations, 1939, *reg.* 56A [EYRE *v.* JOHNSON] 719

Term — Certainty — Commencement and termination defined by reference to commencement and termination of war—Date of termination of European war—Declaration by Government that national emergency ended—Notice to quit—Validity of—Validation of War-Time Leases Act, 1944 (*c.* 34), *ss.* 1, 2*—Tenancy Agreements (End of the War in Europe) Order,* 1945 (*S.R. & O.*, 1945, *No.* 703/*L.*8 [HAWTREY *v.* BEAUFRONT, LTD.] 296

Written agreement purporting to be a sub-lease—Sub-term expressed to extend beyond date of expiry of head lease—No reversion left in head tenant—Head tenant not entitled to serve notice to quit—No contractual obligation on so-called sub-lessee to deliver up possession to head tenant [MILMO *v.* CARRERAS] 288

LIBEL

Privilege—Absolute privilege—Official communications on State matters—Level of such communications—Conflict of laws [SZALATNAY-STACHO *v.* FINK] 303

LOCAL GOVERNMENT

Alteration of area—Extension of county borough to include part of county area—Loss to county ratepayers—Financial adjustments—Increased burden on county ratepayers—Arbitration—Amount of compensation—Method of assessing compensation—" Income "—Local Government Act, 1933 (*c.* 51), *ss.* 151, 152, *Sched. V, r.* 1*—Newport Extension Act,* 1934 (*c.* lvii), *s.* 58 [MONMOUTH COUNTY *v.* NEWPORT COUNTY BOROUGH] 276

Lottery, private, necessity for names of all promoters on tickets 293

MAGISTRATES

Appeal to quarter sessions—Motoring offence—Licence suspended by magistrates—Disqualification removed by order—Jurisdiction—Desirability of stating special reasons—Road Traffic Act, 1930 (*c.* 43), *s.* 35*—Summary Jurisdiction (Appeals) Act,* 1933 (*c.* 38), *s.* 31 (1) (vii) [R. *v.* LEICESTER RECORDER, *Ex parte* GABBITAS] 615

Maintenance, application of income for, direction to accumulate surplus income from residue 323

Manslaughter, confession of adultery, whether reducing murder to 524

MASTER AND SERVANT

Duty of master—Proper system of working—Failure to take reasonable care to prevent theft of servant's property—Whether breach of duty—Actor's clothing stolen from dressing room [DEYONG *v.* SHENBURN] 226

Duty of servant—Skilled manual worker assisting trade competitor during spare time—Whether breach of duty [HIVAC, LTD. *v.* PARK ROYAL SCIENTIFIC INSTRUMENTS, LTD.] 350

Liability of master at common law—Ship under repair—Defective staging—Accident to workman employed by sub-contractors engaged for the electric arc welding—Staging provided by contractors—Sub-contractors for specialised work not responsible for staging erected by contractors [HODGSON *v.* BRITISH ARC WELDING CO., LTD., AND B. & N. GREEN & SILLEY WEIR, LTD.] 95

Liability of master for negligence of servant—Fatal accident to unauthorised passenger in commercial van—Trespasser—Extent of duty to take care [TWINE *v.* BEAN'S EXPRESS, LTD.] 202

MEDICINE

Doctor and patient—Disclosure of confidential information—Patient suffering from venereal disease—Proceedings for decree of nullity contemplated—Request by patient for disclosure of confidential information to named person—Duty of doctor. [C. *v.* C.] 562

Mutual insurance association, surplus arising from transactions between members, assessment to income tax 637

Name, Christian, cannot be altered by deed poll 321

National Fire Service, injury to member of, whether war service 310

NEGLIGENCE

Contributory negligence—Apportionment of liability—Assessment of damages—Costs—Law Reform (Contributory Negligence) Act, 1945 (*c.* 28), *s.* 1 [WILLIAM A. JAY AND SONS *v.* J. S. VEEVERS, LTD.] 646

——, *Highways—Cyclist colliding with air-raid shelter during black-out—Principle in Baker v. Longhurst not generally applicable—Special circumstances of each case proper test* [MORRIS *v.* LUTON CORPORATION] 1

Duty to take care—Negligent driving of commercial van—Fatal accident to unauthorised passenger—Trespasser—Duty to drivers employers [TWINE *v.* BEAN'S EXPRESS, LTD.] 202

Employee of London Passenger Transport Board injured while mounting omnibus—Negligence of conductress—Employee using free pass—Pass issued subject to condition exempting Board from liability for injury however caused—Whether employee using pass at time of accident—Pass issued as a privilege—Pass-holder a licensee and not carried under a contract—Road Traffic Act, 1930 (*c.* 43), *s.* 97 [WILKIE *v.* LONDON PASSENGER TRANSPORT BOARD] 650

Theatrical producer—Failure to take reasonable care to prevent theft—Actor's clothing stolen from dressing room—Liability of producer [DEYONG *v.* SHENBURN] .. 226

Not negotiable, effect of marking cheque .. 394

NUISANCE

Adjoining premises—Fire caused by defective electric wiring—Live wire inadequately protected owing to negligence of contractor—Adjoining premises destroyed—House let with defect—Owner liable for repairs—Knowledge of want of repair—Liability—Fires Prevention (Metropolis) Act, 1774 (*c.* 78), *s.* 86 [SPICER *v.* SMEE] 489

Official communications, on state matters, privilege 304

Pass, free, injury to employee using 650

Passport, effect of holding, allegiance owed when outside realm 186

PATENTS

Contract—Covenant by patentees not to sell fuel economisers except exclusively through agents—Patentees becoming contractors to Government department—Written authority to use patents for service of Crown—Whether authority rendered ineffective contractual obligation with third parties—" Agents, contractors, or others "—Patents and Designs Acts, 1907-1942, *s.* 29—*R.S.C., Ord.* 53A, *r.* 22 [FOSTER WHEELER, LTD. *v.* E. GREEN & SON, LTD.] 63

Pension, aggravation of pre-war disability .. 417

——, appeals, medical evidence in 400

——, claims, burden of proof in 664

——, war service aggravating disease 312

PERPETUITIES

Accumulations — Statutory periods — Settlement—Fund for benefit of settlor's grandchildren already living at date of settlement—Annual sum to be paid to each grandchild on attaining 18—Remainder of income to be accumulated, in separate fund, from date of settlement until youngest grandchild attained 23—Donees of both funds to be chosen by trustees from among grandchildren and their children—" Raising portions "—Life of settlor only period available—Trustee Act, 1925 (*c.* 19), *s.* 31,—*Law of Property Act*, 1925 (*c.* 20), *s.* 164 (1) (*a*), (*d*), 2 (ii) (*a*) [*Re* BOURNE'S SETTLEMENT TRUSTS, BOURNE *v.* MACKAY] 411

Will—Gift for education of children of named families—" Children " to be " the lawful descendants " of three named individuals—Money to be invested by trustees " under a trust for ever to be called " after testatrix and her mother—Trust void for perpetuity [*Re* COMPTON, POWELL *v.* COMPTON (NO. 2)] 117

Person, in Bills of Exchange Act, includes payee 394

PLEADING

Objection—Probate action—Plaintiff alleged in defence to have feloniously caused death of deceased testator—Relevance—Defendant entitled to make allegation though plaintiff not prosecuted [*In the Estate of* G—— (*deceased*). M—— *v.* L——] 579

Plying for hire, what amounts to 458

POWERS

Exercise—Special power to appoint by deed or will—Whether intention to exercise expressed in will—Gift, subject to payment of debts, of " all my real and personal estate whatsoever and wheresoever and over which I shall have any disposing power at the time of my decease "—Gift to objects of the special power — " And " — Failure to use " appoint " [*Re* WELFORD'S WILL TRUSTS, DAVIDSON *v.* DAVIDSON] 23

Special power over personalty—Power to appoint by deed or will—Whether special power exercisable by nuncupative will, made by soldier on active service and admitted to probate—Wills Act, 1837 (*c.* 36), *ss.* 9, 10, 11, 27—*Wills (Soldiers and Sailors) Act*, 1918 (*c.* 58), *s.* 3 (1) [*Re* EARL OF CHICHESTER'S WILL TRUSTS, PELHAM *v.* COUNTESS OF CHICHESTER] 722

PRACTICE

Pleading—Striking out statement of claim—No cause of action—Action to restrain Home Secretary from deporting enemy alien—R.S.C., Ord. 25, *r.* 4 [NETZ *v.* RT. HON. CHUTER EDE, P.C., H.M. SECRETARY OF STATE FOR HOME AFFAIRS] 628

PUBLIC AUTHORITIES

Act of State—Declaration of Government—State of war—Continued existence of country as a state—Whether conclusive [R. *v.* BOTTRILL; *Ex parte* KUECHENMEISTER] 635

Pump, supply of water from, covenant by vendor, whether running with land 464

RAILWAYS AND CANALS

Death of signal fitter on line—Statutory duty of railway to appoint look-out—Signal fitter engaged on routine oiling of signal apparatus on permanent way—" Protection to permanent way men when relaying or repairing permanent way "—Whether signal fitter within the protection—Whether oiling " repairing the permanent way "—Railway Employment (Prevention of Accidents) Act, 1900, (*c.* 27), *s.* 1 (1), *Sched., cl.* 12—*Prevention of Accidents Rules*, 1902 (*S.R. & O.*, 1902, *No.* 616), *r.* 9 [LONDON & NORTH EASTERN RY. CO. *v.* BERRIMAN] 255

Railways — Accommodation crossing —Duties of railway company—No obligation to employ watchman or keeper—Effect of propinquity to level crossing—Railway Clauses Consolidation Act, 1845 (*c.* 29), *s.* 47 [LIDDIATT *v.* GREAT WESTERN RAILWAY CO.] 731

Repair of privately owned wagons on railway company's property—Walking pass to repairing company's employees to enter on railway company's property—Condition incorporated on pass relieving railway company of responsibility for injury by accident —No evidence of actual knowledge of condition—Reasonable notice of condition—Onus of proof [HENSON *v.* LONDON & NORTH EASTERN RY. CO. AND COOTE & WARREN, LTD. (THIRD PARTY)] 653

RATES AND RATING

Assessment—Gas company—Computation on profits basis—Capital sum required for conduct of undertaking—Source from which, and price at which, capital obtainable irrelevant [CROYDON GAS CO. *v.* RATING AUTHORITY FOR THE COUNTY BOROUGH OF CROYDON] 384

Valuation list—Proposals by county valuation committee to increase large proportion of assessments in area—Systematic examination of all assessments in rating area by county valuation officer with a view to revaluation—Separate proposals in respect of each hereditament—Whether valuation committee making in effect a new valuation list—Rating and Valuation Act, 1925 (*c.* 90), *ss.* 18, 19, 21 (2), 31 (3), 37—*Rating and Valuation (Postponement of Valuations) Act*, 1938 (*c.* 19), *s.* 1—*Rating and Valuation (Postponement of Valuations) Act*, 1940 (*c.* 12), *s.* 1 (3) [PRATT *v.* NORTH WEST NORFOLK ASSESSMENT COMMITTEE AND COUNTY VALUATION COMMITTEE FOR THE COUNTY OF NORFOLK] 4

Rationing, acquiring goods without surrender of coupons 82, 85

Receiver, remuneration of, power of court to fix 329

Recorder, jurisdiction of, suspension of licence for motoring offence 615

Regimental records, admissibility 593

Rent, meaning of 218

Repair, meaning of 255

REVENUE

Excess profits tax—Acquisition of shares by a company in another company already controlled indirectly—Uncertainty as to liability to excess profits tax—Whether main benefit expected to accrue from the transaction was avoidance or reduction of

liability to tax—Finance Act, 1941 (*c.* 30), *s.* 35—*Finance Act*, 1944 (*c.* 23), *s.* 33 [CROWN BEDDING CO., LTD. *v.* INLAND REVENUE COMRS.] 452
——, *Capital employed in business during chargeable accounting period—Sum paid in respect of accruing liability—Liability must be legal obligation existing during accounting period—Finance* (*No.* 2) *Act*, 1939 (*c.* 109), *Sched. VII*, *Pt. II*, *para.* 2 (1)—*Finance Act*, 1940 (*c.* 29), *s.* 34 (4) [NORTHERN ALUMINIUM CO., LTD. *v.* INLAND REVENUE COMRS.] 546
——, *Computation of capital—Deduction of debt—Companies interconnected in standard period but not in chargeable accounting period—Finance* (*No.* 2) *Act*, 1939 (*c.* 109), *ss.* 13 (4), 14, 17 [TRINIDAD PETROLEUM DEVELOPMENT CO., LTD. *v.* INLAND REVENUE COMRS.] 497
——, *Purchase of shares in another company — Direction — Construction — Whether investment or capital employed in business—Finance Act*, 1940 (*c.* 29), *s.* 28, *and Sched. V—Finance Act*, 1941 (*c.* 30), *s.* 35 [FRODINGHAM IRONSTONE MINES, LTD. *v.* INLAND REVENUE COMRS.] 168
——, *Royalties received from licences of patented inventions—" Income received from investments "—Finance* (*No.* 2) *Act*, 1939 (*c.* 109), *s.* 12 (1), (4), *Sched.* 7, *Pt. I*, *para.* 6 (2), (9) [INLAND REVENUE COMRS. *v* DESOUTTER BROTHERS, LTD.] 58
National Defence Contribution—Payments made by company to retiring directors—Payments made in consideration of covenants in restraint of trade—Whether payments capital or revenue expenditure—Finance Act, 1937 (*c.* 54), *Sched. IV* [ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. *v.* INLAND REVENUE COMRS. ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. *v.* KERR (INSPECTOR OF TAXES)] 68
National Savings certificates—Jurisdiction of county court—Savings Certificates Regulations, 1933 (*S.R. & O.*, 1933, *No.* 1149), *r.* 27 (1) [WINTER *v.* WINTER] .. 686
Ribbon Development, compensation for, assess- to income tax 532
——, ——, whether trade receipt 165

ROYAL FORCES

Pension—Disability existing before or arising during war service aggravated by and remaining aggravated by war service—Appeal—Jurisdiction—Pensions Appeal Tribunals Act, 1943 (*c.* 39), *s.* 1, 5—*Royal Warrant concerning Retired pay, Pensions, etc.*, 1943 (*Cmd.* 1943, *No.* 6489), *arts.* 2 (3), 4 [SHIPP *v.* MINISTER OF PENSIONS MINISTER OF PENSIONS *v.* PRETTY] .. 417
——, *Disability existing before war aggravated by war service—Burden of proof—Proper method of approach to consider matter—Royal Warrant concerning Retired Pay, Pensions, etc.*, 1943 (*Cmd.* 1943, *No.* 6489), *art.* 4 (2) — *Pensions Appeal Tribunals* (*England and Wales*) *Rules*, 1943 (*S.R. & O.*, 1943, *No.* 1757-*L.*39), *r.* 12 (6) [ROWING *v.* MINISTER OF PENSIONS] 664
——, *Disease arising during and aggravated by war service — Death hastened by aggravation — Failure to report sick—Test whether course taken direct consequence of war service—Royal Warrant concerning Retired Pay, Pensions, etc., Dec.* 1943 (*Cmd.* 6489), *art.* 4 (1) (*b*) (ii) [JONES *v.* MINISTER OF PENSIONS] 312
Royalties, excess profits tax on 58

SALE OF GOODS

Delivery of lesser quantity—Rights of purchaser—Prescribed and non-prescribed conditions — Inconsistency — Control of Timber (*No.* 21) *Order*, 1941 (*S.R. & O.*, 1941, *No.* 2088), *arts.* 1 (1), (2), 6, *Sched. III* [WILKINSON *v.* BARCLAY] 387

SALE OF LAND

Memorandum of contract—Terms—Balance of purchase money " to be paid immediately on possession "—When possession to be given not stated—Verbal agreement that possession should be given only when vendor had found other accommodation—Insufficiency of memorandum—No enforceable contract—Law of Property Act, 1925 (*c.* 20), *s.* 40 [JOHNSON *v.* HUMPHREY] .. 460
Vacant possession—Position of parties pending completion—Maintenance of property—State and condition of property sold—Breach of undertaking to deliver vacant possession [CUMBERLAND CONSOLIDATED HOLDINGS, LTD. *v.* IRELAND] 284
Separate trial, common enterprise, where, discretion of judge 559
Separation deed, covenant in, whether binding estate of covenantor 114

SETTLEMENTS

Marriage settlement—Covenant to pay if marriage " solemnised "—Ultimate trust for husband's next of kin—Marriage subsequently annulled—Total failure of consideration—Rights of beneficiaries defeated—Trust fund to be repaid to settlor's estate [*Re* AMES' SETTLEMENT, DINWIDDY *v.* AMES] 689
Settled land—Statutory powers of tenant for life—Limitation against exercise of powers—Bequest of fund upon trust to apply part of income, at trustee's direction, for outgoings of real estate settled under same will—Income not so required to be paid to tenant for life of the settled land—Gift over of whole fund on sale of settled land—Settled land sold under statutory powers—Gift over of fund void—Tenant for life to continue to receive income—Settled Land Act, 1925 (*c.* 18), *s.* 106 [*Re* HERBERT, HERBERT *v.* BICESTER (LORD)] 421

SHIPPING AND NAVIGATION

Collision—Convoys meeting on a crossing course—Crossing rule—Duties and obligations—Regulations for preventing collisions at sea, rules 19, 21, 22 [ATTORNEY-GENERAL *v.* ANGLO-AMERICAN OIL CO., LTD., THE " F. J. WOLFE "] 359

STATUTES

Construction—With reference to other statutes alio intuitu [SOMERSHIELD *v.* ROBIN] 218
Statutes, construction of, reference to other statutes, alio intuitu 218

STREET TRAFFIC

Hackney carriages—Motor cars—Plying for hire without being licensed—Vehicles standing in public street—Hire and payment made in adjacent street—No contract with, and no payment to, driver of vehicle—Metropolitan Public Carriage Act, 1869 (*c.* 115), *s.* 7 [GILBERT *v.* MCKAY] 458
Structure, includes wall 424
Sub-contractor, liability to servant, negligence of contractor 95
Theatre, licence for use of, revocation 678

THEATRES

Failure of producer to take reasonable care to prevent theft—Actor's clothing stolen from dressing room—Liability of producer [DEYONG *v.* SHENBURN] 226
Tithe rentcharge, redemption annuity, assessment of compensation, deduction for rates 149

TOWN AND COUNTRY PLANNING

Advertisements—Power of local authority to prohibit the use of a wall of dwelling-house for advertising purposes—" Structure "—Town and Country Planning Act, 1932 (*c.* 48), *s.* 47 (5), (8)—*Town and Country Planning* (*Interim Development*) *Act*, 1943 (*c.* 29), *ss.* 5, 15, *Sched. I* [MILLS & ROCKLEYS, LTD. *v.* LEICESTER CITY COUNCIL] 424
Travelling expenses, housewife directed to work in factory, expenses not deductible in tax assessment. 144

PAGE

——, workman, of, attending for examination, jurisdiction of county court 471

TROVER AND DETINUE

Detinue—Assessment of value to be paid in default of return of goods—Value to be assessed as at date of judgment [ROSENTHAL *v.* ALDERTON AND SONS, LTD.] 583

Vacant possession, includes unimpeded physical enjoyment of property 284

Venereal disease, disclosure of information by doctor, request by patient 562

Warlike operation, damage due to heavy weather no consequence of 123

WATERS AND WATERCOURSES

Sale of land—Contemporaneous agreement for supply of water—Vendor owner of adjacent land—Covenants by vendor to supply water from pump on vendor's land for use of purchaser in connection with house on conveyed land and to keep pump in repair—Whether benefit of agreement assignable to subsequent purchaser—Whether covenants relating to land—Law of Property Act, 1925 (*c.* 20), *s.* 78 [SHAYLER *v.* WOOLF] 464

Weapon, use of, blackout not included 272

WEIGHTS AND MEASURES

Sale of bacon—Weight—" Misrepresentation "—Sale of Food (Weights and Measures) Act, 1926 (*c.* 63), *s.* 3 [PRESTON *v.* COVENTRY AND DISTRICT CO-OPERATIVE SOCIETY, LTD.] 694

WILLS

Construction — Conditions — Validity —Gift on condition that donee should " by poll assume " a different Christian name —Gift over if condition not fulfilled—Condition void for impossibility—Donee absolutely entitled to gift [*Re* PARROTT'S WILL TRUSTS, COX *v.* PARROTT].. 321

——, *Gift of £50 a year—" This sum to be applied " for donee's " maintenance and schooling until she attains the age of 21 " —" To be derived from interest of my shares in War Loan 1917 "—Duration of annuity* [*Re* JACKSON, DAY *v.* ATKIN] 327

——, *Gift of testator's residuary estate to his sons in the event of testator and his wife dying " during the present war "—Substitutionary dispositions if sons should also die " during the present war "—" The present war "—Strict legal meaning displaced by context* [*Re* COOPER'S ESTATE, BENDALL *v.* COOPER] 28

——, *Gift of whole estate to C.—Codicil providing that " in the event of the simultaneous death " of C. and the testatrix " the interests of my moneys to be divided between " Mrs. M. and E., " after the deaths of these two named the capital to go to my nephew "—Testatrix, C. and E. killed instantaneously by the same bomb—Whether gift in will revoked by codicil—" Simultaneous death "—" After the deaths of these two named "—Gift of capital to take effect only after death of survivor of Mrs. M. and E.—E.'s half share payable to Mrs. M. during the remainder of Mrs. M.'s life—Law of Property Act*, 1925 (*c.* 20), *s.* 184 [*Re* PRINGLE, BAKER *v.* MATHESON] 88

——, *Gift to sister of legacy " for life use, to revert to estate if she does not remarry "—Absolute gift to be implied on sister's remarriage* [*Re* LANE'S ESTATE, MEAGHER *v.* GOVERNORS AND GUARDIANS OF THE NATIONAL GALLERY OF IRELAND AND HEAVEN] 735

——, *Rule in Lassence v. Tierney—Life interests with remainder to issue and accruer clause on failure of issue—Last survivor dying without issue—Rule in Lassence v. Tierney applied to accrued shares—Last survivor absolutely entitled* [*Re* LITT'S WILL TRUSTS, PARRY *v.* COOPER] 314

——, *" The residue of my estate to be divided equally " between testator's brother and sisters " during their lifetime "—" After their death to be evenly distributed " between testator's nephews and nieces—Implied gift to survivors or survivor of first takers—Second takers to take per capita on death of last survivor of first takers* [*Re* FOSTER, COOMBER *v.* GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE MAINTENANCE AND EDUCATION OF EXPOSED AND DESERTED YOUNG CHILDREN] 333

Contingent interest in income of residuary estate—Direction to accumulate intermediate income—Intermediate income not available for maintenance during minority —Trustee Act, 1925 (*c.* 19), *ss.* 31 (1), (3), 69 (2) [*Re* STAPLETON, STAPLETON *v.* STAPLETON] 323

Soldier's will—Note of oral instructions for will admitted to probate—Whether capable of exercising special power over personalty—Wills Act, 1837 (*c.* 26), *ss.* 9, 10, 11, 27—*Wills (Soldiers and Sailors) Act*, 1918 (*c.* 58), *s.* 3 (1) [*Re* EARL OF CHICHESTER'S WILL TRUSTS, PELHAM *v.* COUNTESS OF CHICHESTER] 722

WORKMEN'S COMPENSATION

Accident—Disease as injury caused by accident—Succession of accidental injuries—Cumulative effect—Vibrations caused by rapidly rotating instrument—" Raynaud's disease " [FITZSIMONS *v.* FORD MOTOR CO., LTD.] 429

——, *Epileptic drowned—No danger to normal healthy person—Disease not sole cause of death—Construction of statutes —Workmen's Compensation Act*, 1925 (*c.* 84), *s.* 1 (1) [WILSON *v.* CHATTERTON] .. 431

Costs—Travelling expenses of workman attending for examination by medical referee—No arbitration actual or pending —Jurisdiction of county court judge—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 19 (2), *Sched.* 1 (7)—*Workmen's Compensation Rules*, 1926 (*S.R. & O.*, 1926, *No.* 448), *rr.* 57 (9). 76 (4) [HALLIDAY *v.* BARBER, WALKER & CO., LTD.] 471

Industrial disease—Certifying surgeon's certificate—Limit to conclusiveness—Whether disease such as could reasonably be attributed to nature of employment—Onus of proof—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 43 [HOPWOOD *v.* TEXTILE PAPER TUBE CO., LTD.] 618

——, *Pneumoconiosis — Suspension due to pneumoconiosis — Compensation —Contribution by previous employer to compensation payable by last employer — Recorded agreement by last employer to pay lump sum in lieu of weekly payment payable under Scheme—Liability of previous employer to contribute to lump sum payment—" Compensation "— Coal Mining Industry (Pneumoconiosis) Compensation Scheme*, 1943 (*S.R. & O.*, 1943, *No*, 885), *paras.* 8, 9 (2) (*a*) [AMALGAMATED ANTHRACITE COLLIERIES, LTD. *v.* CORY BROTHERS AND CO., LTD.] 232

Right to sue for breach of statutory duty —Alternative remedies—Election between remedies—Receipt of compensation—Knowledge of workman—" Option "—When option exercised—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29 (1) [YOUNG *v.* BRISTOL AEROPLANE CO., LTD.] 98

CASES REFERRED TO

PAGE
Abrey *v.* Newman (1853), 16 Beav. 431 ; 44 Digest 995, *8533* ; 22 L.J.Ch. 627 .. .. 334, 335, 338
Absalom *v.* Talbot, [1944] 1 All E.R. 642 ; [1944] A.C. 204 ; 113 L.J.K.B. 369 ; 171 L.T. 53 448, 450
Ackerley, *Re*, Chapman *v.* Andrew, [1913] 1 Ch. 510 ; 37 Digest 454, *562* ; 82 L.J.Ch. 260 ; 108 L.T. 712. .. .. 24, 25
Adrema, Ltd. *v.* Jenkinson, [1945] 2 All E.R. 29 ; [1945] 1 K.B. 446 ; 114 L.J.K.B. 313 ; 173 L.T. 318 .. .. 666, 667
Ahearn *v.* Bellman, Sedgwick *v.* Ahearn (1879), 4 Ex.D. 201 ; 31 Digest 446, *5926* ; 48 L.J.Q.B. 681 ; 40 L.T. 771 .. .. 134, 138
Albano, S.S., *v.* Allan Line S.S. Co., Ltd., Union Dampfschiffsrhederei Act. *v.* S.S. Parisian, [1907] A.C. 193 ; 41 Digest 742, *5935* ; 76 L.J.P.C. 33 ; 96 L.T. 335 .. .. .. 359, 364
Alderman *v.* Great Western Ry. Co., [1937] 2 All E.R. 408 ; [1937] A.C. 454 ; Digest Supp. ; 106 L.J.K.B. 335 ; 156 L.T. 441 .. .. 310, 311
Allen *v.* Whitehead, [1930] 1 K.B. 211 ; Digest Supp. ; 99 L.J.K.B. 146 ; 142 L.T. 141 .. 381, 383, 384
Amand *v.* Secretary of State for Home Affairs, [1942] 2 All E.R. 381 ; [1943] A.C. 147 ; *sub nom.* R. *v.* Home Secretary, *Ex p.* Amand, 167 L.T. 177 ; *affg.*, S.C. *sub nom. Re* Amand, [1942] 1 All E.R. 480 .. .. 129, 130, 131
Ames, *Re*, Ames *v.* Ames, [1893] 2 Ch. 479 ; 40 Digest 744, *2746* ; 62 L.J.Ch. 685 ; 68 L.T. 787 .. .. 421, 423, 424
Anderton & Halstead, Ltd. *v.* Birrell, [1932] 1 K.B. 271 ; Digest Supp. ; 101 L.J.K.B. 219 ; 146 L.T. 139 .. .. 448, 451
Anglo-Persian Oil Co., Ltd. *v.* Dale, [1932] 1 K.B. 124 ; Digest Supp. ; 100 L.J.K.B. 504 ; 145 L.T. 529 .. .. 643, 645
Appleby *v.* Franklin (1885), 17 Q.B.D. 93 ; 1 Digest 64, *532* ; 55 L.J.Q.B. 129 ; 54 L.T. 135 580, 582
Armstrong *v.* Reeves (1890), 25 L.R.Ir. 325 ; 8 Digest 258, *205i* 205, 210
Arnold *v.* Bath & Wells (Bp.) (1829), 5 Bing. 316 ; 22 Digest 338, *3391* ; 2 Moo. & P. 559 ; 7 L.J.O.S.C.P. 120 .. .. 594, 596
Ashworth *v.* Munn (1880), 15 Ch.D. 363 ; 8 Digest 273, *397* ; 50 L.J.Ch. 107 ; 43 L.T. 553 367, 376
Aspell *v.* Seymour, [1929] W.N. 152 ; Digest Supp. 465, 468
A.-G. *v.* Black (1871), L.R. 6 Exch. 308 ; 28 Digest 20, *100* ; 40 L.J.Ex. 194 ; 25 L.T. 207 ; 1 Tax Cas. 54, Ex. Ch. ; *affg.*, L.R. 6 Exch. 78 .. .. 669, 671, 672
A.-G. *v.* De Keyser's Royal Hotel, [1920] A.C. 508 ; 11 Digest 546, *499* ; 89 L.J.Ch. 417 ; 122 L.T. 691 ; *affg.*, S.C. *sub nom. Re* De Keyser's Royal Hotel, Ltd., De Keyser's Royal Hotel, Ltd. *v.* R., [1919] 2 Ch. 197 .. .. 533, 540
A.-G. *v.* Lockwood (1842), 9 M. & W. 378 ; 42 Digest 767, *1934* ; *affd. on other grounds, sub nom.* Lockwood *v.* A.-G., 10 M. & W. 464 .. .. 256, 260
A.-G. *v.* Marchant (1866), L.R. 3 Eq. 424 ; 8 Digest 330, *1123* ; 36 L.J.Ch. 47 .. .. 205, 212
A.-G. *v.* National Provincial & Union Bank of England, [1914] A.C. 262 ; Digest Supp. ; *sub nom. Re* Tetley, A.-G. *v.* National Provincial & Union Bank of England, 93 L.J.Ch. 231 ; 131 L.T. 34 ; *affg.* S.C. *sub nom. Re* Tetley, National Provincial & Union Bank of England, Ltd. *v.* Tetley, [1923] 1 Ch. 258 .. .. 206, 216
A.-G. *v.* Radloff [1854], 10 Exch. 84 ; 14 Digest 28, *2* ; 23 L.J.Ex. 240 ; 23 L.T.O.S. 191 130, 132
A.-G. *v.* Scott (1873), 28 L.T. 302 ; 28 Digest 8, *34* ; 1 Tax Cas. 55 .. .. 669, 672
A.-G. for Canada *v.* Cain, Same *v.* Gilhula, [1906] A.C. 542 ; 2 Digest 193, *541* ; 75 L.J.P.C. 81 ; 95 L.T. 314 .. .. 629, 634
Attree *v.* Hawe (1878), 9 Ch.D. 337 ; 8 Digest 272, *384* ; 47 L.J.Ch. 863 ; 38 L.T. 733 .. 367, 376
Austerberry *v.* Oldham Corpn. (1885), 29 Ch.D. 750 ; 40 Digest 305, *2618* ; 55 L.J.Ch. 633 ; 53 L.T. 543 .. .. 465, 467
Badische Co., *Re*, Bayer Co., etc., [1921] 2 Ch. 331 ; 12 Digest 397, *3219* ; 91 L.J.Ch. 133 ; 126 L.T. 466 .. .. 37, 54
Bailey *v.* Bailey, [1926] Ch. 758 ; Digest Supp. ; 95 L.J.Ch. 470 ; 135 L.T. 431 .. 686, 687, 688, 689
Baily *v.* De Crespigny (1869), L.R. 4 Q.B. 180 ; 12 Digest 373, *3099* ; 10 B. & S. 1 ; 38 L.J.K.B. 98 ; 19 L.T. 681 .. .. 719, 720
Baker *v.* Longhurst (E.) & Sons, Ltd., [1933] 2 K.B. 461 ; Digest Supp. ; 102 L.J.K.B. 573 ; 149 L.T. 264 .. .. 1, 2, 3

Barker *v.* Herbert, [1911] 2 K.B. 633 ; 36 Digest 197, *374* ; 80 L.J.K.B. 1329 ; 105 L.T. 349 490, 493, 494
Barnardo's Homes *v.* Income Tax Special Comrs., [1921] A.C. 1 ; 28 Digest 84, *483* ; 90 L.J.K.B. 545 ; 125 L.T. 250 ; *sub nom.* R. *v.* Income Tax Acts Special Purposes Comrs., *Ex p.* Dr. Barnardo's Homes National Incorporated Assocn., 7 Tax Cas. 646 .. .. 161, 163, 164
Bayer's Design, *Re*, (1907), 24 R.P.C. 65 ; *affd., sub nom.* Bayer *v.* Symington, *Re* Bayer's Design [1907], 25 R.P.C. 56 ; 43 Digest 246, *886* 177, 180
Bayley-Worthington & Cohen's Contract, *Re*, [1909] 1 Ch. 648 ; 40 Digest 120, *950* ; 78 L.J.Ch. 351 ; 100 L.T. 650 .. .. 566, 570
Beare *v.* Carter, [1940] 2 K.B. 187 ; Digest Supp. ; 109 L.J.K.B. 701 ; 163 L.T. 269 .. 712, 713
Beck & Co. *v.* Szymonowski & Co., [1924] A.C. 43 ; 39 Digest 467, *925* ; 93 L.J.K.B. 25 ; 130 L.T. 387 ; *affg.*, S.C. *sub nom.* Szymonowski & Co. *v.* Beck & Co., [1923] 1 K.B. 457 388, 392
Becke *v.* Smith (1836), 2 M. & W. 191 ; 42 Digest 625, *261* 599, 605
Bennett *v.* Stone, [1903] 1 Ch. 509 ; 40 Digest 122, *965* ; 72 L.J.Ch. 240 ; 88 L.T. 35 .. 566, 570
Bennett *v.* Whitehead (L. & W.), Ltd., [1926] 2 K.B. 380 ; 34 Digest 492, *4068* ; 135 L.T. 329 ; 19 B.W.C.C. 133 .. .. 99, 106, 107, 110, 112, 113
Bent *v.* Cullen (1871), 6 Ch.App. 235 ; 39 Digest 137, *308* ; 40 L.J.Ch. 250 .. .. 327, 329
Beresford *v.* Royal Insurance Co., Ltd., [1938] 2 All E.R. 602 ; [1938] A.C. 586 ; Digest Supp. ; 107 L.J.K.B. 464 ; 158 L.T. 459 .. .. 580, 581
Berry *v.* Gaukroger, [1903] 2 Ch. 116 ; 21 Digest 27, *155* ; 72 L.J.Ch. 435 ; 88 L.T. 521 .. 704, 707
Bethell, *Re*, Bethell *v.* Hildyard (1888), 38 Ch.D. 220 ; 11 Digest 413, *801* ; 57 L.J.Ch. 487 ; 58 L.T. 674 343
Bignold *v.* Giles (1859), 4 Drew. 343 ; 39 Digest 135, *296* ; 28 L.J.Ch. 358 ; 32 L.T.O.S. 308 89, 94
Birch *v.* Joy (1852), 3 H.L. Cas. 565 ; 40 Digest 198, *1656* 277, 282
Birch *v.* Pease & Partners, Ltd., [1941] 1 K.B. 615 ; 165 L.T. 146 ; 34 B.W.C.C. 37 ; *sub nom.* Pease & Partners, Ltd. *v.* Birch, [1941] 1 All E.R. 343 .. .. 99, 110
Birtwhistle *v.* Vardill (1840), 7 Cl. & Fin. 895 ; 18 Digest 6, *24* ; *previous proceedings, sub nom.* Doe d. Birtwhistle *v.* Vardill (1835), 2 Cl & Fin. 571 .. .. 343, 348
Blain *v.* Greenock Foundry Co. (1903), 5 F. (Ct. of Sess.) 893 .. .. 99, 107
Blatchford *v.* Staddon & Founds (1927), 43 T.L.R. 424 ; 34 Digest 465, *3810* ; 20 B.W.C.C. 391 618, 620
Board *v.* Board, [1919] A.C. 956 ; 16 Digest 102, *30* ; 88 L.J.P.C. 165 ; 121 L.T. 620 .. 343
Bolsover Colliery Co., Ltd. *v.* Oxcroft Colliery Co., Ltd., [1933] 2 K.B. 429 ; Digest Supp. ; 102 L.J.K.B. 617 ; 149 391 ; 26 B.W.C.C. 340 .. .. 233, 235
Bonnin *v*, Neame, [1910] 1 Ch. 732 ; 2 Digest 365, *336* ; 79 L.J.Ch. 388 ; 102 L.T. 708 .. 465, 468

PAGE

Boulter, *Re*, Capital & Counties Bank *v.* Boulter, [1918] 2 Ch. 40; 23 Digest 452, *5250*; 87 L.J.Ch. 385; 118 L.T. 783 .. 324, 325, 326
Boussmaker, *Ex p.* (1806), 13 Ves. 71: 2 Digest 157, *270* .. 37, 56
Bow, McLachlan & Co. *v.* Ship Camosun, [1909] A.C. 597; 40 Digest 380, *116*; 79 L.J.P.C. 17; 101 L.T. 167 .. 79, 81
Bower, *Re*, Bower *v.* Mercer, [1930] 2 Ch. 82; Digest Supp.; 99 L.J.Ch. 17; 141 L.T. 639 .. 24, 27
Bower *v.* Peate (1876), 1 Q.B.D. 321; 36 Digest 99, *658*; 45 L.J.Q.B. 446; 35 L.T. 321 .. 489, 490, 495
Bowman *v.* Secular Society, Ltd., [1917] A.C. 406; 8 Digest 265, *270*; 86 L.J.Ch. 568; 117 L.T. 161 .. 206, 213
Boyce *v.* Whitwick Colliery Co., Ltd., Coalville Urban District Council *v.* Boyce (1934), 151 L.T. 464; Digest Supp.; 18 Tax Cas. 655 .. 643, 645
Bozzelli's Settlement, *Re*, Husey-Hunt *v.* Bozzelli, [1902] 1 Ch. 751; 11 Digest 415, *807*; 71 L.J.Ch. 505; 86 L.T. 445 .. 343
Bramwell *v.* Bramwell, [1942] 1 All E.R. 137; [1942] 1 K.B. 370; 111 L.J.K.B. 430 .. 570, 572
Brinkley *v.* A.-G. (1890), 15 P.D. 76; 11 Digest 414, *803*; 59 L.J.P. 51; 62 L.T. 911 .. 343, 348
Brinsmead *v.* Harrison (1871), L.R. 6 C.P. 584; 43 Digest 531, *668*; 40 L.J.C.P. 281; 24 L.T. 798; *on appeal* (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99 .. 583, 584
Brintons, Ltd. *v.* Turvey, [1905] A.C. 230; 34 Digest 464, *3799*; 74 L.J.K.B. 474; 92 L.T. 578; 7 B.W.C.C. 1; *affg., S.C. sub nom.* Higgins *v.* Campbell & Harrison, Ltd., Turvey *v.* Brintons, Ltd., [1904] 1 K.B. 328 .. 429, 430, 432, 433,
British Asbestos Co., Ltd. *v.* Boyd, [1903] 2 Ch. 439; 9 Digest 442, *2865*; 73 L.J.Ch. 31; 88 L.T. 763 .. 587, 591
British Insulated & Helsby Cables *v.* Atherton, [1926] A.C. 205; 28 Digest 52, *264*; 95 L.J.K.B. 336; 134 L.T. 289; *affg.* S.C. *sub nom.* Atherton *v.* British Insulated & Helsby Cables, Ltd., [1925] 1. K.B. 421 .. 68, 71, 73, 74, 643, 645
British South Africa Co. *v.* Companhia de Mocambique, [1893] A.C. 602; 11 Digest 346, *334*; 63 L.J.Q.B. 70; 69 L.T. 604 .. 79, 80, 81
Brocklesby *v.* Temperance Building Society, [1895] A.C. 173; 1 Digest 317, *379*; 64 L.J.Ch. 433; 72 L.T. 477 .. 395, 396
Brodie *v.* Inland Revenue Comrs. (1933), 17 Tax Cas. 432; Digest Supp. .. 160, 161, 163
Brown *v.* Hamilton (William) & Co., Ltd., [1944] S.L.T. 282; [1943] Session Notes 82 .. 99, 101, 105, 109, 110
Brown *v.* Sherwood Colliery Co., Ltd., [1940] 2 All E.R. 25; [1940] 1 K.B. 726; Digest Supp.; 109 L.J.K.B. 761; 162 L.T. 316 .. 472, 473, 474, 475
Brown *v.* Symons (1860), 8 C.B.N.S. 208; 34 Digest 55, *296*; 29 L.J.C.P. 251; 2 L.T. 323 20, 21, 409, 410
Browne's Will Trusts, *Re*, London *v.* Brown, [1915] 1 Ch. 690; 44 Digest 1215, *10506*; 84 L.J.Ch. 623; 113 L.T. 39 .. 334, 336, 337, 338
Buccleuch, The Duke of, (1889), 15 P.D. 86; 42 Digest 627, *293*; 62 L.T. 94; *on appeal*, [1891] A.C. 310 .. 599, 605
Burrell (Charles) & Sons, Ltd. *v.* Selvage (1921), 90 L.J.K.B. 1340; 34 Digest 272, *2309*; 126 L.T. 49; 14 B.W.C.C. 158; *affg.*, S.C. *sub nom.* Selvage *v.* Burrell (Charles) & Sons, Ltd., (1921) 1 K.B. 355 .. 429, 430, 431
Burton *v.* Chapel Coal Co., Ltd., (1909) S.C. 430; 34 Digest 491, *k*; 46 Sc.L.R. 375; [1909] 7 S.L.T. 111; 2 B.W.C.C. 120 .. 99, 107, 110

Cadbury Bros., Ltd. *v.* Sinclair, [1933] 103 L.J.K.B. 29; Digest Supp.; 149 L.T. 412; 18 Tax Cas. 157 .. 238, 242, 529, 531
Calvin's Case (1608), 7 Co. Rep. 1a; 11 Digest 496, *2* .. 187, 189
Campden Charities, *Re* (1881), 18 Ch.D. 310; 8 Digest 343, *1359*; 50 L.J.Ch. 646; 45 L.T. 152 .. 205, 212
Canadian Pacific Ry. Co. *v.* R., [1931] A.C. 414; Digest Supp.; 100 L.J.P.C. 129; 145 L.T. 129 .. 679, 680
Carr *v.* London and North Western Ry. Co. (1875), L.R. 10 C.P. 307; 21 Digest 288, *1020*; 44 L.J.C.P. 109; 31 L.T. 785 .. 395, 396
Castro *v.* R. (1881), 6 App. Cas. 229; 14 Digest 230, *2150*; 50 L.J.Q.B. 497; 44 L.T. 350 698, 699, 702
Cavendish *v.* Cavendish, [1926] P. 10; 27 Digest 425, *4313* .. 121, 122, 129
Cavill *v.* Amos (1900), 64 J.P. 309; 42 Digest 855, *89* .. 458, 453
Channel Collieries Trust, Ltd. *v.* Dover, St. Margaret's & Martin Mill Light Ry. Co., [1914] 2 Ch. 506; 10 Digest 1147, *8118*; 84 L.J.Ch. 28; 111 L.T. 1051 .. 587, 591
Chapman *v.* Chapman & Thomas, [1938] 1 All E.R. 635; [1938] P. 93; Digest Supp.; 107 L.J.P. 30; 158 L.T. 424 .. 379, 380
Chatterton *v.* Secretary of State for India, [1895] 2 Q.B. 189; 32 Digest 111, *1428*; 64 L.J.Q.B. 676; 72 L.T. 858 .. 304, 305
Chauntler *v.* Robinson (1849), 4 Exch. 163; 36 Digest 199, *389*; 19 L.J.Ex. 170; 14 L.T.O.S. 107 .. 490, 496
Chetti *v.* Chetti, [1909] P. 67; 11 Digest 416, *827*; *sub nom.* Venugopal Chetti *v.* Venugopal Chetti, 78 L.J.P. 23; 99 L.T. 885 .. 343
Christchurch Inclosure Act, *Re* [1888], 38 Ch.D. 520; 8 Digest 289, *658*; 57 L.J.Ch. 564; 58 L.T. 827 .. 502, 510
Clan Line Steamers, Ltd. *v.* Board of Trade, The Clan Matheson, [1929] A.C. 514; Digest Supp.; 98 L.J.K.B. 408; 141 L.T. 275 .. 124, 126
Clarke *v.* Ramuz, [1891] 2 Q.B. 456; 40 Digest 184, *1536*; 60 L.J.Q.B. 679; 65 L.T. 657 285, 286
Clark's Trust, *Re* (1875), 1 Ch.D. 497; 8 Digest 262, *241*; 45 L.J.Ch. 194 .. 502, 508
Cleaver *v.* Mutual Reserve Fund Life Assocn., [1892] 1 Q.B. 147; 29 Digest 369, *2969*; 61 L.J.Q.B. 128; 66 L.T. 220 .. 580, 581
Cliff *v.* Midland Ry. Co. (1870), L.R. 5 Q.B. 258; 38 Digest 313, *347*; 22 L.T. 382 .. 733, 734
Clover, Clayton & Co., Ltd. *v.* Hughes, [1910] A.C. 242; 34 Digest 273, *2316*; 79 L.J.K.B. 470; 102 L.T. 340; 3 B.W.C.C. 275 .. 432, 434
Codling *v.* Mowlem (J.) & Co., Ltd., [1914] 3 K.B. 1055; 34 Digest 491, *4067*; 83 L.J.K.B. 1727; 111 L.T. 1086; 7 B.W.C.C. 786; *affg.*, S.C. [1914] 2 K.B. 61 .. 99, 111
Coe *v.* London & North Eastern Ry. Co., [1943] 2 All E.R. 61; [1943] 1 K.B. 531; 112 L.J.K.B. 497; 168 L.T. 382 .. 99, 102, 112
Cohen *v.* Cohen, [1940] 2 All E.R. 331; [1940] A.C. 631; Digest Supp.; 109 L.J.P. 53; 163 L.T. 183 .. 379, 380
Cole *v.* De Trafford (No. 2), [1918] 2 K.B. 523; 34 Digest 198, *1621*; 87 L.J.K.B. 1254; 119 L.T. 476 .. 227, 228
Cole *v.* Harris, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50 544, 545
Cole *v.* London & North Eastern Ry. Co. (1928), 21 B.W.C.C. 87; Digest Supp. .. 429, 431
Colfar *v.* Coggins & Griffith (Liverpool), Ltd., [1945] 1 All E.R. 326; [1945] A.C. 197; 114 L.J.K.B. 148; 172 L.T. 205 .. 227, 230
Collingwood *v.* Home and Colonial Stores, Ltd., [1936] 3 All E.R. 200; Digest Supp.; 155 L.T. 550; *affg.*, [1936] 1 All E.R. 74 .. 489, 490, 495

Collins, *Re*, Collins *v.* Collins (1886), 32 Ch.D. 229 ; 28 Digest 223, *825* ; 55 L.J.Ch. 672 ; 55 L.T. 21 .. 324, 325, 326

Collins *v.* Adamson (Joseph) & Co., Adamson (Joseph) & Co. *v.* Collins, [1937] 4 All E.R. 236 ; [1938] 1 K.B. 477 ; Digest Supp. ; 107 L.J.K.B. 121 ; 21 Tax Cas. 400 .. 68, 72

Colonial Trusts Corpn., *Re*, *Ex p.* Bradshaw (1879), 15 Ch.D. 465 ; 10 Digest 746, *4665* 367, 373

Compton, *Re*, Powell *v.* Compton, [1945] 1 All E.R. 198 ; [1945] Ch. 123 ; 114 L.J.Ch. 99 ; 172 L.T. 158 .. 501, 502, 505, 506, 508, 509, 510, 511

Constantinesco *v.* R. (1926), 42 T.L.R. 383 ; 28 Digest 19, *97* ; *affd.* (1927), 43 T.L.R. 727 ; 11 Tax Cas. 730 .. 712, 715, 716

Cooke *v.* Chilcott (1876), 3 Ch.D. 694 ; 40 Digest 304, *2614* ; 34 L.T. 207 .. 465, 467

Corbett *v.* Inland Revenue Comrs., [1937] 4 All E.R. 700, [1938] 1 K.B. 567 ; Digest Supp. ; 107 L.J.K.B. 276 ; 158 L.T. 98 ; 21 Tax Cas. 449 .. 160, 161, 162, 163

Corcoran, *Re*, Corcoran *v.* Riddell (1892), 62 L.J.Ch. 267 ; 8 Digest 274, *418* ; 67 L.T. 754 367, 371

Cory Brothers & Co., Ltd., Amalgamated Anthracite Collieries, Ltd. *v.* ..

Costello *v.* Pigeon (Owners), [1913] A.C. 407 ; 34 Digest 238, *2037* ; *sub nom.* Costello *v.* Kelsall Brothers, 82 L.J.K.B. 873 ; 108 L.T. 929 ; 6 B.W.C.C. 480 .. 432, 433

Cotman *v.* Brougham, [1918] A.C. 514 ; 9 Digest 78 *286* ; 87 L.J.Ch. 379 ; 119 L.T. 162 ; *affg.* S.C. *sub nom. Re* Anglo-Cuban Oil, Bitumen & Asphalt Co., Ltd., [1917] 1 Ch. 477 436, 442

Cottage Club Estates *v.* Woodside Estates Co. (Amersham), [1928] 2 K.B. 463 ; Digest Supp. ; 97 L.J.K.B. 72 ; 139 L.T. 353 .. 465, 468

Covas *v.* Bingham (1853), 2 E. & B. 836 ; 39 Digest 401, *377* ; 2 C.L.R. 12 ; 23 L.J.Q.B. 26 ; *sub nom.* Bingham v. Covas, 22 L.T.O.S. 97 .. 388, 391

Cranston, *Re*, Webb *v.* Oldfield, [1898] 1 I.R. 431 ; 8 Digest 259, *214i* .. 205, 209, 210, 217

Cribb *v.* Kynoch, Ltd. (No. 2), [1908] 2 K.B. 551 ; 34 Digest 492, *4071* ; 77 L.J.K.B. 1001 ; 99 L.T. 216 ; 1 B.W.C.C. 43 .. 99, 107, 110

Crichton's Oil Co., *Re*, [1902] 2 Ch. 86 ; 10 Digest 1006, *6980* ; 71 L.J.Ch. 531 ; 86 L.T. 787 556, 558

Cricklewood Property & Investment Trust, Ltd. *v.* Leighton's Investment Trust, Ltd., [1945] A.C. 221 ; 114 L.J.K.B. 110 ; 172 L.T. 140 .. 654, 659

Crisp *v.* Bunbury (1832), 8 Bing. 394 ; 3 Digest 135, *98* ; 1 Moo. & S. 646 ; 1 L.J.C.P. 112 687

Cumming *v.* Danson, [1942] 2 All E.R. 653 .. 609, 611, 614

Crippen, *In the Estate of*, [1911] P. 108 ; 23 Digest 167, *1834* ; 80 L.J.P. 47 ; 104 L.T. 224 580, 581

Cunard *v.* Antifyre, Ltd., [1933] 1 K.B. 551 ; Digest Supp. ; 103 L.J.K.B. 321 ; 148 L.T. 287 490, 496

Dalton *v.* Angus (1881), 6 App. Cas. 740 ; 19 Digest 7, *4* ; *sub nom.* Public Works Comrs. *v.* Angus & Co., Dalton *v.* Angus & Co., 50 L.J.Q.B. 689 ; 44 L.T. 844 .. 490, 495

Danziger *v.* Thompson, [1944] 2 All E.R. 151 ; [1944] K.B. 654 ; 113 L.J.K.B. 539 ; 170 L.T. 424 .. 146, 148

Dawson, *Re*, Pattison *v.* Bathurst, [1915] 1 Ch. 626 ; 8 Digest 273, *391* ; 84 L.J.Ch. 476 ; 113 L.T. 19 .. 367, 373, 375, 376

Dawson *v.* African Consolidated Land & Trading Co., [1898] 1 Ch. 6 ; 9 Digest 433, *2823* ; 67 L.J.Ch. 47 ; 77 L.T. 392 .. 587, 591

Derry *v.* Inland Revenue (1927), 13 Tax Cas. 30 ; Digest Supp. ; [1927] S.C. 714 .. 199, 201

Desoutter Bros., Ltd. *v.* Hanger (J. E.) & Co., Ltd., [1936] 1 All E.R. 535 ; Digest Supp. 712, 716

De Vries *v.* Sparks (1927), 137 L.T. 441 ; Digest Supp. .. 134, 137

Dewar *v.* Inland Revenue Comrs., [1935] 2 K.B. 351 ; Digest Supp. ; 104 L.J.K.B. 645 ; 153 L.T. 357 ; 19 Tax Cas. 561 .. 476, 481, 484, 485, 486

D'Huart *v.* Harkness (1865), 34 Beav. 324 ; 11 Digest 383, *611* ; 5 New Rep. 440 ; 34 L.J.Ch. 311 .. 723, 726

Distington Hematite Iron Co., Ltd. *v.* Possehl & Co., [1916] 1 K.B. 811 ; 2 Digest 175, *403* ; 85 L.J.K.B. 919 ; 115 L.T. 412 .. 37, 45

Dodworth *v.* Dale, [1936] 2 All E.R. 440 ; [1936] 2 K.B. 503 ; Digest Supp. ; 105 L.J.K.B. 586 ; 155 L.T. 290 ; 20 Tax Cas. 285 .. 690, 692

Doe *v.* Spiller (1806), 6 Esp. 70 ; 31 Digest 447, *5938* .. 297, 302

Doe *d.* France *v.* Andrews (1850), 15 Q.B. 756 ; 22 Digest 338, *3389* .. 594, 597

Doe *d.* Matthewson *v.* Wrightman (1801), 14 Esp. 5 ; 31 Digest 443, *5901* .. 297, 302, 303

Dormer (otherwise Ward) *v.* Ward, [1901] P. 20 ; 27 Digest 521, *5629* ; 69 L.J.P. 144 ; 83 L.T. 556 .. 690, 692

Dover, Ltd. *v.* Numberger Celluloidwaren Fabrik Gebruder Wolff, [1910] 2 Ch. 25 ; 43 Digest 251, *914* ; 79 L.J.Ch. 625 ; 102 L.T. 634 .. 177, 185

Dredge *v.* Conway, Jones & Co., [1901] 2 K.B. 42 ; 24 Digest 924, *166* ; 70 L.J.K.B. 494 ; 84 L.T. 345 ; 3 W.C.C. 104 .. 256, 264, 271

Drughorn (Fred), Ltd. *v.* Rederiaktiebolaget Transatlantic, [1919] A.C. 203 ; 17 Digest 322, *1333* ; 88 L.J.K.B. 233 ; 120 L.T. 70 .. 146, 148

Drummond, *Re*, Ashworth *v.* Drummond, [1914] 2 Ch. 90 ; 8 Digest 244, *28* ; 83 L.J.Ch. 817 ; 111 L.T. 156 .. 502, 510

Duffield *v.* Elwes (1840), 2 Beav. 268 ; 16 Digest 56, 631 .. 247, 252

Dunbar (otherwise White) *v.* Dunbar, [1909] P. 90 ; 27 Digest 501, *5365* ; 78 L.J.P. 35 ; 100 L.T. 380 .. 690, 692

Duncan *v.* Cammell Laird & Co., Ltd., [1942] 1 All E.R. 587 ; [1942] A.C. 624 ; 111 L.J.K.B. 406 ; 166 L.T. 366 .. 594, 596

Dyke *v.* Elliott, The Gauntlet (1872), L.R. 4 P.C. 184 ; 42 Digest 730, *1526* ; 8 Moo. P.C.C.N.S. 428 ; 41 L.J.Adm. 65 ; 26 L.T. 45 .. 256, 270

Dyson *v.* A.-G., [1911] 1 K.B. 410 ; Digest Pleading 75, *645* ; 81 L.J.K.B. 217 ; 105 L.T. 753 629, 630, 634

Eaton *v.* Wimpey & Co., Ltd., [1937] 4 All E.R. 583 ; [1938] 1 K.B. 353 ; Digest Supp. ; 107 L.J.K.B. 259 ; 158 L.T. 6 ; 30 B.W.C.C. 408 .. 618, 620

Eaves, *Re*, Eaves *v.* Eaves, [1939] 4 All E.R. 260 ; [1940] Ch. 109 ; 109 L.J.Ch. 97 ; 162 L.T. 8 .. 690, 693

Edinburgh Street Tramways Co. *v.* Edinburgh Corpn., [1894] A.C. 456 ; 43 Digest 354, *113* ; 63 L.J.Q.B. 769 ; 71 L.T. 301 .. 89, 91

Edwards *v.* Godfrey, [1899] 2 Q.B. 333 ; 34 Digest 492, *4072* ; 68 L.J.Q.B. 666 ; 80 L.T. 672 ; 1 W.C.C. 32 .. 99, 110

Edwards (Job), Ltd. *v.* Birmingham Navigations, [1924] 1 K.B. 341 ; 36 Digest 215, *575* ; 93 L.J.K.B. 261 ; 130 L.T. 522 .. 489, 490, 493, 495

Ellis *v.* Great Western Ry. Co. (1874), L.R. 9 C.P. 551 ; 38 Digest 313, *351* ; 43 L.J.C.P. 304 ; 30 L.T. 874 .. 733

Engell *v.* Fitch (1869), L.R. 4 Q.B. 659 ; 40 Digest 263, *2284* ; 10 B. & S. 738 ; 38 L.J.Q.B. 304 285, 287

Ensign Shipping Co., Ltd. *v.* Inland Revenue Comrs. (1928), 139 L.T. 111 ; Digest Supp. ; 12 Tax Cas. 1169 .. 533, 541

Errington, *Re*, Gibbs *v.* Lassam, [1927] 1 Ch. 421 ; 44 Digest 997, *8544* ; 96 L.J.Ch. 345 ; 136 L.T. 764 .. 334, 336, 337, 338

Ertel Bieber & Co. *v.* Rio Tinto Co., Dynamit Act. *v.* same, Vereinigte Koenigs and Laurahuette Act. *v.* same, [1918] A.C. 260 ; 12 Digest 395, *3211* ; 87 L.J.K.B. 531 ; 118 L.T. 181 .. .. 37, 39, 40, 41, 42, 45, 48, 50, 51, 55, 57
Esposito *v.* Bowden (1857), 7 E. & B. 763 ; 2 Digest 168, *371* ; 27 L.J.Q.B. 17 ; 29 L.T.O.S. 295 37, 40, 42
Etna, The, [1908] P. 269 ; 41 Digest 747, *5978* ; 77 L.J.P. 138 ; 98 L.T. 424 .. .. 359, 364

Fairholme *v.* Firth & Brown, Ltd. (1933), 49 T.L.R. 470 ; Digest Supp. ; 149 L.T. 332 .. 527
Fenton *v.* Livingstone (1859), 33 L.T.O.S. 335 ; 11 Digest 414, *804* 343, 348
Fenton *v.* Thorley & Co., Ltd., [1903] A.C. 443 ; 34 Digest 266, *2264* ; 72 L.J.K.B. 787 ; 89 L.T. 314 ; 5 B.W.C.C. 1 .. .. 432, 434
Fife Coal Co., Ltd. *v.* Young, [1940] 2 All E.R. 85 ; [1940] A.C. 479 ; Digest Supp. ; 109 L.J.P.C. 49 ; 162 L.T. 344 ; *sub nom.* Young *v.* Fife Coal Co., Ltd., 33 B.W.C.C. 107 .. 432, 434
Fisher *v.* Ruislip-Northwood Urban District Council and County Council of Middlesex, [1945] 2 All E.R. 458 ; [1945] K.B. 584 ; 173 L.T. 261. .. .. 1, 2, 3, 4
Fitzgerald *v.* Fitzgerald (1869), L.R. 1 P. & D. 694 ; 27 Digest 307, *2845* ; 38 L.J.P. & M. 14 ; 19 L.T. 575 ; *subsequent proceedings* (1874), L.R. 3 P. & D. 136 .. .. 171, 172, 173, 175, 176
Flanagan *v.* Ackers Whitley & Co. (1926) 19 B.W.C.C. 399 ; Digest Supp. 432, 434
Fletcher *v.* Lancashire & Yorkshire Ry. Co., [1902] 1 Ch. 901 ; 40 Digest 197, *1650* ; 71 L.J.Ch. 590 .. .. 277, 282
Flindt *v.* Waters (1812), 15 East. 260 ; 2 Digest 162, *317* 37, 56
Florence Land & Public Works Co., *Re*, *Ex p.* Moor (1878), 10 Ch.D. 530 ; 10 Digest 750, *4692* ; 48 L.J.Ch. 137 ; 39 L.T. 589 .. .. 367, 373
Fludyer *v.* Cocker (1805), 12 Ves. 25 ; 40 Digest 199, *1660* 277, 282
Formby Brothers *v.* Formby (1910), 102 L.T. 116 ; 1 Digest 638, *2595* 146, 147
Forster, *Re*, Gellatly *v.* Palmer, [1938] 3 All E.R. 767 ; [1939] Ch. 221 ; Digest Supp. ; 108 L.J.Ch. 18 ; 159 L.T. 613 .. .. 502, 509
Forth Conservancy Board *v.* Inland Revenue Comrs., [1931] A.C. 540 ; Digest Supp. ; 100 L.J.P.C. 193 ; 145 L.T. 121 ; *sub nom.* Inland Revenue Comrs. *v.* Forth Conservancy Board, 16 Tax Cas. 103 .. ..669, 671, 673
Foveaux, *Re*, Cross *v.* London Anti-Vivisection Society, [1895] 2 Ch. 501 ; 8 Digest 259, *206* ; 64 L.J.Ch. 856 ; 73 L.T. 202 .. .. 205, 206, 208, 209, 210, 211, 213, 214, 215, 216, 217, 218
Fox *v.* London Midland & Scottish Ry. Co. (1942), 194 L.T.Jo. 173 .. .. 654, 657
France *v.* Clark (1884), 26 Ch.D. 257 ; 6 Digest 75, *589* ; 53 L.J.Ch. 585 ; 50 L.T. 1 .. 395, 399
Freeman *v.* Cooke (1848), 2 Exch. 654 ; 21 Digest 287, *1019* ; 6 Dow. and L. 187 ; 18 L.J.Ex. 114 ; 12 L.T.O.S. 66 .. .. 395, 397
Fry, *Re*, Reynolds *v.* Denne, [1945] 2 All E.R. 205 ; [1945] Ch. 348 ; 173 L.T. 282 .. .. 321, 323

Gardner *v.* Ingram (1889), 61 L.T. 729 ; 31 Digest 446, *5931* 20, 21, 22, 134, 135, 137, 408, 409, 410, 411
Garnett, *Re*, Richardson *v.* Greenep (1905), 74 L.J.Ch. 570 ; 40 Digest 530, *744* ; 93 L.T. 117 690, 692
Gentel *v.* Rapps, [1902] 1 K.B. 160 ; 13 Digest 328, *653* ; 71 L.J.K.B. 105 ; 85 L.T. 683 445, 446
German Date Coffee Co., *Re* (1882), 20 Ch.D. 169 ; 10 Digest 823, *5361* ; 51 L.J.Ch. 564 ; 46 L.T. 327 .. .. 436, 438
Glasgow Corpn. Water Comrs. *v.* Miller (Surveyor of Taxes) (1886), 2 Tax Cas. 131 ; 28 Digest 21, *107m* ; 13 R. (Ct. of Sess.) 489 .. ..669, 672, 673
Glasgow Corpn. Waterworks, *Re* (1875), 1 Tax Cas. 28 ; 28 Digest 21, *107o* ; *sub nom.* Glasgow Water Comrs. *v.* Inland Revenue, 2 R. (Ct. of Sess.) 708 .. .. 668, 669, 671, 673
Gleaner Co., Ltd. *v.* Assessment Committee, [1922] 2 A.C. 169 ; 28 Digest 49, *n* 448, 449, 450
Gleen *v.* Gleen (1900), 17 T.L.R. 62 ; 22 Digest 345, *3489* 594, 596
Glenboig Union Fireclay Co. *v.* Inland Revenue Comrs., [1921] S.C. 400 ; 12 Tax Cas. 427 165, 167
Gloucester (The Bishop of) *v.* Cunnington, [1943] 1 All E.R. 61 ; [1943] 1 K.B. 101 ; 112 L.J.K.B. 151 ; 168 L.T. 68 224
Godman *v.* Godman, [1920] P. 261 ; 39 Digest 337, *240* ; 89 L.J.P. 193 ; 123 L.T. 274 723, 726, 728, 729
Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633 ; 8 Digest 327, *1099* ; 52 L.J.Q.B. 193 ; 48 L.T. 239 .. .. 502, 510
Goodman's Trusts, *Re* (1881), 17 Ch.D. 266 ; 3 Digest 372, *135* ; 50 L.J.Ch. 425 ; 44 L.T. 527 343, 344, 348
Gordon *v.* Gordon, [1903] P. 141 ; 16 Digest 65, *750* ; 72 L.J.P. 33 ; 89 L.T. 73 .. .. 247, 252
Gosling *v.* Gaskell, [1897] A.C. 575 ; 10 Digest 792, *4975* ; 66 L.J.Q.B. 848 ; 77 L.T. 314 566, 569
Governments Stock & Other Securities Investment Co. *v.* Manila Ry. Co., [1897] A.C. 81 ; 10 Digest 761, *4758* ; 66 L.J.Ch. 102 ; 75 L.T. 553 .. .. 367, 373
Grant *v.* Edmondson, [1931] 1 Ch. 1 ; Digest Supp. ; 100 L.J.Ch. 1 ; 143 L.T. 749 .. 465, 467
Gray *v.* Fidler, [1943] 2 All E.R. 289 ; [1943] 1 K.B. 694 ; 169 L.T. 193 .. .. ..406, 407, 408
Great Western Ry. *v.* London and County Banking Co., [1901] A.C. 414 ; 6 Digest 442, *2842* ; 70 L.J.K.B. 915 ; 85 L.T. 152.. .. ..395, 398, 399
Greenhalgh *v.* Mallard, [1943] 2 All E.R. 234 .. .. 513, 514
Greg *v.* Planque, [1936] 1 K.B. 669 ; Digest Supp. ; 105 L.J.K.B. 415 ; 154 L.T. 475 256, 259, 264, 267
Grey *v.* Fidler, [1943] 2 All E.R. 289 ; [1943] 1 K.B. 694 ; 169 L.T. 193 .. .. .. 487, 488
Grey *v.* Pearson (1857), 6 H.L. Cas. 61 ; 42 Digest 626, *277* ; 26 L.J.Ch. 473 ; 29 L.T.O.S. 67 599, 605
Grove-Grady, *Re*, Plowden *v.* Lawrence, [1929] 1 Ch. 557 ; Digest Supp. ; 98 L.J.Ch. 261 ; 140 L.T. 659 ; *varied on appeal*, *sub nom.* A.-G. *v.* Plowden, [1931] W.N. 89 .. .. 205, 210, 211, 216, 217, 502, 510
Gulf of Suez, The (1920), 37 T.L.R. 60 ; 41 Digest 745, *5965* ; *on appeal*, [1921] P. 318 359, 364

Haig's (Earl) Trustees *v.* Inland Revenue Comrs., [1939] S.C. 676 ; Digest Supp. ; 22 Tax Cas. 725 .. .. 711, 712, 715, 716
Hall, *In the Estate of*, Hall *v.* Knight & Baxter, [1914] P. 1 ; 23 Digest 115, *1102* ; 83 L.J.P. 1 ; 109 L.T. 587 .. .. 580, 581
Hall *v.* Derby Sanitary Authority (1885), 16 Q.B.D. 163 ; 8 Digest 243, *26* ; 55 L.J.M.C. 21 ; 54 L.T. 175 .. .. 502, 509
Hall (J. P.) & Co., Ltd. *v.* Inland Revenue Comrs., [1921] 3 K.B. 152 ; Digest Supp. ; 90 L.J.K.B. 1229 ; 125 L.T. 720 ; 12 Tax Cas. 382 .. .. 533, 542
Halsey *v.* Lowenfeld, [1916] 2 K.B. 707 ; 2 Digest 157, *272* ; 85 L.J.K.B. 1498 ; 115 L.T. 617 37, 40, 45
Hamilton, *Re*, Cadogan *v.* Fitzroy, [1896] 2 Ch. 617 ; 8 Digest 274, *419* ; 65 L.J.Ch. 815 ; 75 L.T. 113 .. .. 367, 371
Hamilton *v.* Fraser & Co. *v.* Pandorf & Co. (1887), 12 App. Cas. 518 ; 29 Digest 203, *1624* ; 57 L.J.Q.B. 24 ; 57 L.T. 726 .. .. 124, 126
Hancock *v.* Watson, [1902] A.C. 14 ; 43 Digest 644, *792* ; 71 L.J.Ch. 149 ; 85 L.T. 729 ..314, 315, 318
Hankey *v.* Clavering, [1942] 2 All E.R. 311 ; [1942] 2 K.B. 326 ; 111 L.J.K.B. 711 ; 167 L.T. 193 .. .. 134, 135, 297, 302, 303
Harbin *v.* Masterman, [1896] 1 Ch. 351 ; 23 Digest 400, *4714* ; 65 L.J.Ch. 195 ; 73 L.T. 591 704, 708
Hart *v.* Gumpach (1873), L.R. 4 P.C. 439 ; 32 Digest 112, *1444* ; 42 L.J.P.C. 25 .. .. 304, 306
Harvey *v.* Farnie (1882), 8 App. Cas. 43 ; 11 Digest 429, *932* ; 52 L.J.P. 33 ; 48 L.T. 273 343
Haskins *v.* Lewis, [1931] 2 K.B. 1 ; Digest Supp. ; 100 L.J.K.B. 180 ; 144 L.T. 378 ..675, 677, 678

PAGE

Hayes, *Re*, Turnbull *v.* Hayes, [1901] 2 Ch. 529 ; 37 Digest 425, *335* ; 70 L.J.Ch. 770 ; 85 L.T. 85 24, 27
Haynes *v.* Harwood, [1935] 1 K.B. 146 ; Digest Supp. ; 104 L.J.K.B. 63 ; 151 L.T. 121 312, 313
Heaven *v.* Pender (1883), 11 Q.B.D. 503 ; 34 Digest 192, *1570* ; 52 L.J.Q.B. 702 ; 49 L.T. 357 227, 229
Heranger S.S. Owners *v.* Diamond S.S. Owners, [1939] A.C. 94 ; Digest Supp. ; 108 L.J.P. 12 ; 160 L.T. 241 359, 364
Herron *v.* Martin (1911), 27 T.L.R. 431 ; 31 Digest 440, *5865* 408, 409, 410, 411
Heyne *v.* Fischel & Co. (1913), 30 T.L.R. 190 ; 22 Digest 347, *3509* ; 110 L.T. 264 594, 597
Hicklin, *Re*, Public Trustee *v.* Hoare, [1914] 2 Ch. 278 ; 21 Digest 28, *157* ; 86 L.J.Ch. 740 ; 117 L.T. 403 704, 707
Hickman *v.* Peacey, [1945] 2 All E.R. 215 ; [1945] A.C. 304 ; 114 L.J.Ch. 225 ; 173 L.T. 89 89, 90, 92
Hillier, *Re*, Dauncey *v.* Finch and A.-G., [1944] 1 All E.R. 480 502, 509
Hindustan S.S. Co. *v.* The Admiralty, [1921] 8 Lloyd L.R. 230 ; Digest Supp. 124, 127
Hobson, *Re*, Barwick *v.* Holt, [1912] 1 Ch. 623 ; 44 Digest 566, *3839* ; 106 L.T. 507 89, 94
Hoddinott *v.* Newton, Chambers & Co., [1899] 1 Q.B. 1018 ; 34 Digest 238, *2031* ; 68 L.J.Q.B. 495 ; 80 L.T. 559 ; 1 W.C.C. 62 ; *on appeal*, [1901] A.C. 49 256, 264, 271
Holden (Isaac) & Sons, Ltd. *v.* Inland Revenue Comrs. (1924), 12 Tax Cas. 768 ; Digest Supp. 533, 542, 547, 549
Holford's Settlement, *Re*, Lloyds Bank, Ltd. *v.* Holford, [1944] 2 All E.R. 462 ; [1945] Ch. 21 ; 114 L.J.Ch. 71 ; 171 L.T. 379 24, 27
Hooper, *Re*, Parker *v.* Ward, [1932] 1 Ch. 38 ; Digest Supp. ; 101 L.J.Ch. 61 ; 146 L.T. 208 118, 120
Howard-Williams *v.* Howard-Williams, [1944] P. 85 ; 113 L.J.P. 71 ; 171 L.T. 278 379, 380
Hubbuck & Sons, Ltd. *v.* Wilkinson, Heywood & Clark, Ltd., [1899] 1 Q.B. 86 ; Digest Pleading 72, *626* ; 68 L.J.Q.B. 34 ; 79 L.T. 429 629, 630
Hughes *v.* Bank of New Zealand, [1938] 1 All E.R. 778 ; [1938] A.C. 366 ; Digest Supp. ; 107 L.J.K.B. 306 ; 158 L.T. 463 ; 21 Tax Cas. 472 238, 242, 529, 530, 531
Humble *v.* Hunter (1848), 12 Q.B. 310 ; 1 Digest 639, *2606* ; 17 L.J.Q.B. 350 ; 11 L.T.O.S. 265 146, 147
Hummeltenberg, *Re*, Beatty *v.* London Spiritualistic Alliance, [1923] 1 Ch. 237 ; Digest Supp.; 92 L.J.Ch. 326 ; 129 L.T. 124 205, 209, 210, 211, 215, 216, 217
Hurst *v.* Picture Theatres, Ltd., [1915] 1 K.B. 1 ; 30 Digest 513, *1682* ; 83 L.J.K.B. 1837 ; 111 L.T. 972 679, 685
Hutchinson's Trusts, *Re*, (1882) 21 Ch.D. 811 ; 44 Digest 1003, *8602* ; 51 L.J.Ch. 924 ; 47 L.T. 573 333, 334, 335, 336, 337, 338
Hyde *v.* Hyde (1888), 13 P.D. 166 ; 16 Digest 55, *607* ; 57 L.J.P. 89 ; 59 L.T. 529 247, 252, 253
Hyde *v.* Hyde and Woodmansee (1866), L.R. 1 P. & D. 130 ; 11 Digest 413, *800* ; 35 L.J.P. & M. 57 ; 14 L.T. 188 343, 344, 345, 348

Iberian Trust, Ltd. *v.* Founders Trust & Investment Co., Ltd., [1932] 2 K.B. 87 ; Digest Supp ; 101 L.J.K.B. 171 ; 147 L.T. 399 247, 252
Illingworth *v.* Leith Provident Co-operative Society, [1943] S.L.T. 85 ; 36 B.W.C.C. Supp. 1 618, 620, 621
Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A.C. 531 ; 8 Digest 241, *1* ; 61 L.J.Q.B. 265 ; 65 L.T. 621 ; 3 Tax Cas. 53 205, 208, 210, 212, 214, 216, 217, 501, 502, 507, 509, 511
Inland Revenue Comrs. *v.* British Salmson Aero Engines, Ltd., British Salmson Aero Engines, Ltd. *v.* Inland Revenue Comrs., [1938] 3 All E.R. 283 ; [1938] 2 K.B. 482 ; Digest Supp. ; 107 L.J.K.B. 648 ; 159 L.T. 147 ; 22 Tax Cas. 29 712, 715, 716
Inland Revenue Comrs. *v.* Hamilton-Russell's Exors., [1943] 1 All E.R. 474 476, 477, 484
Inland Revenue Comrs. *v.* Muller & Co.'s Margarine, Ltd., [1901] A.C. 217 ; 39 Digest 278, *627* ; 70 L.J.K.B. 677 ; 84 L.T. 729 ; *affg.*, S.C. *sub nom.* Muller & Co.'s Margarine, Ltd. *v.* Inland Revenue Comrs., [1900] 1 Q.B. 310 476, 478
Inland Revenue Comrs. *v.* Newcastle Breweries, Ltd. (1926), 95 L.J.K.B. 936 ; Digest Supp. ; 135 L.T. 618 ; *affd., sub nom.* Newcastle Breweries, Ltd. *v.* Inland Revenue Comrs. (1927), 96 L.J.K.B. 735 ; 137 L.T. 426 ; 12 Tax Cas. 927 533, 540, 541
Inland Revenue Comrs. *v.* Williams' Exors., Williams' Exors. *v.* Inland Revenue Comrs., [1942] 2 All E.R. 266 ; 167 L.T. 272 69, 73
Inland Revenue Comrs. *v.* Rolls-Royce, Ltd., [1944] 2 All E.R. 340 58, 59, 60, 61
Innes (or Grant) *v.* Kynoch, [1919] A.C. 765 ; 34 Digest 272, *2308* ; 88 L.J.P.C. 85 ; 121 L.T. 39 ; 12 B.W.C.C. 78 429, 430
Irish Society *v.* Derry (Bp.) (1846), 12 Cl. & Fin. 641 ; 22 Digest 350, *3543* 594, 595, 596
Ironmonger *v.* Vintner (1938), 31 B.W.C.C. 90 ; Digest Supp. 432, 433, 435

Jackson *v.* Fisher's Foils, Ltd., [1944] 1 All E.R. 421 ; [1944] 1 K.B. 316 ; 113 L.J.K.B. 365 ; 171 L.T. 51 666, 667
Janson *v.* Driefontein Consolidated Mines, Ltd., [1902] A.C. 484 ; 11 Digest 544, *485* ; 71 L.J.K.B. 857 ; 87 L.T. 372 29, 30
Janson *v.* Driefontein Consolidated Mines, Ltd., [1902] A.C. 484 ; 2 Digest 128, *49* ; 71 L.J.K.B. 857 ; 87 L.T. 372 37, 39, 40, 56
Johnstone *v.* Pedlar, [1921] 2 A.C. 262 ; Digest Supp. ; 90 L.J.P.C. 181 ; 125 L.T. 809 187, 190
Jones *v.* Newtown & Llandidloes Guardians, [1920] 3 K.B. 381 ; 27 Digest 76, *601* ; 89 L.J.K.B. 1161 ; 124 L.T. 23 171, 174
Jones (R. E.), Ltd. *v.* Waring & Gillow, Ltd., [1926] A.C. 670 ; Digest Supp. ; 95 L.J.K.B. 913 ; 135 L.T. 548 394, 396
Jordan *v.* Jordan, [1939] 2 All E.R. 29 ; [1939] P. 239 ; Digest Supp. ; 108 L.J.P. 104 ; 160 L.T. 368 171, 173
Judkin's Trusts, *Re*, (1884), 25 Ch.D. 743 ; 23 Digest 409, *4805* ; 53 L.J.Ch. 496 ; 50 L.T. 200 324, 325

Kendall *v.* Hamilton (1879), 4 App. Cas. 504 ; 1 Digest 579, *2195* ; 48 L.J.Q.B. 705 ; 41 L.T. 418 99, 110, 113
Kerrison *v.* Smith, [1897] 2 Q.B. 445 ; 30 Digest 512, *1675* ; 66 L.J.Q.B. 762 ; 77 L.T. 344 679, 684
Kestos, Ltd. *v.* Kempat, Ltd., and Vivian Fitch Kemp, *Re* Kestos, Ltd. Registered Design (No, 725,716) (1935), 53 R.P.C. 139 ; Digest Supp. 177, 180, 184
Kingston Union *v.* Metropolitan Water Board, [1926] A.C. 331 ; 38 Digest 547, *901* ; 95 L.J.K.B. 605 ; 134 L.T. 483 385, 386
Kinneil Cannel & Coking Coal Co., Ltd. *v.* Sneddon (or Waddell), [1931] A.C. 575 ; Digest Supp ; 100 L.J.P.C. 113 ; 145 L.T. 289 ; 24 B.W.C.C. 181 99, 111
Kirk *v.* Eustace, [1937] 2 All E.R. 715 ; [1937] A.C. 491 ; Digest Supp. ; 106 L.J.K.B. 617 ; 157 L.T. 171 ; *revsg.*, [1936] 3 All E.R. 520 115, 116
Kitano Maru S.S. Owners *v.* Otranto S.S. Owners, The Otranto, [1931] A.C. 194 ; Digest Supp. ; 100 L.J.P. 11 ; 144 L.T. 251 359, 364
Kotzias *v.* Tyser, [1920] 2 K.B. 69 ; Digest Supp. ; 89 L.J.K.B. 529 ; 122 L.T. 795 29, 30

Lace *v.* Chandler, [1944] 1 All E.R. 305 ; [1944] 1 K.B. 368 ; 113 L.J.K.B. 282 ; 170 L.T. 185 297, 298, 721, 722

PAGE

Lambert Bros., Ltd. *v.* Inland Revenue Comrs. [1927], 12 Tax Cas. 1053 ; Digest Supp. 533, 541
Lancashire & Yorkshire Bank's Lease, *Re*, Davis (W.) & Son *v.* Lancashire & Yorkshire Bank, [1914] 1 Ch. 522 ; 31 Digest 439, *5853* ; 83 L.J.Ch. 577 ; 110 L.T. 571 .. .. .. 20, 21, 408, 409, 410, 411
Lander *v.* British United Shoe Machinery Co., Ltd. (1933), 102 L.J.K.B. 768 ; Digest Supp. ; 149 L.T. 395 ; 26 B.W.C.C. 411 .. .. 431, 432, 433, 435
Lassence *v.* Tierney (1849), 1 Mac. & G. 551 ; 43 Digest 643, *790* ; 2 H. & Tw. 115 ; 15 L.T.O.S. 557 .. .. 314, 315, 316, 317, 318, 319
Lee *v.* Nursery Furnishings, Ltd., (1945) 1 All E.R. 387 ; 172 L.T. 285 .. .. ..139, 141, 142
Leng, *Re*, Dodsworth *v.* Leng, [1938] 3 All E.R. 181 ; [1938] Ch. 821 ; Digest Supp. ; 108 L.J.Ch. 65 ; 159 L.T. 355 .. .. 324, 326
Lewis *v.* Fermor (1887), 18 Q.B.D. 532 ; 2 Digest 289, *595* ; 56 L.J.M.C. 45 ; 56 L.T. 236 206, 213
Lewis *v.* Paulton and Others (1907), 14 S.L.T. 818 .. .. 687, 689
Lickbarrow *v.* Mason (1787), 2 Term Rep. 63 ; 6 Digest 456, *2911* ; 6 East. 20n ; *revsd. sub nom.* Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357 Ex. Ch. ; *revsd. and venire de novo awarded sub nom.* Lickbarrow *v.* Mason (1793), 4 Bro. Parl. Cas. 57 ; *subsequent proceedings* (1795), 5 Term Rep. 683 ; 6 Term Rep. 131 .. .. 394, 395
Lincolnshire Sugar Co., Ltd. *v.* Smart, [1937] 1 All E.R. 413 ; [1937] A.C. 697 ; Digest Supp. ; 106 L.J.K.B. 185 ; 156 L.T. 215 ; *sub nom.* Smart *v.* Lincolnshire Sugar Co., Ltd., 20 Tax Cas. 643 .. .. 669, 674
Lindus and Hortin *v.* Inland Revenue Comrs. (1933), 17 Tax Cas. 442 ; Digest Supp. ..160, 161, 164
Lissenden *v.* Bosch (C.A.V.), Ltd., [1940] 1 All E.R. 425 ; [1940] A.C. 412 ; Digest Supp. ; 109 L.J.K.B. 350 ; 162 L.T. 195 ; 33 B.W.C.C. 21 .. .. 99, 102
Lister *v.* Lane & Nesham, [1893] 2 Q.B. 212 ; 31 Digest 328, *4700* ; 62 L.J.Q.B. 583 ; 69 L.T. 176 .. .. 465, 470
Lloyds Bank, Ltd. *v.* Cooke, [1907] 1 K.B. 794 ; 6 Digest 74, *587* ; 76 L.J.K.B. 666 ; 96 L.T. 715 .. .. 394, 396, 397, 398, 399
Lochgelly Iron & Coal Co., Ltd. *v.* M'Mullan, [1934] A.C. 1 ; Digest Supp. ; 102 L.J.P.C. 123 ; 149 L.T. 526 ; 28 B.W.C.C. 463 .. .. 99, 102
Lodge *v.* National Union Investment Co., Ltd., [1907] 1 Ch. 300 ; 35 Digest 205, *303* ; 76 L.J.Ch. 187 ; 96 L.T. 301 .. .. 519, 522
Lurcott *v.* Wakely & Wheeler, [1911] 1 K.B. 905 ; 31 Digest 332, *4757* ; 80 L.J.K.B. 713 ; 104 L.T. 290 .. .. 465, 470
Lysaght *v.* Edwards (1876), 2 Ch.D. 499 ; 40 Digest 182, *1518* ; 45 L.J.Ch. 554 ; 34 L.T. 787 285, 286
Lysons *v.* Knowles (Andrew) & Sons, Ltd., Stuart *v.* Nixon & Bruce, [1901] A.C. 79 ; 34 Digest 238, *2032* ; 70 L.J.K.B. 170 ; 84 L.T. 65 ; 3 B.W.C.C. 1 ; *revsg.*, [1900] 1 Q.B. 780; *and revsg.*, [1900] 2 Q.B. 95 .. .. 432, 433

M'Alister (or Donoghue) *v.* Stevenson, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281 .. .. 227, 229
McDonald *v.* James Dunlop & Co. (1905), 7 F. (Ct. of Sess.) 533 .. .. 99, 107
McFarlane *v.* Hutton Brothers (Stevedores) (1926), 96 L.J.K.B. 357 ; Digest Supp. ; 136 L.T. 547 ; 20 B.W.C.C. 222 .. .. 432, 434
M'Gillivray *v.* Hope, [1935] A.C. 1 ; Digest Supp. ; 104 L.J.P.C. 11 ; 151 L.T. 482 ; 27 B.W.C.C. 348 .. ..232, 233, 235
Mackay *v.* Rosie, [1908] S.C. 174 ; 1 B.W.C.C. 52 .. .. 99, 110
Mackenzie *v.* Mackenzie, [1940] 1 All E.R. 256 ; [1940] P. 81 ; Digest Supp. ; 109 L.J.P. 9 ; 162 L.T. 228 .. .. 308, 309
Mackenzie & Co., Ltd., *Re*, [1916] 2 Ch. 450 ; 9 Digest 158, *903* ; 85 L.J.Ch. 804 ; 115 L.T. 440 513, 517
Mackworth *v.* Hellard, [1921] 2 K.B. 755 ; 31 Digest 563, *7111* ; 90 L.J.K.B. 693 ; 125 L.T. 451 .. .. 219, 221
Makin *v.* A.-G. for New South Wales, [1894] A.C. 57 ; 14 Digest 371, *3924* ; 63 L.J.P.C. 41 ; 69 L.T. 778 .. .. 698, 700
Marsh *v.* Means (1857), 3 Jur. N.S. 790 ; 8 Digest 312, *933* ; 30 L.T.O.S. 89 .. .. 205, 210
Martin *v.* Finch, [1937] 2 All E.R. 631 ; Digest Supp. ; 156 L.T. 447 ; 30 B.W.C.C. 99 .. 432, 433
Matthey *v.* Curling, [1922] 2 A.C. 180 ; 12 Digest 399, *3231* ; 91 L.J.K.B. 593 ; 127 L.T. 247 719, 720
Mellor *v.* Daintree (1886), 33 Ch.D. 198 ; 44 Digest 599, *4242* ; 56 L.J.Ch. 33 ; 55 L.T. 175 736
Mellor *v.* Denham (1880), 5 Q.B.D. 467 ; 14 Digest 29, *8* ; 49 L.J.M.C. 89 .. .. .. 130, 131
Mercantile Bank of India, Ltd. *v.* Central Bank of India, Ltd., [1938] 1 All E.R. 52 ; [1938] A.C. 287 ; Digest Supp. ; 107 L.J.P.C. 25 ; 158 L.T. 269 .. ..394, 395, 396
Mercer *v.* Denne, [1905] 2 Ch. 538 ; 22 Digest 382, *3907* ; 74 L.J.Ch. 723 ; 93 L.T. 412 .. 594, 597
Mersey Docks & Harbour Board *v.* Birkenhead Assessment Committee, [1901] A.C. 175 ; 38 Digest 526, *735* ; 70 L.J.K.B. 584 ; 84 L.T. 542 .. .. 385, 386
Mersey Docks and Harbour Board *v.* Lucas (1883), 8 App. Cas. 891 ; 28 Digest 21, *104* ; 53 L.J.Q.B. 4 ; 49 L.T. 781 ; 2 Tax Cas. 25 .. .. 669, 673
Messager *v.* British Broadcasting Co., Ltd., [1929] A.C. 151 ; Digest Supp. ; 98 L.J.K.B. 198 ; 140 L.T. 227 .. .. 712, 713
Middlesex County Council *v.* Hall, [1929] 2 K.B. 110 ; Digest Supp. ; 98 L.J.K.B. 482 ; 141 L.T. 243 .. .. 609, 613
Miller *v.* Boothman (William) & Sons, Ltd., [1944] 1 All E.R. 333 ; [1944] 1 K.B. 337 ; 113 L.J.K.B. 206 ; 170 L.T. 187 .. .. 244, 245
Mills *v.* Jones (1929), 142 L.T. 337 ; Digest Supp. 712, 715
Minister of Health *v.* Bellotti, Minister of Health *v.* Holliday, [1944] 1 All E.R. 238 ; [1944] 1 K.B. 298 ; 113 L.J.K.B. 436 ; 170 L.T. 146 .. ..679, 680, 684
Moore *v.* Tredegar Iron & Coal Co., Ltd. (1938), 31 B.W.C.C. 359 ; Digest Supp. 432, 434
Morgan, *Re*, Morgan *v.* Morgan, [1893] 3 Ch. 222 ; 39 Digest 137, *310* ; 62 L.J.Ch. 789 ; 69 L.T. 407 .. .. 327, 329
Morton *v.* Morton, Daly and McNaught, [1937] 2 All E.R. 470 ; [1937] P. 151 ; Digest Supp. ; 106 L.J.P. 100 ; 156 L.T. 46 .. .. 121, 123
Moss Empires, Ltd. *v.* Inland Revenue Comrs., [1937] 3 All E.R. 381 ; [1937] A.C. 785 ; Digest Supp. ; 106 L.J.P.C. 138 ; 157 L.T. 396 ; 21 Tax Cas. 264 .. .. ..160, 161, 163
Moxham (M.), The (1876), 1 P.D. 107 ; 11 Digest 346, *333* ; 46 L.J.P. 17 ; 34 L.T. 559 ; *revsg.* (1875) 1 P.D. 43 .. .. 79, 80, 81
Municipal Mutual Insurance, Ltd. *v.* Hills (1932), 147 L.T. 62 ; Digest Supp. ; 16 Tax Cas. 430 .. ..638, 639, 669
Murphy Radio, Ltd. *v.* Welwyn Garden City Rating Authority, [1943] 2 All E.R. 16 ; 168 L.T. 427 .. .. 5, 10

Nachimson *v.* Nachimson, [1930] P. 217 ; Digest Supp. ; 99 L.J.P. 104 ; 143 L.T. 254 343, 344
Neale *v.* Del Soto, [1945] 1 All E.R. 191 ; [1945] K.B. 144 ; 114 L.J.K.B. 138 ; 172 L.T. 65 543, 544, 545
New York Life Insurance Co. *v.* Styles (1889), 14 App. Cas. 381 ; 28 Digest 59, *300* ; 59 L.J.Q.B. 291 ; 61 L.T. 201 ; *sub nom.* Styles *v.* New York Life Insurance Co., 2 Tax Cas. 460 638

PAGE

Nichol *v.* Martyn (1799), 2 Esp. 732 ; 34 Digest 167, *1306* .. 351, 355
Nicholls *v.* Austin (Leyton), Ltd., [1944] 2 All E.R. 485 ; [1945] 1 K.B. 50 ; 114 L.J.K.B. 21 ; 171 L.T. 353 .. 244, 245
Nicol *v.* Nicol (1886), 31 Ch.D. 524 ; 27 Digest 245, *2158* ; 55 L.J.Ch. 437 ; 54 L.T. 470 .. 115
Noble *v.* Harrison, [1926] 2 K.B. 332 ; 36 Digest 189, *316* ; 95 L.J.K.B. 813 ; 135 L.T. 325 .. 490, 494
Noble (B. W.), Ltd. *v.* Mitchell (1926), 43 T.L.R. 102 ; Digest Supp. ; 11 Tax Cas. 372 .. 68, 72
Nokes *v.* Doncaster Amalgamated Collieries, Ltd., [1940] 3 All E.R. 549 ; [1940] A.C. 1014 ; Digest Supp. ; 109 L.J.K.B. 865 ; 163 L.T. 343 .. 319, 320
No-Nail Cases Proprietary, Ltd. *v.* No-Nail Boxes, Ltd., [1944] 1 All E.R. 528 ; [1944] 1 K.B. 629 ; 113 L.J.K.B. 353 ; 170 L.T. 384 .. 64, 65, 67

Ogden *v.* Ogden, [1908] P. 46 ; 11 Digest 334, *228* ; 77 L.J.P. 34 ; 97 L.T. 827 .. 343
Osborn *v.* Gillett (1873), L.R. 8 Exch. 88 ; 1 Digest 34, *263* ; 42 L.J.Ex. 53 ; 28 L.T. 197 .. 580, 581, 582
Ottoman Bank *v.* Jebara, [1928] A.C. 269 ; 43 Digest 481, *188* ; 97 L.J.K.B. 502 ; 139 L.T. 194 .. 37, 50, 56
Overton *v.* Freeman (1852), 11 C.B. 867 ; 26 Digest 410, *1309* ; 21 L.J.P.C. 52 ; 18 L.T.O.S. 224 .. 489, 490, 496

Paine *v.* Bevan and Bevan (1914), 110 L.T. 933 ; 6 Digest 74, *588* .. 395, 397, 398
Palmer, *Re*, Palmer *v.* Palmer, [1916] 2 Ch. 391 ; 21 Digest 35, *220* ; 85 L.J.Ch. 577 ; 115 L.T. 57 .. 33, 35, 704, 707, 710
Pardy *v.* Pardy, [1939] 3 All E.R. 779 ; [1939] P. 288 ; Digest Supp. ; 108 L.J.P. 145 ; 161 L.T. 210 .. 171, 173, 175, 176
Parker *v.* South Eastern Ry. Co., Gabell *v.* South Eastern Ry. Co. (1877), 2 C.P.D. 416 ; 8 Digest 130, *866* ; 46 L.J.Q.B. 768 ; 36 L.T. 540 .. 654, 660
Parker-Jervis, *Re*, Salt *v.* Locker, [1898] 2 Ch. 643 ; 21 Digest 41, *261* ; 67 L.J.Ch. 682 ; 79 L.T. 403 .. 704, 706, 708, 709
Parkinson *v.* Parkinson, [1939] 3 All E.R. 108 ; [1939] P. 346 ; Digest Supp. ; 161 L.T. 251 .. 564, 565
Patten, *Re*, Westminster Bank *v.* Carlyon, [1929] 2 Ch. 276 ; Digest Supp. ; 98 L.J.Ch. 419 ; 141 L.T. 295 .. 421, 424
Payne *v.* Wright, [1892] 1 Q.B. 104 ; 14 Digest 552, *6279* ; 61 L.J.M.C. 114 ; 66 L.T. 148 .. 130, 131
Peal *v.* Peal, [1931] P. 97 ; Digest Supp. ; 100 L.J.P. 69 ; 143 L.T. 768 .. 343
Pease *v.* Pattinson (1886), 32 Ch.D. 154 ; 8 Digest 262, *244* ; 55 L.J.Ch. 617 ; 54 L.T. 209 .. 502, 508
Penang and General Investment Trust, Ltd. *v.* Inland Revenue Comrs., [1943] 1 All E.R. 514 ; [1943] A.C. 486 ; 112 L.J.K.B. 356 ; 169 L.T. 93 .. 599, 604
Penny *v.* Wimbledon Urban Council, [1899] 2 Q.B. 72 ; 26 Digest 410, *1308* ; 68 L.J.Q.B. 704 ; 80 L.T. 615 .. 490, 495
Perkins *v.* Stevenson (Hugh) & Sons, Ltd., [1939] 3 All E.R. 697 ; [1940] 1 K.B. 56 ; Digest Supp. ; 109 L.J.K.B. 1 ; 161 L.T. 149 ; 32 B.W.C.C. 181 .. 99, 100, 101, 102, 103, 108, 110, 111
Perrin *v.* Morgan, [1943] 1 All E.R. 187 ; [1943] A.C. 399 ; 112 L.J.Ch. 81 ; 168 L.T. 177 .. 28, 29, 30, 31, 89, 92
Peru Republic *v.* Peruvian Guano Co. (1887) 36 Ch.D. 489 ; Digest Pleading 73, *635* ; 56 L.J.Ch. 1081 ; 57 L.T. 337 .. 629, 630
Phillips *v.* Barnett, [1922] 1 K.B. 222 ; 31 Digest 566, *7132* ; 91 L.J.K.B. 198 ; 126 L.T. 173 .. 675, 676
Phillips *v.* Jones (1850), 15 Q.B. 859 ; 43 Digest 530, *657* ; 19 L.J.Q.B. 374 ; 16 L.T.O.S. 4 .. 583, 584
Phipps (P.) & Co. (Northampton and Towcester Breweries), Ltd. *v.* Rogers, [1925] 1 K.B. 14 ; 31 Digest 448, *5947* ; 93 L.J.K.B. 1009 ; 132 L.T. 240 .. 134, 135
Pirbright *v.* Salwey, [1896] W.N. 86 ; 8 Digest 261, *230* .. 118, 120
Port of London Authority *v.* Orsett Union Assessment Committee, [1920] A.C. 273 ; 38 Digest 563, *1017* ; 89 L.J.K.B. 481 ; 122 L.T. 722 .. 385, 387
Porter *v.* Freudenberg, Kreglinger *v.* Samuel (S.) & Rosenfeld, *Re* Merton's Patents, [1915] 1 K.B. 857 ; 2 Digest 156, *260* ; 84 L.J.K.B. 1001 ; 112 L.T. 313 .. 628, 629, 633, 634
Pound (Henry), Son & Hutchins, *Re* (1889), 42 Ch.D. 402 ; 10 Digest 811, *5184* ; 58 L.J.Ch. 792 ; 62 L.T. 137 .. 566, 569
Price, *Re*, Tomlin *v.* Latter, [1900] 1 Ch. 442 ; 11 Digest 383, *615* ; 69 L.J.Ch. 225 ; 82 L.T. 79 .. 723, 725, 726, 729
Priestly *v.* Fowler (1837), 3 M. & W. 1 ; 34 Digest 202, *1647* ; Murp. & H. 305 ; 7 L.J.Ex. 42 .. 227, 230
Psalms and Hymns (Baptist) Trustees *v.* Whitwell (1890), 3 Tax Cas. 7 ; 28 Digest 78, *479* .. 477, 482

Queen's Club Gardens Estates, Ltd. *v.* Bignell, [1924] 1 K.B. 117 ; 31 Digest 447, *5932* ; 93 L.J.K.B. 107 ; 130 L.T. 26 .. 133, 134, 137

R. *v.* Ahearne (1852), 6 Cox C.C. 6 ; 14 Digest 330, *r* .. 560, 561
R. *v.* Barnes, R. *v.* Richards, [1940] 2 All E.R. 229 ; 27 Cr. App. Rep. 154 .. 559, 560, 561
R. *v.* Ailes (1918), 13 Cr. App. Rep. 173 ; 14 Digest 227, *2116* .. 698, 702, 703
R. *v.* Armstrong, [1922] 2 K.B. 555 ; 14 Digest 378, *3988* ; 91 L.J.K.B. 904 ; 127 L.T. 221 ; 16 Cr. App. Rep. 149 .. 698, 701
R. *v.* Bailey, [1924] 2 K.B. 300 ; Digest Supp. ; 93 L.J.K.B. 989 ; 132 L.T. 349 ; 18 Cr. App. Rep. 42 .. 698, 702, 703
R. *v.* Ball, [1911] A.C. 47 ; 14 Digest 375, *3959* ; *sub nom.* Public Prosecutions Director *v.* Ball (No. 2), 80 L.J.K.B. 691 ; 103 L.T. 738 ; 6 Cr. App. Rep. 31 .. 698, 700
R. *v.* Birchall (1913), 9 Cr. App. Rep. 91 ; 15 Digest 780, *8353* ; 109 L.T. 478 ; 23 Cox, C.C. 579 .. 524, 526
R. *v.* Bonneyman (1942), 28 Cr. App. Rep. 131 .. 580
R. *v.* Bradlaugh (1883), 15 Cox, C.C. 217 ; 14 Digest 226, *2106* .. 560, 561
R. *v.* Brailsford, [1905] 2 K.B. 730 ; 14 Digest 117, *861* ; 75 L.J.K.B. 64 ; 93 L.T. 401 .. 189, 191, 194
R. *v.* Burdett (1820), 4 B. & Ald. 95 ; 22 Digest 160, *1366* .. 187, 197
R. *v.* Casement, [1917] 1 K.B. 98 ; 14 Digest 128, *1002* ; 86 L.J.K.B. 467 ; 115 L.T. 267, 277 .. 186, 187, 192, 194
R. *v.* Christopherson (1885), 16 Q.B.D. 7 ; 38 Digest 503, *579* ; 55 L.J.M.C. 1 ; 53 L.T. 804 .. 149, 151, 152
R. *v.* Cole (1810), 1 Phillips on Evidence, 10th Edn., p. 508 ; Russell on Crime, 9th Edn., p. 653 ; Stephen on Evidence, 11th Edn., art. 10 ; 14 Digest 363, *3848* .. 698, 701, 702
R. *v.* Cole (1941), 165 L.T. 125 ; 28 Cr. App. Rep. 43 .. 698, 701
R. *v.* Egerton (1819), Russ. & Ry. 375 ; 15 Digest 943, *10427* .. 698, 702
R. (Sherry) *v.* Fermanagh County, The County Court Judge and Chairman of Quarter Sessions for, [1935] N.I. 211 .. 130, 132
R. *v.* Gibbins & Proctor (1918), 13 Cr. App. Rep. 134 ; 14 Digest 226, *2102* .. 560, 561
R. *v.* Gillingham, [1939] 4 All E.R. 122 ; 27 Cr. App. Rep. 143 .. 698, 700
R. *v.* Greening, [1913] 3 K.B. 846 ; 15 Digest 781, *8381* ; 83 L.J.K.B. 195 ; 109 L.T. 720 ; 23 Cox, C.C. 601 ; 9 Cr. App. Rep. 105 .. 524, 526
R. *v.* Grondkowski & Malinowski, [1946] 1 All E.R. 559 .. 698, 699
R. *v.* Hausmann (1909), 3 Cr. App. Rep. ; 14 Digest 30, *15* .. 130, 132

R. *v.* Income Tax Special Comrs., *Ex p.* Shaftesbury Homes & Arethusa Training Ship, [1923] 1 K.B. 393 ; 28 Digest 84, *480* ; 92 L.J.K.B. 152 ; 128 L.T. 463 ; 8 Tax Cas. 367 476, 477, 481, 483, 484, 485

R. *v.* Joddrell (1830), 1 B. & Ad. 403 ; 38 Digest 572, *1098* ; 9 L.J.O.S.M.C. 26 .. .. 149, 152

R. *v.* Jones (1908), 72 J.P. 215 ; 15 Digest 780, *8352* 524, 526

R. *v.* Knocklaoe Camp (Commandant), *Ex p.* Forman (1917), 117 L.T. 627 ; 2 Digest 198, *563* ; 87 L.J.K.B. 43 ; 16 L.G.R. 295 .. .. 628, 629, 633, 634

R. *v.* Naguib, [1917] 1 K.B. 359 ; 11 Digest 414, *802* ; 86 L.J.K.B. 709 ; 116 L.T. 640 .. 343

R. *v.* Norman, [1915] 1 K.B. 341 ; 14 Digest 230, *2154* ; 84 L.J.K.B. 440 ; 112 L.T. 784 ; 11 Cr. App. Rep. 58 .. .. 698, 699

R. *v.* Oliver, [1943] 2 All E.R. 800 ; [1944] K.B. 68 ; 113 L.J.K.B. 119 ; 170 L.T. 110 .. 85, 86

R. *v.* Palmer, [1913] 2 K.B. 29 ; 15 Digest 780, *8354* ; 82 L.J.K.B. 531 ; 108 L.T. 814 ; 23 Cox, C.C. 377 ; 8 Cr. App. Rep. 191 .. .. 524, 526

R. *v.* Pearson (1835), 2 Lew. C.C. 216 ; 15 Digest 781, *8378* 524, 526

R. *v.* Rothwell (1871), 12 Cox, C.C. 145 ; 15 Digest 780, *8350* 524, 526

R. *v.* Rowton (1865), Le. & Ca. 520 ; 14 Digest 289, *3051* ; 5 New Rep. 428 ; 34 L.J.M.C. 57 ; 11 L.T. 745 .. .. 698, 700

R. *v.* Southern (1930), 142 L.T. 383 ; Digest Supp. ; 22 Cr. App. Rep. 6 .. .. ..698, 699, 703

R. *v.* Turner (1816), 5 M. & S. 206 ; 14 Digest 430, *4552* 187, 197

R. *v.* Twiss, [1918] 2 K.B. 853 ; 14 Digest 403, *4232* ; 88 L.J.K.B. 20 ; 119 L.T. 680 ; 13 Cr. App. Rep. 177 .. .. 698, 700

R. *v.* Vine Street Police Station Superintendent, *Ex p.* Liebmann, [1916] 1 K.B. 268 ; 2 Digest 141, *162* ; 85 L.J.K.B. 210 ; 113 L.T. 971 .. ..629, 633, 634

R. *v.* Whitchurch (1881), 7 Q.B.D. 534 ; 14 Digest 29, *10* ; *sub nom. Re* Nottingham JJ., *Ex p.* Whitchurch, 50 L.J.M.C. 99 ; *sub nom., Ex p.* Whitchurch, 45 L.T. 379 .. .. 130, 131

R. *v.* Worthing Borough Council and Horsham and Worthing Assessment Committee, *Ex p.* Burgess, [1937] 2 All E.R. 681 ; 106 L.J.K.B. 810 ; *sub nom.* R. *v.* Horsham and Worthing Assessment Committee, *Ex p.* Burgess, [1937] 2 K.B. 408 ; Digest Supp. ; 157 L.T. 41 .. .. 5, 9

Ragdale, *Re*, Public Trustee *v.* Tuffill, [1934] Ch. 352 ; Digest Supp. ; 103 L.J.Ch. 181 ; 150 L.T. 459 .. .. 89, 94, 334, 337, 338

Raill, *Re*, Westminster Bank, Ltd. *v* Harrison, [1939] 3 All E.R. 657 ; Digest Supp. .. 334, 338

Railway Assessment Authority *v.* Southern Ry. Co., London County Council *v.* Southern Ry Co., [1936] 1 All E.R. 26 ; [1936] A.C. 266 ; Digest Supp. ; 105 L.J.K.B. 115 ; 154 L.T. 314 .. .. 385, 386

Raine, *Re*, Tyerman *v.* Stansfield, [1929] 1 Ch. 716 ; Digest Supp. ; 98 L.J.Ch. 244 ; 141 L.T. 25 .. .. 324, 326

Ralph *v.* Carrick (1879), 11 Ch.D. 873 ; 44 Digest 1254, *10819* ; 48 L.J.Ch. 801 ; 40 L.T. 505 736

Rapier *v.* London Tramways Co., [1893] 2 Ch. 588 ; 36 Digest 175, *206* ; 63 L.J.Ch. 36 ; 69 L.T. 361 .. .. 490, 493

Reade-Revell, *Re*, Crellin *v.* Melling, [1930] 1 Ch. 52 ; Digest Supp. ; 99 L.J.Ch. 136 ; 142 L.T. 177 .. ..324, 325, 326

Redfern, *Re*, Redfern *v.* Bryning (1877), 6 Ch.D. 133 ; 44 Digest 564, *3816* ; *sub nom.*, Redfern v. Hall, 37 L.T. 241 736

Redfern *v.* Redfern, [1891] P. 139 ; 27 Digest 263, *2317* ; 60 L.J.P. 9 ; 64 L.T. 68.. .. 121, 122

Reeve *v.* Whitmore, Martin *v.* Whitmore (1863), 4 De G.J. & Sm. 1 ; 7 Digest 119, *689* ; 3 New Rep. 15 ; 33 L.J.Ch. 63 ; 9 L.T. 311.. .. .. 367, 378

Reischer *v.* Borwick, [1894] 2 Q.B. 548 ; 29 Digest 206, *1650* ; 63 L.J.Q.B. 753 ; 71 L.T. 238 124, 127

Richard & Great Western Ry. Co., *Re*, [1905] 1 K.B. 68 ; 11 Digest 156, *367* ; 74 L.J.K.B. 9 ; 91 L.T. 724 .. .. 277, 282

Richards *v.* Goskar, [1936] 3 All E.R. 839 ; [1937] A.C. 304 ; Digest Supp. ; 106 L.J.K.B. 85 ; 156 L.T. 52 ; 29 B.W.C.C. 357 .. .. 618, 620

Richards *v.* United National Collieries, Ltd., (1927) 96 L.J.K.B. 716 ; Digest Supp. ; 137 L.T. 467 ; 20 B.W.C.C. 465 .. .. 472, 474

Robb *v.* Green, [1895] 2 Q.B. 315 ; 34 Digest 121, *928* ; 64 L.J.K.B. 593 ; 73 L.T. 15 ..351, 354, 355, 357

Rouse *v.* Dixon, [1904] 2 K.B. 628 ; 34 Digest 491, *4066* ; 73 L.J.K.B. 662 ; 91 L.T. 436 ; 6 W.C.C. 44 .. .. 99, 107, 110

Royal Bristol Permanent Building Society *v.* Bomash (1887), 35 Ch.D. 390 ; 40 Digest 187, *1562* ; 56 L.J.Ch. 840 ; 57 L.T. 179 .. .. 285, 287

Royal British Bank *v.* Turquand (1856), 6 E. & B. 327 ; 9 Digest 615, *4094* ; 25 L.J.Q.B. 317 586, 587, 589, 591, 592

Russell *v.* Russell, [1895] P. 315 ; 27 Digest 318, *2960* ; 64 L.J.P. 105 ; 73 L.T. 295 .. 171, 175

Rutter *v.* Palmer, [1922] 2 K.B. 87 ; Digest Supp. ; 91 L.J.K.B. 657 ; 127 L.T. 419 .. 651

Rylands *v.* Fletcher (1868), L.R. 3 H.L. 330 ; 36 Digest 187, *311* ; 37 L.J.Ex. 161 ; 19 L.T. 220 ; *affg.*, S.C. *sub nom.* Fletcher *v.* Rylands (1866), L.R. 1 Exch. 265 .. .. 490, 495

Salaman *v.* Secretary of State for India, [1906] 1 K.B. 613 ; Digest Pleading 85, *714* ; 75 L.J.K.B. 418 ; 94 L.T. 858 .. .. 629, 632

Salvesen (or Von Lorang) *v.* Administrator of Austrian Property, [1927] A.C. 641 ; Digest Supp. ; 96 L.J.P.C. 105 ; 137 L.T. 571 343

Sandler *v.* Sandler, [1934] P. 149 ; Digest Supp. ; 103 L.J.P. 88 ; 151 L.T. 313 .. .. 379, 380

Sans Pariel, H.M.S., [1900] P. 267 ; 41 Digest 746, *5977* ; 69 L.J.P. 127 ; 82 L.T. 606 .. 359, 364

Schaffenius *v.* Goldberg, [1916] 1 K.B. 284 ; 2 Digest 156, *261* ; 85 L.J.K.B. 374 ; 113 L.T. 949 .. ..628, 629, 634

Schofield, *Ex p.*, [1891] 2 Q.B. 428 ; 14 Digest 551, *6275* ; 60 L.J.M.C. 157 ; *sub nom.* Rook *v.* Schofield, 64 L.T. 780.. .. .. 130, 131

Scottish Musician, The, [1942] P. 128 ; 111 L.J.P. 65 ; 72 Ll.L.Rep. 284 .. .. .. 359, 364

Seaman *v.* Burley, [1896] 2 Q.B. 344 ; 14 Digest 553, *6289* ; 65 L.J.M.C. 208 ; 75 L.T. 91 130

Seaham Harbour Dock Co. *v.* Crook (1931), 16 Tax Cas. 333 ; Digest Supp. 669, 674

Selwood *v.* Towneley Coal & Fireclay Co., Ltd., [1939] 4 All E.R. 34 ; [1940] 1 K.B. 180 ; Digest Supp. ; 109 L.J.K.B. 8 ; 161 L.T. 323 ; 32 B.W.C.C. 238 99, 100. 101, 103, 108, 110, 111

Sharpe *v.* Nicholls, [1945] 2 All E.R. 55 ; [1945] K.B. 382 ; 114 L.J.K.B. 409 ; 172 L.T. 363. .543, 544, 545

Shaw *v.* Halifax Corpn., [1915] 2 K.B. 170 ; 8 Digest 243, *21* ; 84 L.J.K.B. 761 ; 112 L.T. 921 502, 509

Shepherd, *Re*, *Ex p.* Ball (1879), 10 Ch.D. 667 ; 1 Digest 65, *533* ; 48 L.J.Bcy. 57 ; 40 L.T. 141 .. .. 580, 581

Simpson, *Re*, Clarke *v.* Simpson, [1913] 1 Ch. 277 ; 40 Digest 752, *2819* ; 82 L.J.Ch. 169 ; 108 L.T. 317 .. .. 421, 424

Sinha (Peerage) Case (1939), 171 Lords Journals, 350 .. ..343, 344, 346

Slater *v.* Burnley Corpn. (1888), 59 L.T. 636 ; 12 Digest 559, *4646* 621, 622, 626, 627

Smith, *Re*, Grose-Smith *v.* Bridger, [1899] 1 Ch. 331 ; 40 Digest 744, *2747* ; 68 L.J.Ch. 198 ; 80 L.T. 218 .. ..421, 423, 424

Smith *v.* Cammell Laird & Co., Ltd., [1939] 4 All E.R. 381 ; [1940] A.C. 242 ; Digest Supp. ; 109 L.J.K.B. 134 ; 163 L.T. 9.. .. .. 95, 97

PAGE

Smith *v.* Coles, [1905] 2 K.B. 827 ; 34 Digest 238, *2034* ; 75 L.J.K.B. 16 ; 93 L.T. 754 ; 8 B.W.C.C. 116 .. 432, 433
Smith *v.* Prosser, [1907] 2 K.B. 735 ; 6 Digest 73, *584* ; 77 L.J.K.B. 71 ; 97 L.T. 155 .. 395, 397
Smith *v.* Selwyn, [1914] 3 K.B. 98 ; 1 Digest 63, *516* ; 83 L.J.K.B. 1339 ; 111 L.T. 195 580, 582
Smith *v.* Smith, [1923] P. 191 ; 28 Digest 68, *361* ; 92 L.J.P. 132 ; 130 L.T. 8 .. 161, 163, 164
Somerset *v.* Hart (1884), 12 Q.B.D. 360 ; 25 Digest 431, *304* ; 53 L.J.M.C. 77 .. 381, 382
Somes *v.* British Empire Shipping Co. (1860), 8 H.L. Cas. 338 ; 12 Digest 558, *4634* ; 30 L.J.Q.B. 229 ; 2 L.T. 547 .. 621, 622, 625, 626
Sottomayer *v.* De Barros (1879), 5 P.D. 94 ; 11 Digest 416, *829* ; 49 L.J.P. 1 ; 41 L.T. 281 343
Southern *v.* Borax Consolidated, Ltd., [1940] 4 All E.R. 412 ; Digest Supp. .. 68, 72
Southwell *v.* Savill Brothers, Ltd., [1901] 2 K.B. 349 ; 28 Digest 57, *288* ; 70 L.J.K.B. 815 ; 85 L.T. 167 ; 4 Tax Cas. 430 .. 68, 72
Spiller *v.* Maude (1881), 32 Ch.D. 158, n. ; 8 Digest 262, *245* .. 502, 508, 511
Spink (Bournemouth), Ltd. *v.* Spink, [1936] 1 All E.R. 597 ; [1936] Ch. 544 ; Digest Supp. ; 105 L.J.Ch. 165 ; 155 L.T. 18 .. 519, 521
Spurgeon *v.* Spurgeon (1930), 46 T.L.R. 396 ; Digest Supp. .. 564, 565
Srini Vasan (otherwise Clayton) *v.* Srini Vasan, [1945] 2 All E.R. 21 ; [1946] P. 67 ; 114 L.J.P. 49 ; 173 L.T. 102 .. 343, 344
State (Gettins), The, *v.* Judge Fawsitt, [1945] I.R. 183 .. 130, 132
Steel *v.* Cammell, Laird & Co., Ltd., [1905] 2 K.B. 232 ; 34 Digest 271, *2302* ; 74 L.J.K.B. 610 ; 93 L.T. 357 ; 7 B.W.C.C. 9 .. 429, 431
Steele *v.* Robert George & Co., Ltd., [1942] 1 All E.R. 447 ; [1942] A.C. 497 ; 111 L.J.P.C. 9 ; 167 L.T. 1 .. 312, 313
Stevenson (Hugh) & Sons *v.* Akt. Fur Cartonagen Industrie, [1918] A.C. 239 ; 2 Digest 177, 416 ; 87 L.J.K.B. 416 ; 118 L.T. 126 .. 37, 41
Stockholms Enskilda Bank Aktiebolag *v.* Schering, Ltd., [1941] 1 All E.R. 257 ; [1941] 1 K.B. 424 ; 165 L.T. 19 .. 37, 46, 50
Strickland *v.* Hayes, [1896] 1 Q.B. 290 ; 38 Digest 164, *97* ; 65 L.J.M.C. 55 ; 74 L.T. 137 445, 446
Stubley *v.* London & North Western Ry. Co. (1865), L.R. 1 Exch. 13 ; 38 Digest 312, *345* ; 4 H. & C. 83 ; 35 L.J.Ex. 3 ; 13 L.T. 376 .. 734
Sturla *v.* Freccia (1880), 5 App. Cas. 623 ; 22 Digest 314, *3072* ; 50 L.J.Ch. 86 ; 43 L.T. 209 .. 594, 596, 597
Suburban Hotel Co., *Re*, (1867), 2 Ch. App. 737 ; 10 Digest 821, *5354* ; 36 L.J.Ch. 710 ; 17 L.T. 22 .. 436, 439
Swan *v.* North British Australasian Co. (1863), 2 H. and C. 175 ; 6 Digest 73, *585* ; 2 New Rep. 521 ; 32 L.J.Ex. 273 .. 394, 396, 397
Sweeting *v.* Prideaux (1876), 2 Ch.D. 413 ; 44 Digest 1258, *10864* ; 45 L.J.Ch. 378 ; 34 L.T. 240 .. 736
Swift & Co. *v.* Board of Trade, [1925] A.C. 520 ; 25 Digest 138, *558* ; 94 L.J.K.B. 629 ; 133 L.T. 49 .. 277, 282, 283
Sylvester's Case (1703), 7 Mod. Rep. 150 ; 2 Digest 139, *144* .. 629, 633
Symons (Walter), Ltd., *Re*, [1934] Ch. 308 ; Digest Supp. ; 103 L.J.Ch. 136 ; 150 L.T. 349 556, 558

Tailby *v.* Official Receiver (1888), 13 App. Cas. 523 ; 20 Digest 334, *770* ; 58 L.J.Q.B. 75 ; 60 L.T. 162 .. 367, 372
Tart *v.* Chitty (G. W.) & Co., Ltd., [1933] 2 K.B. 453 ; Digest Supp. ; 102 L.J.K.B. 568 ; 149 L.T. 261 .. 2, 3
Taylor, *Re*, Midland Bank Executor and Trustee Co., Ltd. *v.* Smith, [1940] 2 All E.R. 637 ; [1940] Ch. 481 ; 109 L.J.Ch. 188 ; 163 L.T. 51 .. 118, 120
Taylor *v.* Taylor, [1937] 3 All E.R. 571 ; [1938] 1 K.B. 320 ; Digest Supp. ; 107 L.J.K.B. 340 574, 576, 578
Teape's Trusts, *Re* (1873), L.R. 16 Eq. 442 ; 37 Digest 451, *541* ; 43 L.J.Ch. 87 ; 28 L.T. 799 23, 24, 26
Tecalemit, Ltd. *v.* Ewarts, Ltd. (No. 2) (1927), 44 R.P.C. 503 ; 43 Digest 247, *892* .. 177, 178, 180
Telfair, *Re*, Garrioch *v.* Barclay (1902), 86 L.T. 496 ; 44 Digest 1215, *10503* .. 334, 337, 338
Tewkesbury Gas Co., *Re*, Tysoe *v.* Tewkesbury Gas Co., [1911] 2 Ch. 279 ; 17 Digest 352, *1628* ; 80 L.J.Ch. 590 ; 105 L.T. 300 .. 133, 134, 136
Thellusson *v.* Woodford (1805), 11 Ves. 112 ; 37 Digest 63, *67* ; 1 Bos. & P.N.R. 357 ; *affg.* (1799), 4 Ves. 227 .. 413, 415
Thomas *v.* Sutters, [1900] 1 Ch. 10 ; 25 Digest 435, *327* ; 69 L.J.Ch. 27 ; 81 L.T. 469 .. 445, 446
Thomas *v.* Thomas, [1924] P. 194 ; 27 Digest 315, *2925* ; 93 L.J.P. 61 ; 130 L.T. 716 .. 171, 174, 176
Thomas *v.* Todd, [1926] 2 K.B. 511 ; Digest Supp. ; 95 L.J.K.B. 808 ; 135 L.T. 377 .. 566, 569
Thompson *v.* Maberley (1811), 2 Camp. 573 ; 31 Digest 439, *5847* .. 20, 21, 409, 410
Thompson *v.* R., [1918] A.C. 221 ; 14 Digest 360, *3810* ; 87 L.J.K.B. 478 ; 118 L.T. 418 ; 13 Cr. App. Rep. 61 ; *affg.*, S.C. *sub nom.* R. *v.* Thompson, [1917] 2 K.B. 630 .. 698, 700, 701
Thurn & Taxis (Princess) *v.* Moffit, [1915] 1 Ch. 58 ; 2 Digest 156, *259* ; 84 L.J.Ch. 220 ; 112 L.T. 114 .. 629, 633
Tidy *v.* Battman, [1934] 1 K.B. 319 ; Digest Supp. ; 103 L.J.K.B. 158 ; 150 L.T. 90 .. 2, 3
Tilley *v.* Wales (Inspector of Taxes), [1943] 1 All E.R. 280 ; [1943] A.C. 386 ; 112 L.J.K.B. 186 ; 169 L.T. 49 .. 13, 14, 15
Tolhausen *v.* Davies (1888), 58 L.J.Q.B. 98 ; 36 Digest 14, *47* .. 203, 204
Trim Joint District School Board of Management *v.* Kelly, [1914] A.C. 667 ; 34 Digest 238, *2040* ; 83 L.J.P.C. 220 ; 111 L.T. 305 ; 7 B.W.C.C. 274 ; *affg.*, S.C. *sub nom.* Kelly *v.* Trim Joint District School Board of Management, 6 B.W.C.C. 921 .. 432, 434
Tuck, *Re*, Murch *v.* Loosemore, [1906] 1 Ch. 692 ; 16 Digest 50, *534* ; 75 L.J.Ch. 497 ; 94 L.T. 597 .. 248, 253
Tuck & Sons *v.* Priester (1887), 19 Q.B.D. 629 ; 42 Digest 729, *1516* ; 56 L.J.Q.B. 553 .. 256, 270
Tyne Mutual Steamship Insurance Assocn. *v.* Brown (1896), 74 L.T. 283 ; 9 Digest 323, *2046* 586, 587, 591

Unsworth *v.* Elder Dempster Lines, Ltd., [1940] 1 All E.R. 362 ; [1940] 1 K.B. 658 ; Digest Supp ; 109 L.J.K.B. 305 ; 162 L.T. 163 ; 33 B.W.C.C. 1 .. 99, 102, 110, 111
Unwin *v.* Hanson, [1891] 2 Q.B. 115 ; 42 Digest 631, *337* ; 60 L.J.Q.B. 531 ; 65 L.T. 511 .. 256, 266, 268

V.G.M. Holdings, Ltd., *Re*, [1942] 1 All E.R. 224 ; [1942] Ch. 235 ; 111 L.J.Ch. 145 .. 519, 521, 523
Vincent *v.* Southern Ry. Co., [1927] A.C. 430 ; Digest Supp. ; 96 L.J.K.B. 597 ; 136 L.T. 513 256, 262, 263
Von Brockdorff *v.* Malcolm (1885), 30 Ch.D. 172 ; 37 Digest 480, *771* ; 55 L.J.Ch. 121 ; 53 L.T. 263 .. 24, 27
Vyner *v.* Waldenberg Bros., Ltd., [1945] 2 All E.R. 547 ; 173 L.T. 330 .. 139, 141, 142

Walker *v.* Midland Ry. Co. (1886), 55 L.T. 489 ; 29 Digest 9, *118* .. 203, 204
Wallis, Son & Wells *v.* Pratt & Haynes, [1911] A.C. 394 ; 39 Digest 477, *996* ; 80 L.J.Q.B. 1058 ; 105 L.T. 146 .. 388, 392
Warner *v.* Couchman, [1912] A.C. 35 ; 34 Digest 318, *2604* ; 81 L.J.K.B. 45 ; 105 L.T. 676 ; 5 B.W.C.C. 177 ; *affg.*, [1911] 1 K.B. 351 .. 432, 434
Wedgwood, *Re*, Allen *v.* Wedgwood, [1915] 1 Ch. 113 ; 8 Digest 259, *208* ; 84 L.J.Ch. 107 ; 112 L.T. 66 .. 205, 206, 209, 210, 211, 217

Wernher, *Re*, Wernher *v.* Beit, [1918] 2 Ch. 82 ; 39 Digest 335, *222* ; 87 L.J.Ch. 372 ; 118 L.T. 388 ; *affg.*, [1918] 1 Ch. 339 .. 723, 726, 728, 72

Wessex Dairies, Ltd. *v.* Smith, [1935] 2 K.B. 80 ; Digest Supp. ; 104 L.J.K.B. 484 ; 153 L.T. 185 .. 351, 354, 357, 35

Weston's Settlement, *Re*, Neeves *v.* Weston, [1906] 2 Ch. 620 ; 37 Digest 451, *540* ; 76 L.J.Ch. 54 ; 95 L.T. 581 .. 24, 2

White, *Re*, Skinner *v.* A.-G., [1939] 3 All E.R. 187 ; [1940] A.C. 350 ; Digest Supp. ; 108 L.J.Ch. 330 ; 161 L.T. 169 .. 704, 70

White *v.* Morley, [1899] 2 Q.B. 34 ; 25 Digest 436, *330* ; 68 L.J.Q.B. 702 ; 80 L.T. 761 .. 445, 44

Whiteley (William), Ltd. *v.* R. (1909), 101 L.T. 741 ; 12 Digest 94, *576* .. 621, 622, 62

Wicks *v.* Dowell & Co., Ltd., [1905] 2 K.B. 225 ; 34 Digest 266 ; *2265, sub nom.* Wilkes *v.* Dowell & Co., 74 L.J.K.B. 572 ; 92 L.T. 677 ; 7 B.W.C.C. 14 .. 432, 433, 434, 43

Wilkinson *v.* Verity (1871), L.R. 6 C.P. 26 ; 3 Digest 109, *338* ; 40 L.J.C.P. 141 ; *sub nom.* Williamson *v.* Verity, 24 L.T. 32 .. 583, 58

Williams *v.* Archer (1847), 5 C.B. 318 ; 43 Digest 524, *615* ; 5 Ry. & Can. Cas. 289 ; 17 L.J.C.P. 82 .. 583, 58

Williams *v.* Guest, Keen & Nettlefolds, [1926] 1 K.B. 497 ; 34 Digest 272, *2310* ; 95 L.J.K.B. 676 ; 134 L.T. 459 ; 18 B.W.C.C. 535 .. 429, 43

Williams *v.* Singer, Pool *v.* Royal Exchange Assurance, [1921] A.C. 65 ; 28 Digest 78, *425* ; 89 L.J.K.B. 1151 ; 123 L.T. 632 ; 7 Tax Cas. 387 .. 477, 482, 48

Williamson *v.* Ough, [1936] A.C. 384 ; Digest Supp. ; 105 L.J.K.B. 193 ; 154 L.T. 524 ; 20 Tax Cas. 194 .. 161, 16

Wilsons & Clyde Coal Co., Ltd. *v.* English, [1937] 3 All E.R. 628 ; [1938] A.C. 57 ; Digest Supp. ; 106 L.J.P.C. 117 ; 157 L.T. 406 .. 227, 228, 23

Wilsons & Clyde Coal Co., Ltd. *v.* Flynn, [1930] A.C. 516 ; Digest Supp. ; 99 L.J.P.C. 139 ; 143 L.T. 362 ; 23 B.W.C.C. 159 .. 618, 62

Wing *v.* London General Omnibus Co., [1909] 2 K.B. 652 ; 36 Digest 89, *594* ; 78 L.J.K.B. 1063 ; 101 L.T. 411 .. 490, 49

Wombwell's Settlement, *Re*, Clerke *v.* Menzies, [1922] 2 Ch. 298 ; 40 Digest 530, *740* ; 92 L.J.Ch. 18 ; 127 L.T. 295 .. 690, 69

Wood, *Re*, [1940] 4 All E.R. 306 ; *sub nom. Re* Wood's Application, [1941] Ch. 112 .. 566, 56

Wood *v.* Walsh & Sons, [1899] 1 Q.B. 1009 ; 24 Digest 924, *165* ; 68 L.J.Q.B. 492 ; 80 L.T. 345 ; 1 W.C.C. 68 .. 256, 27

Wood *v.* Wood (1923), 92 L.J.K.B. 538 ; 34 Digest 238, *2042* ; 130 L.T. 305 ; 16 B.W.C.C. 208 .. 432, 43

Wood, Skinner & Co., Ltd., [1944] Ch. 323 ; 113 L.J.Ch. 215 ; 171 L.T. 37 .. 556, 558, 55

Woodhall, *Ex p.*, (1888), 20 Q.B.D. 832 ; 14 Digest 551, *6271* ; 57 L.J.M.C. 71 ; 59 L.T. 841 .. 13

Wringe *v.* Cohen, [1939] 4 All E.R. 241 ; [1940] 1 K.B. 229 ; Digest Supp. ; 109 L.J.K.B. 227; 161 L.T. 366 .. 490, 494, 49

Yorkshire Dale S.S. Co., Ltd. *v.* Minister of War Transport, The Coxwold, [1942] 2 All E.R. 6 ; [1942] A.C. 691 ; 111 L.J.K.B. 512 ; 167 L.T. 349 ; *revsg.*, [1941] 3 All E.R. 214 .. 124, 12

Young *v.* Bristol Aeroplane Co., Ltd., [1944] 2 All E.R. 293 ; [1944] 1 K.B. 718 ; 113 L.J.K.B. 513 ; 171 L.T. 113 ; 37 B.W.C.C. 51 .. 431, 432, 43

Youth *v.* R., [1945] W.N. 27 .. 560, 561

Zinc Corpn., Ltd. *v.* Hirsch, [1916] 1 K.B. 541 ; 12 Digest 394, *3208* ; 85 L.J.K.B. 565 ; 114 L.T. 222 .. 37, 41

STATUTES, ETC., REFERRED TO

	PAGE
Treason Act, 1351	186
Charitable Uses Act, 1735 (*c.* 36), *s.* 3	366
Fires Prevention (Metropolis) Act, 1774 (*c.* 78), *s.* 86	489
Marriage Act, 1823 (*c.* 76)	717
Wills Act, 1837 (*c.* 26), *ss.* 9, 10, 11, 27	722
Pluralities Act, 1838 (*c.* 106), *s.* 59	224
Metropolitan Police Act, 1839 (*c.* 47), *s.* 44	380
Admiralty Court Act, 1840 (*c.* 65), *s.* 6	79
Railway Clauses Consolidation Act, 1845 (*c.* 29), *s.* 47	731
Burial Act, 1852 (*c.* 85), *ss.* 33, 34, 38	621
Admiralty Court Act, 1861 (*c.* 10), *ss.* 7, 35	79
Metropolitan Public Carriage Act, 1869 (*c.* 115), *s.* 7	458
Bills of Exchange Act, 1882 (*c.* 61), *s.* 81	394
Married Women's Property Act, 1882 (*c.* 75), *s.* 17	570
Guardianship of Infants Act, 1886 (*c.* 27)	717
Finance Act, 1894 (*c.* 30), *ss.* 1, 2 (1) (*b*)	32
——, *ss.* 2 (1) (*b*), 7 (7), 8 (4), 9 (1), 14 (1)	704
Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39), *s.* 4	170
Railway Employment (Prevention of Accidents) Act, 1900 (*c.* 27), *s.* 1 (1), Sched., cl. 12	255
Street Betting Act, 1906 (*c.* 43), *ss.* 1 (1), (4), 2	444
Patents and Designs Act, 1907-1938, *ss.* 49 (1), 93	176
Patents and Designs Acts, 1907-1942, *s.* 29	63
Indictments Act, 1915 (*c.* 90), *s.* 5 (3), Sched. I, *r.* 3	697
Income Tax Act, 1918 (*c.* 40), *s.* 27	16
——, *ss.* 37 (1) (*b*), 40	205
——, *s.* 46, Sched. C, *r.* 2 (*d*), Sched. D, Case III, *r.* 3 (1), (2), (4), Miscellaneous Rules, *r.* 7	236, 528
——, Sched. D, Case I	68, 165, 532, 668
——, Sched. D, Cases I and II, *r.* 3 (*i*)	448
——, Sched. D, Case III, *r.* 1 (*a*), Rule 21, All Schedules Rules	159
——, Sched. D, Case III, *r.* 1 (*a*), All Schedules Rules, *r.* 19	476
——, Sched. D, Case VI	711
——, Sched. E	13
——, Sched. E, r. 9	144
——, All Schedules Rules, *r.* 16	198
——, All Schedules Rules, *r.* 19	573
Wills (Soldiers and Sailors) Act, 1918 (*c.* 58), *s.* 3 (1)	722
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 2 (1), proviso (i)	487
——, *ss.* 5 (5), 15 (3)	74
——, *s.* 12 (1) (*a*)	675
——, *s.* 12 (2), proviso (i)	218, 406
Finance Act, 1920 (*c.* 18), *s.* 27	236
Finance Act, 1921 (*c.* 32), *s.* 32	16
Finance Act, 1922, (*c.* 17), *s.* 21	598
Finance Act, 1923 (*c.* 14), *s.* 24	236, 528
Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 7 (1)	74
——, *s.* 10	218, 406
——, *s.* 10 (1)	487
Settled Land Act, 1925 (*c.* 18), *s.* 106	421
Trustee Act, 1925 (*c.* 19), *s.* 31	411
——, *ss.* 31 (1), (3), 69 (2)	323
Law of Property Act, 1925 (*c.* 20), *s.* 40	460
——, *s.* 78	464
——, *s.* 80 (1)	114
——, *ss.* 101 (1) (iii), (3), 109 (6)	329
——, *s.* 164 (1) (*a*), (*d*), 2 (ii) (*a*)	411
——, *s.* 184	88
Guardianship of Infants Act, 1925 (*c.* 45), *ss.* 7 (3), 9 (1) (*a*), (4), 11 (2)	717
Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 22 (1) (*a*) (iv)	79
——, *s.* 31 (1) (*a*)	129
——, *s.* 176	379
——, *s.* 198	121
Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1)	431
——, *s.* 19 (2). Sched. 1 (7)	471
——, *s.* 29 (1)	98
——, (*c.* 84), *s.* 43	618
Rating and Valuation Act, 1925 (*c.* 90), *ss.* 18, 19, 21 (2), 31 (3), 37	4
Sale of Food (Weights and Measures) Act, 1926 (*c.* 63), *s.* 3	694
Companies Act, 1929 (*c.* 23), *s.* 45	519
——, *s.* 50, Sched. I, Table A, arts. 3, 37, 54	512
——, *s.* 143, Sched. I, Table A, art. 88	586
——, *s.* 168 (6)	435
——, s. 309	329
Road Traffic Act, 1930 (*c.* 43), *s.* 35	615
——, *s.* 97	650
Town and Country Planning Act, 1932 (*c.* 48), *s.* 47 (5), (8)	424
Finance Act, 1933 (*c.* 19), *s.* 31 (1)	637
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3, Sched. 1 (*h*)	133
——, *s.* 3 (1), Sched. I, para. (*h*)	609
——, Sched. I (*h*)	146
Summary Jurisdiction (Appeals) Act, 1933 (*c.* 38), *s.* 31 (1) (vii)	615
Local Government Act, 1933 (*c.* 51), *ss.* 151, 152, Sched. V, *r.* 1	276
Betting and Lotteries Act, 1934 (*c.* 58), *ss.* 2 (1), 20	444
——, *ss.* 21, 22, 24	293
Restriction of Ribbon Development Act, 1935 (*c.* 47), *ss.* 1, 2, 7, 9	532
——, *s.* 9	165
Tithe Act, 1936 (*c.* 43), Sched. I, Pt. I, paras. 3 (*a*), 4	148
Finance Act, 1937 (*c.* 54), Sched. IV	68
Matrimonial Causes Act, 1937 (*c.* 57), *s.* 2 (*b*)	379

	PAGE
——, *s.* 6 (3)	308
——, *s.* 7 (1) (*c*)	562
Factories Act, 1937 (*c.* 67), ss. 14, 60	243
——, *s.* 47 (1)	139
Rating and Valuation (Postponement of Valuations) Act, 1938 (*c.* 19), *s.* 1	4
Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (*c.* 26), Sched. II	146
Finance Act, 1938 (*c.* 46), *ss.* 30 (2), 35 (3)	159
Finance Act, 1939 (*c.* 41), *s.* 15	598
Rent and Mortgage Interest Restrictions Act, 1939 (*c.* 71)	675
——, *ss.* 3 (1), 7 (1)	225
Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *s.* 8 (1)	272, 310
Finance (No. 2) Act, 1939 (*c.* 109), *s.* 7, Sched. 6, paras. 1, 2	16
——, *s.* 12 (1), (4), Sched. VII, Pt. I, para. 6 (2), (9)	58
——, *ss.* 13 (4), 14, 17	497
——, Sched. VII, Pt. II, para. 2 (1)	546
Rating and Valuation (Postponement of Valuations) Act, 1940 (*c.* 12), *s.* 1 (3)	4
Finance Act, 1940 (*c.* 29), *s.* 28 and Sched. V	168
——, *s.* 34 (4)	546
Finance (No. 2), Act, 1940 (*c.* 48), *s.* 6, Sched. VII, paras. 1, 2	16
Finance Act, 1941 (*c.* 30), *s.* 23	144
——, *s.* 35	168, 452
Pensions (Mercantile Marine) Act, 1942 (*c.* 26), *s.* 1 (2)	273
Courts (Emergency Powers) Act, 1943 (*c.* 19), *s.* 1 (2) (*a*) (*v*)	566
Town and Country Planning (Interim Development) Act, 1943 (*c.* 29), *ss.* 5, 15, Sched. I	424
Pensions Appeal Tribunals Act, 1943 (*c.* 39), *s.* *s*1, 5	417
——, *s.* 1, Sched., para. 5 (2), (3)	400
Finance Act, 1944 (*c.* 23), *s.* 33	452
Validation of War-time Leases Act, 1944 (*c.* 34), *s.* 1	721
——, *ss.* 1, 2	296
Law Reform (Contributory Negligence) Act, 1945 (*c.* 28), *s.* 1	646
Newport Extension Act, 1934 (*c.* lvii), *s.* 58	276
R.S.C., Ord. 25, *r.* 4	628
R.S.C., Ord. 41, *r.* 5	247
——, Ord. 53A, *r.* 22	63
——, Ord. 53B, *r.* 13	319
Appendices to R.S.C., 1883, App. L., No. 37	319
County Court Rules, Ord. VI, *r.* 7 (1)	570
Prevention of Accidents Rules, 1902 (S.R. & O., 1902, No. 616), *r.* 9	255
Workmen's Compensation Rules, 1926 (S.R. & O., 1926, No. 448), *rr.* 57 (9), 76 (4)	471
Designs Rules, 1932-1938, *r.* 17	176
Pensions Appeal Tribunals (England and Wales) Rules, 1943 (S.R. & O., 1943, No. 1757), *rr.* 12 (6), 13, 14, 15, 16	400
——, *r.* 12 (6)	664
Matrimonial Causes Rules, 1944, *r.* 62 (2)	247
Defence (General) Regulations, 1939, reg. 56A	719
——, reg. 58A	666
Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 17	243
Shipbuilding Regulations, 1931 (S.R. & O., 1931, No. 133), reg. 11 (*b*)	95
Savings Certificates Regulations, 1933 (S.R. & O., 1933, No. 1149), *r.* 27 (1)	686
Regulations for Preventing Collisions at Sea, *rr.* 19, 21, 22	359
Control of Timber (No. 21) Order, 1941 (S.R. & O., 1941, No. 2088), arts. 1 (1), (2), 6, Sched. III	387
Essential Work (Coalmining Industry) Order, 1943 (S.R. & O., 1943, No. 505), art. 5 (3)	666
Consumer Rationing (Consolidation) Order, 1944 (S.R. & O., 1944, No. 800), arts. 1, 2 (3), 4	85
——, arts. 3, 4	82
Tenancy Agreements (End of the War in Europe) Order, 1945 (S.R. & O., 1945, No. 703/L.8)	296
Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943 (S.R. & O., 1943, No. 885), paras. 8, 9 (2) (*a*)	232
War Pensions (Coastguards) Scheme, 1944 (S.R. & O., 1944, No. 500)	273
Royal Warrant concerning Retired Pay, Pensions, etc., 1943 (Cmd. 1943, No. 6489), arts. 2 (3), 4	417
——, art. 4 (1) (*b*) (ii)	312
——, art. 4 (1), (2), (3)	400
——, art. 4 (2)	664

WORDS AND PHRASES

PAGE
Able to secure .. 598
Accounted for and assessed in the same manner as the tax deducted from original payment .. 16
After the deaths of these two named .. 88
After the deaths of these two named the capital to go to my nephew .. 88
After their death to be evenly distributed .. 333
Agents, contractors, or others .. 63
All my real and personal estate whatsoever and wheresoever and over which I shall have any disposing power at the time of my decease .. 23
And .. 23
Annual payment .. 159
Any means whatsoever .. 598
Appoint .. 23
Attendance .. 406
By deed poll assume .. 321
Charge or incumbrance affecting or to affect land .. 366
Children .. 117
Compensation .. 232
During the present war .. 28
During their lifetime .. 333
Dwelling-house .. 675
Estoppel by negligence .. 394
Evidence .. 400
For life use, to revert to estate if she does not remarry .. 735
Free from rates .. 148
Furniture .. 406
Income .. 276
Injurious act .. 272
In respect of .. 159
In respect of income .. 159
In the case of a rent charge created in lieu of any corn rent which was free from rates, or a rentcharge which was otherwise free from rates .. 148
In the event of the simultaneous death .. 88
Income received from investments .. 58
Interests of my moneys to be divided between .. 88
Keepers .. 380
Landlord .. 146
Lawful descendants .. 117
Lawfully or unlawfully sub-let .. 74
Living . . . separate from her husband .. 198
Living with her husband .. 198
Maintenance and schooling until she attains the age of 21 .. 327
Mere mechanical device .. 176
Misrepresentation .. 694
Monumental inscription .. 621
Not being a landlord who has become landlord by purchasing the dwelling-house after Dec. 6, 1937 .. 146
Not negotiable .. 394
On or before .. 133
Option .. 98
Part of a house let as a separate dwelling .. 543
Person .. 394
Poor relations .. 501
Present war .. 28
Protection to permanent way men when relaying or repairing permanent way .. 255
Raising portions .. 411
Raynaud's disease .. 429
Reasonable to make order .. 609
Reinstatement .. 666
Repairing the permanent way .. 255
Residuary estate .. 159
Residue of my estate to be divided equally .. 333
Royalty .. 711
Simultaneous death .. 88
Solemnised .. 689
Structure .. 424
Suitable alternative accommodation .. 609
This sum to be applied .. 327
To be derived from interest of my shares in War Loan 1917 .. 327
To be paid immediately on possession .. 460
To Mrs. E. J. an annuity of £5,000 *and after her death an annuity of* £5,000 *to her two daughters, C. and N., and to the survivor of them* .. 32
Under a trust for ever to be called .. 117
Use of weapon .. 272
Varied .. 512
Was .. 148

CORRIGENDA

P. 4. MORRIS *v.* LUTON CORPN. At end of case add " MACKINNON and TUCKER, L.JJ., agreed."
P. 170. THOMAS *v.* THOMAS, Solicitors: *Bentleys. Stokes & Lowless*, agents for *Steels*, Warrington, for the respondent.
P. 628. TWYFORD *v.* MANCHESTER CORPN. Solicitors: for " R. H. Adcock " read " P. B. Dingle."
P. 719. EYRE *v.* JOHNSON. Date of hearing: for " April 8 " read " April 2."

Printed by **R. J. ACFORD, LTD., Chichester, Sussex.**

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

MORRIS *v.* MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF LUTON.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Tucker, L.JJ.), November 14, 1945.]

Highways—Obstruction—Air-raid shelter erected in roadway by local authority—Lighting—Shelter not illuminated—Corners of shelter painted with white paint—Cyclist injured by colliding with shelter—Duty of local authority to give appropriate warning of danger.

Negligence—Contributory negligence—Highways Cyclist colliding with air-raid shelter during black-out—Principle in Baker v. Longhurst *not generally applicable—Special circumstances of each case proper test.*

On Dec. 13, 1941, during the hours of black-out, the appellant was riding his bicycle when he collided with an unlighted air-raid shelter which had been erected, and was maintained, by the respondent corporation. As a result of the accident, the appellant suffered severe injuries. The shelter had never at any time been lighted, but in Sept., 1940, before it was completed, the respondents had received a circular letter from the Ministry of Home Security dealing with the questions of light and containing suggestions on the subject. A scheme had been worked out by the respondents' engineer, but it was disapproved by the Ministry on the ground of expense. Up to the date of the accident, nothing further had been done about lighting, but the corners of the shelter had been painted with white paint. The action was dismissed in the court below, on the ground that the respondent corporation was under no duty to light the shelter. On appeal, it was contended on behalf of the respondent corporation (i) that the accident was either due to the fact that the appellant was driving at a speed at which he could not pull up within the limits of his vision, or that he failed to keep a proper look-out ; in either case he was guilty of negligence and was, therefore, not entitled to recover ; (ii) that the case was distinguishable from *Fisher* v. *Ruislip-Northwood Urban District Council and County Council of Middlesex* (4) in that the respondent corporation had not omitted to do something which they reasonably ought to have done to make the shelter safe and not a source of danger to lawful users of the highway :—

HELD : (i) the proposition laid down in *Baker* v. *Longhurst (E.) & Sons, Ltd.* (1) that a person driving in the dark, if unable to stop within the limits of his vision, was guilty of negligence, was not a general rule, to be observed by all users of the road, and no principle could be extracted from it affecting other cases where the circumstances were different. The proper test, now adopted by the court as guiding all future occasions, was that such cases had to be determined on their own particular facts.

(ii) on the facts here, the respondent corporation had not discharged the onus of proving contributory negligence on the part of the appellant.

Baker v. *Longhurst (E.) & Sons, Ltd.* (1) *not followed.*

Tidy v. *Battman* (2) *applied.*

(iii) the respondent corporation were under a duty to take reasonable steps to prevent the shelter becoming a danger to users of the highway, and their failure to take any such steps made them liable to the appellant.

Fisher v. *Ruislip-Northwood Urban District Council and County Council of Middlesex* (4) *followed.*

[**EDITORIAL NOTE.** The proposition that a person driving in the dark must be able to pull up within the limits of his vision was first adumbrated by ROWLATT, J., in *Page* v. *Richards & Draper* ((1920), cited in 149 L.T., at p. 263). In *Evans* v. *Downer & Co.* ((1933), 149 L.T., 264*n*) SCRUTTON, L.J., referred to the principle as having been laid down in several unreported Court of Appeal decisions, and he based it upon a *dictum* of LORD BRAMWELL, who said, "If you cannot see where you are going, you must not go." Then in *Baker* v. *Longhurst* (1) SCRUTTON, L.J., laid down the principle in express terms as follows: "Either [the plaintiff] was going at a pace at which he could not stop within the limits of his vision, or if he could stop within the limits of his vision, he was not looking out. In either event he was guilty of negligence." The authority of this decision was much reduced by the observations of LORD WRIGHT in *Tidy* v. *Battman* (2), that no case is exactly like another and no general principle of this nature should be extracted from these "limits of vision" cases, and GREENE, M.R., now expresses himself strongly in the case here reported, holding that no such general principle of law exists.

AS TO LIGHTING OBSTRUCTIONS IN HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436; and FOR CASES, see DIGEST, Vol. 26, pp. 392-394, Nos. 1187-1207.

AS TO NEGLIGENT DRIVING, see HALSBURY, Hailsham Edn., Vol. 23, pp. 639, 640, para. 899; and FOR CASES, see DIGEST, Supp., Negligence, Nos. 389a-389e.]

Cases referred to:

*(1) *Baker* v. *Longhurst (E.) & Sons, Ltd.*, [1933] 2 K.B. 461; Digest Supp.; 102 L.J.K.B. 573; 149 L.T. 264.

*(2) *Tidy* v. *Battman*, [1934] 1 K.B. 319; Digest Supp.; 103 L.J.K.B. 158; 150 L.T. 90.

*(3) *Tart* v. *Chitty (G. W.) & Co., Ltd.*, [1933] 2 K.B. 453; Digest Supp.; 102 L.J.K.B. 568; 149 L.T. 261.

*(4) *Fisher* v. *Ruislip-Northwood Urban District Council and County Council of Middlesex*, [1945] 2 All E.R. 458; [1945] K.B. 584; 173 L.T. 261.

APPEAL by the plaintiff from a decision of CASSELS, J., dated Nov. 8, 1944. The following facts were found by the judge: On Dec. 13, 1941, during the hours of black-out, the plaintiff was riding his bicycle along Talbot Road, Luton, when he came into collision with an unlighted air-raid shelter which had been erected by the defendants on the carriageway, parallel with the footway but wholly on the carriageway, 6ins. from the curb and extending upon the carriageway a distance of 7ft. 3ins., which included the 6ins. from the curb, and the shelter occupied that amount of the total width of the road, which was 22ft. The plaintiff was seriously injured and has been left with a permanent partial disability. He was an engineer by occupation and was earning about £7 a week. The special damage was agreed between the parties as £175.

The defendants had erected the air-raid shelter in Sept., 1940. It never was lighted in any shape or form. The matter of lighting was under consideration by the defendants, because in the month before the shelter was completed the defendants had received a circular letter from the Ministry of Home Security dealing with the question of lights and containing suggestions on the subject. The borough deputy surveyor and engineer worked out a scheme for the lighting of all shelters in the borough, providing for corner lights on each corner of the shelters. The scheme was disapproved by the regional technical adviser of the Ministry on the ground of the excessive expense. There was at the time an arrangement which the local authority had with the Ministry that the latter would be paying for the lighting. The difficulty was to find a lamp which would burn for a long time without attention and in 1940 such lamps were not obtainable. Nothing further was done about lighting but, before the plaintiff met with his accident, vertical lines in white paint had been painted on each corner of the shelter, and horizontal lines around the shelter.

On these facts the judge held that the plaintiff was not guilty of contributory negligence. The judge held further that if the plaintiff were entitled to recover damages he would have been awarded in addition to the special damage the sum of £1,000. Since the evidence was not sufficient, however, to distinguish the case from *Fox* v. *Newcastle-Upon-Tyne City Council* ([1941] 2 All E.R. 563) the judge was bound to follow the decision in that case that the defendants were under no obligation to light the shelter.

A *N. R. Fox-Andrews, K.C.*, for the appellant.
S. R. Edgedale for the respondents.

LORD GREENE, M.R.: In this appeal counsel for the respondents, put forward two arguments, one relating to negligence and the other to contributory negligence. As the latter formed the latest part of his address I will deal with it at once.

B The judge found (and there was ample evidence on which he could so find) that the burden of proving contributory negligence had not been discharged. Upon that it seems to me, having seen the evidence, that his conclusion was undoubtedly right. Counsel for the respondents says that it was wrong because it violated a principle which he first described as a principle of law and afterwards, alternatively, suggested was a principle of good driving or something
C like that. I need scarcely say that I refer to the well known passage in the judgment of SCRUTTON, L.J., in *Baker* v. *Longhurst (E.) & Sons, Ltd.* (1), where, interpreting him literally, he appears to lay down a sort of general proposition ([1933] 2 K.B. 461, at p. 468) that a person riding in the dark must be able to pull up within the limits of his vision. I cannot help thinking that that observation turned out in the result to be a very unfortunate one because the question as has been so often pointed out, is a question of fact. There is sometimes a
D temptation for judges in dealing with these traffic cases to decide questions of fact in language which appears to lay down some rule which users of the road must observe. That is a habit into which one perhaps sometimes slips unconsciously; I may have done it myself for all I know: but it is much to be deprecated because these are questions of fact dependent on the circumstances of each case. I cannot regard that observation of SCRUTTON, L.J., as in any sense affecting other cases where the circumstances are different.

E In the hope that this suggested principle may rest peacefully in the grave in future and not be resurrected with the idea that there is still some spark of life in it, I should like to say that I am in agreement with the observation of LORD WRIGHT sitting in this court in *Tidy* v. *Battman* (2) where he says ([1934] 1 K.B. 319, at p. 322), referring to *Tart* v. *Chitty (G. W.) & Co., Ltd.* (3) and *Baker* v. *Longhurst* (1), that they show:

> F . . . that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts.

That was the observation of one member of this court. I now adopt it myself and, if my brethren take the same view upon that, in future there will be the
G unanimous opinion of three members of this court that that is the law and I hope that that may conduce to the certainty of the law in these matters.

On the question of negligence, the case in my opinion is quite clearly covered by the recent decision of this court in *Fisher* v. *Ruislip-Northwood Urban District Council* (4). Counsel for the respondents endeavoured to draw a distinction between that case and this by suggesting that the respondent corporation had not omitted to do something which they reasonably ought to have done to make
H the shelter safe and not a source of danger to His Majesty's subjects lawfully using the highway. His attempt to make out that they had not omitted to do something that they reasonably ought to have done, in my opinion, completely breaks down on the facts. Here was a shelter which for 15 months had been left unlighted. The judge has found that they could perfectly well have lit it, but they omitted to do so. Counsel for the respondents says: "Well, we put before the Ministry concerned a scheme of lighting and the Ministry refused to sanction it because it was too expensive," and it is suggested that the evidence went as far as this, that, owing to the shortage of labour and the impossibility

of getting a lamp to burn for 6 or 7 days without attention, the corporation had a good excuse for doing nothing. The judge has not accepted that view, and, in my opinion, it is quite a preposterous view on the facts of this case. The idea that the duties of a local authority in regard to safety on the roads are to be affected by matters of expense (speaking always within reasonable limits) is one which does not appeal to me. The corporation was going to be indemnified by the Ministry against the expense of any reasonable scheme. Even if the Ministry disapproved there was nothing to prevent the corporation carrying it out ; and the argument that it would have been put to expense if it had done so is one which, to my mind, is singularly unattractive. In any event, as the judge found, they could have done something effective to light the shelter.

In my opinion, the case, on the facts, cannot be distinguished from the *Ruislip* case (4) and the appeal must, consequently, be allowed.

Appeal allowed with costs ; judgment entered for the plaintiff for £1,175.

Solicitors : *W. H. Thompson* (for the apppellant) ; *William Charles Crocker* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PRATT *v.* NORTH WEST NORFOLK ASSESSMENT COMMITTEE AND COUNTY VALUATION COMMITTEE FOR THE COUNTY OF NORFOLK.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Tucker, L.JJ.), November 12, 13, 1945.]

Rates and Rating—Valuation list—Proposals by county valuation committee to increase large proportion of assessments in area—Systematic examination of all assessments in rating area by county valuation officer with a view to revaluation—Separate proposals in respect of each hereditament—Whether valuation committee making in effect a new valuation list—Rating and Valuation Act, 1925 (*c.* 90), *ss.* 18, 19, 21 (2), 31 (3), 37—*Rating and Valuation* (*Postponement of Valuations*) *Act,* 1938 (*c.* 19), *s.* 1—*Rating and Valuation* (*Postponement of Valuations*) *Act,* 1940 (*c.* 12), *s.* 1 (3).

In Dec., 1940, the appellant county valuation committee, being of opinion that the general level of the existing assessments in the rating area was too low, made proposals to increase the assessments of a great number of houses. The assessment committee, on Nov. 14, 1941, approved the proposals and between Nov., 1941, and Dec., 1942, the valuation committee made proposals relating to some 577 hereditaments. The assessments of nearly all these hereditaments were increased by the assessment committee. In addition to these proposals the acting county valuation officer undertook a systematic examination of all the assessments in the rating area and a further 618 hereditaments were inspected by him on behalf of the valuation committee with a view to revaluing all of them. One of the hereditaments affected by these measures was that of the respondent, the county valuation committee having made, on Aug. 17, 1942, a proposal to amend the current valuation list, which had come into force on Apr. 1, 1934, by raising the gross value of the respondent's hereditament from £14 to £20, and the rateable value from £8 to £12. On Dec. 18, 1942, the assessment committee allowed the proposal and the 1934 list was amended in that respect. In making the proposals to increase the gross and rateable values of the hereditaments, including that of the respondent, the valuation committee acted under the Rating and Valuation Act, 1925, s. 37, whereby any person, including the valuation committee, aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force might make a " proposal " for the amendment of the list. On appeal, the principal question for the determination of the court was whether the respondent's assessment was invalid on the ground that it was part of an operation amounting in substance to the making of a new valuation list contrary to the provisions of the Rating and Valuation

(Postponement of Valuation) Acts, 1938 and 1940 :—

HELD : (i) the proposal of the county valuation committee and its acceptance by the assessment committee and the consequent amendment of the 1934 valuation list were within the powers conferred upon those bodies by the Rating and Valuation Act, 1925, s. 37.

(ii) even assuming that the county valuation committee was in fact engaged in an operation resulting in an alteration of all the assessments, such operation, if carried out within the powers conferred by the Rating and Valuation Act, 1925, s. 37, was lawful ; the consequential entries in the valuation list were still amendments of the existing list and did not amount, in effect, to the making of a new list.

(iii) the assessment made upon the respondent was, therefore, valid and must stand.

Decision of the Divisional Court ([1945] 2 All E.R. 78) *reversed.*

[**EDITORIAL NOTE.** The Divisional Court held unanimously that the county valuation committee had no power to use the provisions for amendment in the Rating and Valuation Act, 1925, s. 37, to bring into existence a new valuation list by piecemeal revaluation. The Court of Appeal now decides that no such new list can be brought into existence at all except by means of the statutory procedure laid down by sect. 19 of the Act, and that such amendments are, therefore, valid. *Dicta* in *R.* v. *Worthing Borough Council* (1) and *Murphy Radio, Ltd.* v. *Welwyn Garden City* (2), suggesting the contrary, cannot be supported.

As the procedure under Baines Act has been little used, attention may be drawn to the form of order here made, at p. 13, *post.*

AS TO AMENDMENT OF VALUATION LISTS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-488, para. 913 ; and FOR CASES, see DIGEST, Supp., Rates and Rating, Nos. 1147a-1161a.

FOR THE RATING AND VALUATION (POSTPONEMENT OF VALUATIONS) ACTS, 1938 and 1940, see HALSBURY'S STATUTES, Vols. 31 and 33, pp. 614, 615 and 361, 362, respectively.]

Cases referred to :

*(1) *R.* v. *Worthing Borough Council and Horsham and Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 All E.R. 681 ; 106 L.J.K.B. 810 ; *sub nom. R.* v. *Horsham and Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 K.B. 408 ; Digest Supp. ; 157 L.T. 41.

*(2) *Murphy Radio, Ltd.* v. *Welwyn Garden City Rating Authority*, [1943] 2 All E.R. 16 ; 168 L.T. 427.

APPEAL by the respondents, the North-West Norfolk Assessment Committee and the County Valuation Committee for the county of Norfolk, from a decision of the Divisional Court (LEWIS, OLIVER and BIRKETT, JJ.), dated May 4, 1945, and reported ([1945] 2 All E.R. 78), where the facts are fully set out. The matter came before the Divisional Court on a special case stated for the opinion of the High Court by consent of the parties under an order of COHEN, J., pursuant to the Quarter Sessions Act, 1849, s. 11. The stated case, after setting out the facts, concluded with these words in para. 13 :

> The question for the opinion of the court is whether or not upon the facts stated herein the said proposal is a valid or legal proposal. If the said proposal is a good and valid proposal, then the gross value of £20 determined by the said assessment committee will be confirmed. If the said proposal is illegal and invalid, then the gross value of £14 as stated in the current valuation list will stand unaltered.

The preliminary point was taken in the Divisional Court by counsel for the present appellants that there was no jurisdiction in that court to examine the validity of the assessment in question. The point was decided against the present appellants by the Divisional Court and was not taken before the Court of Appeal. Accordingly, the judgment of the Divisional Court stands on that matter.

A. S. Comyns Carr, K.C., and *Harold B. Williams* for the appellants.

F. W. Beney, K.C., and *Gilbert Dare* for the respondent.

LORD GREENE, M.R. : It is important at the outset to have a clear view of the relevant facts, because it is on an appreciation of those facts, when related to the statutory provisions, that the decision depends. I do not propose to go through all the matters mentioned in the special case, but there are one or two circumstances that are important. The assessment in question, which is now said to be illegal, was one of a number of assessments made in the parish of

Heacham. Heacham is one of the 29 parishes in the rating area. The rating area consists of those 29 parishes, and the rating authority for the area is the Docking Rural District Council. What the county valuation committee has done, as appears from the case, is this: In Dec., 1940, it formed the opinion that the general level of the existing assessments in the rating area was too low. It also appears that the acting county valuation officer, on behalf of the county valuation committee, was, in Dec., 1942, actively making a systematic inspection and revaluation of all the hereditaments in the rating area, with a view to the making of further proposals so as to raise the general level of the existing assessments in the rating area. It does not appear from the case whether the justification for the view that the general level was too low was that there had been a change in circumstances since the making of the 1934 valuation list, or whether the justification was that the original assessments were too low, or partly one and partly the other. The case is silent on that matter, and, in my opinion, it is of no real importance. I only mention it because an attempt was made to base some point upon it in the course of the argument for the respondent. The actual proposals which have been made from time to time by the county valuation committee began in Dec., 1940, with 22 houses in one of the parishes, Ingoldisthorpe, 17 in Heacham, and 5 in Dersingham, which was another of the 29 parishes. The rating authority itself had already made proposals to increase the assessments of those hereditaments, but their proposed figures were lower than those put forward by the county valuation committee. In Nov., 1941, the committee's proposals were approved by the assessment committee. Then, in Dec., 1941, and again in Dec., 1942, the county valuation committee made further proposals amounting in all to 577 hereditaments, including the hereditament the subject-matter of these proceedings. The fate of those proposals was as follows: they were all accepted, with the exception of 8 of them, two of those 8 stand adjourned, and I gather from the language used in the case that the other 6 were rejected, With regard to them, therefore, the valuation list of 1934 stands unamended. The county valuation officer made further inspections of 618 hereditaments, in the three parishes of Heacham, Snettisham and Dersingham, but no proposals have been made with regard to them, with the exception of certain hereditaments in the parish of Heacham. As I have already pointed out, the committee are engaged in a systematic inspection and revaluation of the whole of the area.

To sum up the effect of those facts, the position is obviously as follows. The existing valuation list, which came into force on Apr. 1, 1934, has been amended in certain particulars. All the proposals so far made, with the exception of the 8, 6 of which were rejected, have been accepted, and the valuation list, therefore, in respect of those accepted proposals stands amended. In so far as it has not been amended, it remains the valuation list in force. What the total number of hereditaments is in the whole of the rating area, we do not know, but it is fair to assume that those 29 parishes comprise a large number of hereditaments which at present have not been made the subject of any proposal. There are also a number of hereditaments in the parishes in respect of which proposals have alredy been made which have not been inspected or valued, and have not been made the subject-matter of proposals down to the present day. Whether or not the county valuation committee, when it has completed its valuation, will think fit to make any, and, if so, how many, proposals with regard to the remaining hereditaments in the rating area is quite uncertain; we do not know. For all we can tell, they may come to the conclusion that they will not make any further proposals in the rating area at all, or they may decide that some or all of the hereditaments are hereditaments in respect of which they ought to make a proposal. But not only do we not know whether any proposals will be made at all, but it is quite impossible for us to tell, on the assumption that further proposals will be made, what the fate of those proposals will be. They may be accepted, if made, or they may be rejected. If they are accepted, the valuation list will be amended. If they are rejected, the valuation list will not be amended.

Those are the facts on which the Divisional Court has held that the assessment now in question is illegal. The ground on which it is said to be illegal, broadly stated, is that the operation on which the county valuation committee has been engaged in respect of this particular rating area is one which in substance is the making of a new valuation list, and that the making of a new valuation list is prohibited during the period of suspense laid down by the Rating and Valuation (Postponement of Valuation) Act, 1938, followed by the Rating and Valuation (Postponement of Valuation) Act, 1940. It is said: here is the county valuation committee engaged on an operation, namely, the making of a new valuation list, which is prohibited by statute, and, therefore, any changes in assessments made in pursuance of that operation must be illegal. That is the substance of the argument. It appears to me, with all respect, that, once the facts are appreciated, that conclusion cannot possibly stand. Let me assume that the operation on which the valuation committee is engaged is completed. It is impossible on these facts to see what the result will be when that happens. As I have already pointed out, for all we know the valuation list may be left standing, with the exception of what has already been done, or it may be altered in further particulars. But to call the result a new valuation list appears to me to be a misconception both of what a valuation list means, and of the effect of amendments resulting from proposals under the Rating and Valuation Act, 1925, s. 37. When the operations are completed, there will be in existence a document, and that document, it seems to me, quite clearly will be the 1934 valuation list amended in such particulars as in the result may be made the subject of amendment. In so far as there are no alterations in the 1934 list, obviously the assessments appearing in that document will continue to owe their legal validity and force to the fact that they appear in that valuation list and to nothing else. They will derive no force of any kind whatsoever from the circumstance that the valuation committee has valued those hereditaments, and has either decided not to put forward a proposal, or has put forward a proposal which has been rejected. If that happens, it simply means that those items in the valuation list are left undisturbed; the fact that an attempt is made to amend them will not alter the position at all. The position of such a document, the ultimate form of which is quite uncertain on the facts, is, as I have said, that it is the 1934 valuation list amended by means of such proposals as may be accepted under sect. 37.

It is an argument which it is sometimes difficult to combat, to assert that a thing is something which it is not by saying that in substance it is what it is not, but in this case I cannot see what force that argument has got. It is simply not true to say that the list as amended pursuant to accepted proposals is a new valuation list, and to put in the words "in substance" does not make it any more true. You have to look and see what the document is upon which, and upon the entries in which, legal rights depend, and if you look at the source of the legal rights which flow from entry in the document, in so far as it has not been altered by a proposal, they flow from the valuation list itself as originally made. In so far as a proposal has been made and has been adopted and the consequential amendment has been made in the valuation list, that entry owes its force to the amendment made under the powers of sect. 37. To say that such a document is in substance a new valuation list I am afraid is an argument which I am quite unable to follow, much less to accept. On the facts, therefore, in this case, it appears to me quite impossible to establish the proposition that the present assessment is invalid on the ground that it is part of an operation amounting in substance to the making of a new valuation list.

But, in support of the argument, certain considerations were urged to which I must make reference. It was said by counsel for the respondent that the circumstance that the particular authority which was engaged in this operation was the county valuation committee, who are not the body entrusted with the duty of making valuation lists under sect. 19, was immaterial. The argument which had been suggested by the appellants was: how can it be said that this operation is in substance the making of a new valuation list when the body conducting the operation is not the body who, by the statute, is given the task of making a valuation list? Counsel for the respondent said that that argument really carries no weight, for the reason that under sect. 37 proposals can be made by the very authority which, in normal times, prepares the draft valuation list, namely, the rating authority, and that, in the present case, the rating authority itself might have undertaken the very task which has been undertaken by the county valuation committee. I do not pause to inquire whether that argument of counsel for the respondent is right or wrong. I will assume that it is right and examine the arguments on the assumption that the operation now being conducted by the valuation committee had in fact been conducted, and was being conducted, by the rating authority itself. It could no more be said in that case, in my opinion, that the rating authority was engaged in making a new valuation list than it could be said in the case where the operation is being conducted by the valuation committee. Incidentally, the making of a new valuation list in any intelligible sense does not describe the function which, under sects. 19 and 25, falls on the rating authority. The rating authority prepares the draft list. Its duty is to prepare the draft list and that is published and is an advertisement to those concerned. The actual document which produces the legal effect and becomes the valuation list, that is to say, a list the entries in which fix the liability of the ratepayer, is a document which comes into existence through the action of the assessment committee. Until the assessment committee has performed its function with regard to the draft list and dealt with objections, there is no valuation list in existence, there is only a draft list. Therefore, the function of making a valuation list in any intelligible sense is not the function of the rating authority at all. But that is by the way.

The argument presented to us by counsel for the respondent may be conveniently dealt with, I think, under three heads which possibly were somewhat mixed up at one stage in the argument. The first head, as I understood it, was something like this : the real vice of what was done lay in the circumstance that a general valuation was being made of the whole of the rating area. That, if I understood counsel for the respondent correctly, meant that a new valuation list was in substance being prepared. That seems to me to be an impossible view. What the county valuation committee was doing in conducting this valuation was merely this : the valuation by itself was a thing which had no legal effect whatsoever : the valuation was made for the purpose of informing the valuation committee as to whether there was, or was not, a case for making proposals in respect of the hereditaments valued. The valuation no doubt would be useful to enable them to support a proposal if they decided to make it, but the valuation itself was quite clearly carried out with the sole object of seeing whether any and what proposals should be made. To say that that valuation was in substance the making of a new valuation list, in my opinion, is not really an intelligible proposition. It was nothing of the kind.

Counsel for the respondent in that branch of his argument, if I understood him rightly, repudiated the suggestion that the number of proposals which might be made or accepted as the result of the valuation was a material matter, because it was the valuation irrespective of the consequences which might ensue as the result of it which constituted the vice and turned the whole operation into the making in substance of a new valuation list. But he had another argument which I think on analysis must be a different one and that argument was this : It is, he said, a question of degree. That argument really amounts to this, that you must look and see what it is that has happened and if what has happened amounts to a sufficiently large revision of the valuation list then in substance it must be regarded as the making of a new valuation list. What precise percentage of alterations would be necessary to produce that result was naturally left in obscurity. It would be surely intolerable that the validity of assessments should depend on what a court subsequently should consider was the precise point at which the making of a proposal and the amendment of the valuation list ceased to be a legitimate operation under sect. 37 and became an illegitimate operation on the ground that it was in substance the making of a new valuation list. That would leave the whole of the list in a state of chaos and uncertainty. Quite apart from those considerations, the answer to the argument I think again is this. It is not true to say that an existing valuation list which has been altered 5 per cent., 10 per cent., 75 per cent., 80 per cent., 90 cent., if you like 99 per cent., and left standing with regard to the balance is a new valuation list. It is not ; it is an amended valuation list and the extent of the area which the amendments cover appears to me to be neither here nor there. There is nothing in sect. 37 to suggest that the area of permitted proposals and consequential amendment is to be restricted by any such consideration. In fact, it is, I think, true to say that the decision of the Divisional Court and the argument which was presented to us on behalf of the respondent require an entire re-writing of sect. 37.

There was one further point taken and that was something of this nature, if I followed it correctly; that however that may be in the case of what you might call sporadic action with regard to individual hereditaments, however true it may be to say that a very large number of amendments of that character are legitimate, once the proposal in question is made pursuant to a general valuation and a general theory, for instance, of a general rise in values over the area, it becomes automatically wrong for some reason. Although, as I say, you could have amendments up to 90 per cent. of the hereditaments based on the particular circumstances of each hereditament, you could not have amendments of 90 per cent. of the hereditaments where the alteration was based on a general rise in values. There is not a word of that to be found in sect. 37. It is quite illegitimate to my mind to write into sect. 37 a new proviso, " Provided always that proposals of more than a certain percentage," whatever you like, " which are based on a general rise in values may not be made." It simply is not there and the distinction is nowhere drawn by the Legislature.

The argument really depends on some observations made in the course of two cases in the Divisional Court. The first one is *R.* v. *Worthing Borough Council and Horsham and Worthing Assessment Committee, Ex p. Burgess* (1). That was a case where a very large number of proposals with regard to shops, houses and flats in the borough were made. " The Rating and Valuation Committee of the Worthing Council resolved that a re-valuation of premises be carried out with a view to proposals being made for the amendment of the Valuation List." A very large number of proposals indeed ensued. There were well over 20,000, so obviously it was a very large operation indeed carried out on the basis that the existing valuations were too low. The Divisional Court upheld the legality of the proceedings and in the course of their judgment they appear to suggest a distinction between cases where amendments are proposed as the result of some general consideration and cases where amendments are proposed by reason of the particular circumstances of specific individual hereditaments. What I mean will be clear from reading a passage or two from the judgment of LORD HEWART, L.C.J., who said this ([1937] 2 All E.R. 681, at p. 683, 685):

> It is manifest, therefore, at the outset, that what was being considered by the borough of Worthing was not a suggestion for the making of a new valuation list, because of some general consideration, such as a general rise in the annual value of the properties, but a suggestion for a detailed revision of the current list because of specific incorrectness in the case of a series of individual hereditaments . . . Nobody here suggests that the *causa causans* of the action complained of was, or was believed to be, a fluctuation of general value, occurring after the bringing into force of the valuation list.

Then SINGLETON, J., said ([1937] 2 All E.R. 681, at p. 690):

> The argument that what took place was the making of a new valuation within the quinquennial period fails on the facts. No new list was made, but a very large number of amendments were made to the current list. If something was done which was in fact the making of a new list, it might well be said to be contrary to the spirit of the Act, and, in particular to that of sect. 19, but that did not take place. There is no need to consider such a case unless and until it arises, and it may then turn out really to be a question of fact.

In that case, having regard to the view which was taken of the facts, the proposals in question, although there were a very large number of them indeed, were regarded as being of a specific and individual nature. That was considered by the Divisional Court to be a sufficient ground for deciding the case without going into the larger question. But in so far as the suggested distinction referred to in the passages which I have read was made in those judgments, if indeed that distinction has even the force of *dictum*, which I do not think it has, I should with respect, disagree with it. I can see no justification whatever, once it is admitted that a large number of proposals can be made, provided they are specific, for saying that a similar large number of proposals cannot be made because they are based on some general proposition. That idea is one which I cannot for a moment accept. It again involves re-writing sect. 37. What justification is there, I ask, for writing into sect. 37 any qualification of the kind ? The argument that the result is to do in an indirect way what could only be done in a direct way, namely, the making in substance of a new valuation list, I have already dealt with. It may very well be, having regard to the circumstances in which the Postponement Acts were passed, that it never occurred to the Legislature under the first Act that it would be thought worth while and under the second Act that it would be found practicable or desirable in war circumstances to conduct a large scale operation such as this. The Legislature may very well have thought that and not directed its attention to the possibility, which was no doubt at the time a theoretical possibility, that under sect. 37 a very large alteration of an existing valuation list might be effected. It may very well be, as I say, that the Legislature did not trouble about that because it appeared to be an unlikely event. Of course, as things have happened, the valuation lists have remained in force for ten years and more and the difference in value in many cases I have no doubt has been very considerable ; but there is nothing in sect. 37, it seems to me, which prevents the making of proposals based on a general rise in values. The most impossible complications would be involved if you accepted any such view. Supposing, for instance, you had in an area a very large proportion of hereditaments of a particular type, it might be factories or it might be shops, as it was at Worthing. The authorities might take the view that with regard to the thousands of shops in a particular area circumstances had so changed that assessments ought to be put up. They might cover the most important part of the rateable hereditaments in the area. Is it to be said that because the general proposition is applied to all shops and an inspection takes place of each individual shop in order to see whether it is or is not under-valued—and that, of course, has to be done in any case—that for some reason the whole thing is abortive and void because it is conducting a general inspection with a view to a general alteration of assessments with regard to a particular class of hereditament in the rating area ? It seems to me that once you get to asking questions of that kind you are leaving the whole thing in complete uncertainty.

There is one more authority which I should mention and that is *Murphy Radio, Ltd.* v. *Welwyn Garden City Rating Authority* (2). In that case STABLE, J., who was a member of the Divisional Court, said this ([1943] 2 All E.R. 16, at p. 19) :

> As regards the second point, if the appellants had been able to say that what was done here was to alter the valuation because of what has been described as some general economical or social change, the result might—I do not say that it would—have been different. Whether what was done here comes within that category or not, in my judgment, is essentially a question of fact. There are no facts found in this case to support the contention that what really happened was that a fresh valuation was being made piecemeal and that what was done was a colourable attempt to make a fresh valuation and not to deal with errors or omissions that were apparent on the face of the valuation when it was made.

That passage in so far as it suggests the distinction to which I have referred in my opinion cannot be supported.

The argument for the appellant naturally led to the larger conclusion that even if proposals were made for every single hereditament in the rating area and were accepted, with the result that every item in the valuation list was altered, nevertheless that would be a perfectly valid operation to be effected under sect. 37. What I have said at present, of course, is on the basis that on the facts of this case there is no evidence whatsoever that such a result will ensue. In fact, it cannot ensue in view of what has happened in the past and we are not justified in assuming that it will ensue in the future. But the broader argument is one which really lies at the bottom of the whole of the consideration of this case and I must say a word or two about it. It is said that even if a list was amended to the extent of 100 per cent., the proper description of the resulting document would not be a new valuation list but the original valuation list as amended. I can see no answer to that argument. You start off with the original valuation list. The valuation list is a thing which comes into existence in the manner laid down by the statute and has the legal consequences that the statute provides. If subsequently it is decided to amend that list by altering the assessment the document is still the original list as amended. It is not a new valuation list for the very simple reason that a new valuation list can only be made in a certain way. It is, in my judgment, true to say even in that case that the resulting document is the old valuation list as amended pursuant to sect. 37 of the statute. If that were not the case some very remarkable results would follow. For instance, these things are not done in a day or a month or a year. The county valuation authority, whose duty, by-the-by, is to promote uniformity in the principles and practice of valuation, may set about trying to get the assessments put up piecemeal. That is what they have done in this case. They have taken a bit here and a bit there and they have made their proposals extending over years and that process will presumably go on. Now at what point in the history of that process is the law going to say " Stop ! You are now reaching the point where you are doing something illegal." I have already said why I cannot see how illegality comes into it at all however much the percentage of proposals may be. But apparently on the respondent's argument there is suggested to be some mystical effect in bringing your percentage of alterations up to 100. The idea that directly you reach that point there is something illegal which either affects the last amendment or affects the totality of the amendments which have been previously made seems to me to be a quite impossible result, quite apart from its obvious inconvenience. During the time the process is going on nobody can tell what the result is going to be for the simple reason, as I mentioned, that the county valuation committee itself cannot tell whether, as a result of its valuation of a particular hereditament or a group of hereditaments, it is going to make a proposal at all. Furthermore, nobody can tell whether proposals if made will be accepted. Therefore, you could not say in the course of the operation that any illegality had arisen. Nor could you say as soon as the 100 per cent. mark is reached, if it is reached, that some taint of illegality affects it. I cannot see how any such theory could possibly be worked out in practice and I can find no foundation for it in the language of the statute. Quite apart from that instance of a series of proposals spread over a number of years ultimately covering the whole area, there is another example which MACKINNON, L.J., mentioned in the course of the argument. A proposal can be made by any individual ratepayer. Supposing all the ratepayers in the area formed a ratepayers' association and decided that they were all over-assessed and proceeded through the association to value the whole of the area and each ratepayer as the result of that valuation decided to make a proposal to have his assessment put down. On what possible ground could it be said that he could not do it ? Could it be said that all the ratepayers were precluded from availing themselves of the right to make a proposal which sect. 37 gives them or would it be the first ratepayer or the ratepayer whose hereditament finally made up the 100 per cent. ? The thing is simply unworkable if you work it out and it all comes, if I may say so, from the idea that by inserting the words " in substance " you can turn a thing into something which it is not. Once that line of approach is abandoned and an attempt is made to construe the statute and discover what it does mean and what are the realities of the subject-matter with which the section deals, the matter to my mind becomes perfectly clear, reasonable and workable.

I think I have now covered the whole of the ground. I hope I have done justice to the judgment of the Divisional Court and to the arguments presented to us on behalf of the respondent. In my opinion the assessment was perfectly valid, the appeal succeeds and the question raised by the case should be answered accordingly.

MACKINNON, L.J. : I agree, and I have very little that I should like to add. The appellant below, Pratt, was the owner of a house called " West View," Heacham. That hereditament was entered in the 1934 list as at a value of £14 gross and £8 net. On Aug. 17, 1942, the county valuation committee made a proposal under sect. 37 of the 1925 Act to increase those figures to £20 gross and £12 net. On Dec. 18 the assessment committee allowed the proposal and the 1934 list was amended in that respect. Pratt appealed against this amendment on the ground that the action of the county valuation committee in making the proposal as to his hereditament was illegal. On the clear terms of sect. 37, manifestly there was no illegality whatever. The Divisional Court, however, has held that it was illegal. For the reasons that have been so fully expressed by LORD GREENE, M.R., I am quite unable to understand how that result can be arrived at. It is beyond argument that the proposal of the county valuation committee and its acceptance by the assessment committee and the consequent amendment of the 1934 list are all patently within the powers conferred upon those bodies by sect. 37. The special case sets out a mass of evidence as to the general activities of the county valuation committee, and the proposals they had already made as to the hereditaments other than that of Pratt's and the likelihood of their making proposals as to yet other hereditaments. All that evidence on the appeal of Pratt as to the allowance under sect. 37 of proposals affecting his hereditament appears to me to be totally irrelevant and inadmissible. I agree that the appeal succeeds.

Tucker, L.J.: This case differs on its facts from several similar cases which have been before the courts because here we have a finding in the agreed statement of facts that the county valuation committee were:

> . . . continuing a systematic inspection and revaluation of all the hereditaments in the rating area with a view to the making of further proposals so as to raise the general level of the existing assessments in the said rating area.

In other cases which have been before the courts, the issue has not been so clearly raised as it is in this because in those cases it was impossible to show what the activities or intentions of the authority concerned were with regard to the whole of the hereditaments in their area. This is a 100 per cent. case because the county valuation committee were admittedly engaged in the operation of revaluing every hereditament in the area, with the result that there might be some alteration in the assessment of every hereditament in the area. For that reason, amongst others, I do not think that much assistance is to be obtained from the decisions which have been arrived at in cases where the facts were quite different.

For the reasons stated by Lord Greene, M.R., I agree that it is quite impossible in this case to say that the county valuation committee were engaged in the preparation of a new valuation list. It is quite clear they were not. The procedure is quite different, and the persons who prepare the valuation when a valuation list is made are different. Furthermore, where a new valuation list is being prepared, it has to go in its entirety before the assessment committee for approval, whereas, in an operation of this kind, it may well be that proposals will not be made with regard to a number of hereditaments so that their assessments may not get before the assessment committee at all. For those and other reasons, it is quite clear that a new valuation list was not in fact being prepared.

The argument by counsel for the respondent, as I understand it, was really based in this way. It is true they may not have been engaged, strictly speaking, in preparing a new valuation list, but, none the less, they were doing something which is so contrary to the whole intention of the Act of Parliament that it is really illegal. In those other cases where an effort has been made to uphold that view, proceedings have been taken by way of obtaining rules for prohibition or *certiorari* for the purpose of challenging an operation of this kind in circumstances very different from those in the present case. As I understand the argument, it has always been that the intention of the Act was to specify periods when valuation lists would be made, and that if a rating authority, or a county valuation committee, engages in a wholesale operation of this kind it is so contrary to the intention of the Act that it is unlawful and should be prohibited by proper process. I think the answer to that is that it is quite impossible to find anything in the Act which does render such an operation illegal. It is manifestly an operation which is being carried out within the four corners of sect. 37, and, although I am inclined to agree, speaking for myself, that I do not think an operation of this kind was ever envisaged when sect. 37 of the Act was enacted, none the less it seems to me an operation which is clearly legal and lawful within sect. 37, and it is quite impossible to say that by engaging in an operation of this kind, which may result in a 100 per cent. alteration of the assessments, the county valuation committee are doing anything unlawful.

The only other observation I desire to make is this: as Lord Greene, M.R., has pointed out, we have not had argued before us the so-called question of jurisdiction which was raised before the Divisional Court. I, therefore, of course, express no view upon that matter, but I do not desire to be taken in any way as giving any tacit acquiescence in the view that a matter of this kind can be raised by way of objection to a proposal by an individual occupier.

For these reasons, I agree that the question propounded in para. 13 of the case should be answered in the affirmative.

Appeal allowed with costs. Order that judgment of Court of Quarter Sessions, consequential on the decision of the Divisional Court, be rescinded. Leave to appeal to the House of Lords.

Solicitors: *Vizard, Oldham, Crowder & Cash,* agents for *Mills & Reeve,* Norwich (for the appellants); *Metcalfe, Copeman & Pettefar* (for the respondents).

A [*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

LEELAND *v.* BOARLAND (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Macnaghten, J.), October 22, 23, 1945.]

B *Income Tax—Sched. E—Payment of lump sum to company director in consideration of acceptance of reduced salary and alteration of director's tenure of office —Compensation not in nature of a capital receipt—Income Tax Act,* 1918 (*c.* 40), *Sched. E.*

C The appellant was one of two shareholders of United Thrift Assocn., Ltd. The only business transacted by this company was the promotion of the Freehold Co-operative Investment Trust, Ltd., which was registered, on May 13, 1932, as an Industrial and Provident Society. The rules of Investment Trust, Ltd., provided, *inter alia*, that their board of directors should consist of not less than five nor more than seven persons, two of whom, United Thrift, Ltd., were entitled to appoint, and the remuneration of the two directors so appointed should be a sum equal to one-quarter of the net profits made by Investment Trust, Ltd., over and above an amount D sufficient to pay the shareholders thereof a dividend at the rate of 6 per cent. per annum. United Thrift, Ltd., then appointed the appellant and their other shareholder to be directors of Investment Trust, Ltd., on the terms that their appointment should be irrevocable except with their consent. Towards the end of 1938 the directors of Investment Trust, Ltd., decided to convert the company into a company limited by shares under the Industrial & Provident Societies Act, 1893, and it was considered E advisable that the provisions as to the appointment of two directors by United Thrift, Ltd., and the remuneration of the directors so appointed should be cancelled. Accordingly, by an agreement, dated Jan. 21, 1939, and made between all parties concerned, the two directors appointed by United Thrift, Ltd., in consideration of a payment of £10,000 each, agreed to relinquish their rights to receive any special remuneration, and United Thrift, Ltd., agreed to abandon their rights to nominate two directors. F It was in the contemplation of the parties that the appellant and the other director appointed by United Thrift, Ltd., should continue to act as directors of Investment Trust, Ltd., and they in fact continued so to act on the same terms as to remuneration and tenure of office as the other directors. The sum of £10,000 having been paid to the appellant, the question for the consideration of the court was whether the sum so paid should be considered as a "capital" payment or as a profit arising from his office as G director:—

HELD: the payment was made in substitution for the reduction in salary and for the alteration of the appellant's tenure of office. It was, therefore, a profit arising from his office as director and properly assessable to income tax under Sched. E.

Tilley v. *Wales* (*Inspector of Taxes*) (1) *followed.*

H [**EDITORIAL NOTE.** The court again applies *Tilley* v. *Wales* (1) to sums paid as compensation for reduction of salary of directors. It is argued that the compensation in fact belongs to the Association nominating the directors, but it is pointed out that it would be improper for a body having power to appoint directors to exact any part of the remuneration. The sums are, therefore, properly assessable as profits from office under Sched. E. The case may be usefully compared with *Wilson* v. *Nicholson Sons & Daniels, Ltd.* ([1943] 2 All E.R. 732).

AS TO PAYMENTS ASSESSABLE UNDER SCHED. E, see HALSBURY, Hailsham Edn., Vol. 17, pp. 212-217, paras. 431-438; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Case referred to:

*(1) *Tilley* v. *Wales* (*Inspector of Taxes*), [1943] 1 All E.R. 280; [1943] A.C. 386; 112 L.J.K.B. 186; 169 L.T. 49.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the division of St. Marylebone in the county of Middlesex for the opinion of the King's Bench Division of the High Court of Justice. On an appeal by the taxpayer against an assessment made upon him under Sched. E for the year 1938-1939 in the sum of £10,000, received by him from the Freehold Co-operative Investment Trust, Ltd., the following facts were found by the Commissioners:—

On Apr. 8, 1932, a private limited company was registered under the name of United Thrift Association, Ltd. (hereinafter called "United") with a nominal capital of £100 in 100 shares of £1 each of which two only have been issued, one to the appellant and one to . . . Berman . . . The only business transacted by United was the promotion of the Freehold Co-operative Investment Trust, Ltd. (hereinafter called "the Investment Trust"), which was registered on May 13, 1932, as an Industrial and Provident Society . . . with a capital of £2,000,000 . . . [rr. 37, 47] of the rules of the Investment Trust [provide]: The board of directors shall consist of not less than five nor more than seven persons, two of whom the United Thrift Association, Ltd., so long as it shall maintain a holding in the shares of the Trust, shall be entitled to appoint and may remove from time to time, in writing, under its common seal . . . The two directors appointed by the United Thrift Association, Ltd., shall each be paid as remuneration for their services in respect of each half-yearly accounting period . . . a sum equal to one-quarter of the net profits made by the Trust over and above an amount sufficient to pay the shareholders thereof a dividend at the rate of 6 per cent. per annum, but such remuneration . . . shall be ascertained and computed before any amount is allocated to any reserve or to the writing off of preliminary expenses, or any other similar reserve or provision, or before provision for payment of income tax or any other tax, duty or similar imposition, should be levied or rendered payable at any time hereafter. . .

By a letter dated May 13, 1932, from United to the appellant and Berman, United agreed so long as it held shares in the Investment Trust to nominate the appellant and Berman as directors of the Investment Trust.

By an agreement dated Aug. 15, 1932, between United and the Investment Trust it was agreed, *inter alia*, that (i) United shall be entitled to nominate two directors to serve on the Board of the Investment Trust, which right shall be exercisable by United so long as United maintain a holding of shares in the Investment Trust; (ii) United nominate the appellant and Berman as directors of the Investment Trust . . .

. . . Towards the end of 1938 the directors of the Investment Trust . . . decided to convert the Investment Trust into a limited company, under the Industrial and Provident Societies Act, 1893, s. 54. The Investment Trust was duly converted into a public company on Dec. 11, 1939, under the title of United Vested Properties, Ltd.

Negotiations were entered into between the Investment Trust, United and the appellant and Berman for the concellation of the right of United to nominate two directors of the Investment Trust . . . [and] on Jan. 21, 1939, an agreement was entered into [between the said parties] in the following terms: . . . in consideration of the sum of ten thousand pounds now paid to [the appellant] and Berman . . . the Association agrees to relinquish all their rights to nominate two directors to the Trust as from Jan. 1, 1939 . . . and [the appellant] and Berman hereby agree to relinquish and cancel their right to receive the remuneration . . . as set out in the . . . agreement [of Aug. 15, 1932] as from Jan. 1, 1939. The payment made to [the appellant] and Berman by the Trust in consideration of the relinquishment by them of their right to the remuneration . . . shall be deemed to be compensation and/or liquidated damages for the loss or relinquishment of such rights . . .

The two sums of £10,000 were duly paid by the Investment Trust to the appellant and Berman. It was in the contemplation of the parties to the agreement of Jan. 21, 1939, that the appellant and Berman should continue to act as directors of the Investment Trust and they in fact continued so to act upon the same terms as to remuneration and tenure of office as the remaining directors.

On these facts the Commissioners held that the sum of £10,000 was a payment from the appellant's office as directors and properly assessable under Sched. E. The taxpayer appealed.

Robert Fortune for the appellant.

The Attorney-General (*Rt. Hon. Sir Hartley Shawcross, K.C.*) and *Reginald P. Hills* for the respondent Crown.

MACNAGHTEN, J.: On Apr. 8, 1932, the United Thrift Association, Ltd., which I will call the "Association," was registered under the Companies Act, 1929, as a private company limited by shares, with an authorised capital of

£100 divided into 100 shares of £1 each. Only two shares have been issued, one to the appellant and the other to Berman. On May 13, 1932, the Association promoted a company called the Freehold Co-operative Investment Trust, Ltd. This company, which I will call "the Trust," was registered under the Industrial and Provident Societies Act, 1883. The rules of the Trust provided for the appointment of directors and for their remuneration. By r. 37 it was provided that the board of directors should consist of not less than 5 nor more than 7 persons, and that two of them should be appointed by the Association. The Association, in promoting the Trust, took care that the directors whom it appointed should be well remunerated; for, by r. 47, it was provided that the remuneration of the directors, other than those appointed by the Association, should be fixed from time to time by the Trust in general meeting; and that the two directors appointed by the Association should each be paid as remuneration for their services in respect of each half-yearly accounting period a sum equal to one-quarter of the net profits made by the Trust over and above an amount sufficient to pay the shareholders thereof a dividend at the rate of 6 per cent. per annum, and that such remuneration should be ascertained and computed before any amount had been allotted to any reserve or to the writing-off of preliminary expenses or any other similar reserve, and before provision for payment of income tax or any other tax, duty, or similar imposition. The Association under the provisions of that rule appointed the appellant and Berman to be directors of the Trust on the terms that the appointments should be irrevocable except with their consent.

Towards the end of 1938 the directors of the Trust, having regard to the provisions of the Prevention of Fraud (Investments) Act, 1939, which was then passing through Parliament, decided to convert it into a company limited by shares and it was considered advisable that before carrying out that operation the provisions as to the appointment of two directors by the Association and the remuneration of the directors so appointed should be cancelled. At a meeting of the directors of the Trust held on Jan. 13, 1939, these matters were discussed, and the question as to the payment to be made to the appellant and Berman was considered. One firm of actuaries valued their rights as worth £27,000; and the company's auditors valued theirs at £25,000. The appellant and Berman considered those figures very low: but they were good enough to accept the moderate sum of £10,000 each, because they were "still very interested in the welfare and progress of the Trust." It was in the contemplation of the parties at that time that the appellant and Berman should continue to act as directors of the Trust, and they in fact continued to do so. Accordingly, under an agreement, dated Jan. 21, 1939, made between the Association, the appellant, Berman and the Trust, the appellant and Berman each received £10,000.

The question at issue on this appeal is whether the sums so paid to the appellant and Berman should be considered as "capital" payments or as profits arising from their office as directors. In my opinion, the payments were, in accordance with the decision of the House of Lords in *Tilley* v. *Wales* (1), plainly profit from their office as director.

Counsel for the appellant, suggested that the appellant and Berman were not entitled to the payments made to them; that the Association was entitled to compensation, and the case ought to be treated as if the Association had got the money. But the argument presented by counsel overlooks the fact that the Association, the body corporate created by the appellant and Berman, had no right to the money at all. Indeed, as I ventured to indicate during the argument, it would be very improper conduct on the part of a person who had power to appoint a director of a company to exact from the person so appointed any part of his remuneration as director.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *D. B. Levinson & Shane* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

SHADBOLT (INSPECTOR OF TAXES) *v.* THE RT. HON. LORD PENDER, ADMIRAL HENRY WILLIAM GRANT AND OTHERS.

[KING'S BENCH DIVISION (Macnaghten, J.), October 22, 23, 24, 1945.]

Income Tax—Exemption—Income derived from investments of superannuation funds—Claims for repayment of tax deducted at the source—Two Finance Acts in respect of same financial year—Second Act increasing standard rate of tax imposed by first Act—Increased rate payable in respect of whole financial year—Sale of investments by trustees before increase of standard rate—Deduction made at original rate—Deficiency in tax deduction to be made up by adding to deduction due on next payment—Purchase of investments by trustees after increase of standard rate—Income received on new investments not only less tax at increased rate but also less deficiency in tax arising through transferors having suffered tax only at former standard rate—Deficiency payment to be "accounted for and assessed in the same manner as the tax deducted from original payment"—Payments of tax in fact made by transferees—Transferors not to be treated as persons who made payments—Income Tax Act 1918 (*c.* 40), *s.* 27—*Finance Act,* 1921 (*c.* 32), *s.* 32—*Finance* (*No.* 2) *Act,* 1939 (*c.* 109), *s.* 7, *Sched.* 6, *paras.* 1, 2—*Finance* (*No.* 2), *Act,* 1940 (*c.* 48), *s.* 6, *Sched.* 5, *paras.* 1, 2.

The respondents were the managing trustees of certain superannuation funds, and the income derived from the investments of such funds was exempt from income tax by virtue of the Finance Act, 1921, s. 32. Accordingly, the trustees made quarterly claims for the repayment of income tax deducted at the source and such claims were duly allowed by the Inland Revenue Commissioners. In each of the years 1939-1940 and 1940-1941 there were two Finance Acts, the standard rate of income tax for the year imposed by the first Act being increased by the second Act. By the Finance (No. 2) Act, 1939, Sched. 6, para. 2, and the Finance (No. 2) Act, 1940, Sched. 5, para. 2, it was provided that, in the cases where the taxpayer suffered tax by deduction before the rate was increased and the deduction had been made at the original rate, the deficiency in the amount of tax so deducted should be made good by increasing the deduction from the next payment by an amount equal to the amount of the deficiency. During the year 1939-1940 the trustees sold certain investments before the standard rate was increased, and they received interest thereon subject to the deduction at the original rate, with the result that their transferees had to make good the deficiency. In the following year the trustees bought certain investments after the standard rate had been increased. On the income derived from those investments the trustees had to pay by deduction not only the tax at the increased standard rate, but also the sum required to make good the deficiency in the amount of tax which their transferors had suffered. On the repayment claim made by the trustees for the years in question it was contended for the Crown that, for the year 1939-1940, when the trustees had sold stock before the increase of the standard rate, the amount paid by the transferees in respect of the deficiency must be deemed to have been paid by the transferors, *i.e.*, the trustees, with the result that the trustees could recover, under the exemption section, not only the tax actually suffered by deduction, but also the deficiency which was in fact paid by the transferees; conversely, for the year 1940-1941, when the trustees had bought stock after the increase of the standard rate, the amount of the deficiency paid by them as transferees must be deemed to have been paid by their transferors, with the result that the trustees could not recover the amount paid for such deficiency. These contentions of the Crown were based on the Finance (No. 2) Act, 1939, Sched. 6, para. 2, and the Finance (No. 2) Act, 1940, Sched. 5, para. 2, which provided that the deficiency payment "should be accounted for and assessed in the same manner as the tax deducted from the original payment." The deficiency which, according to the contentions of the Crown, the trustees were entitled to claim for the year 1939-1940 was of a smaller amount than the deficiency which the trustees had actually borne by deduction for the year 1940-1941:—

HELD: the words "accounted for" in the Finance (No. 2) Act, 1939, Sched. 6, para. 2, and the Finance (No. 2) Act, 1940, Sched. 5, para. 2, meant that the paying agent who had deducted the tax must account for it, and the words " . . . and assessed in the same manner as the tax deducted from the original payment " meant that the deficiency payment was to be treated as if it had been included in the original assessment: they could not be construed as containing by implication a provision that, in the case of a transfer of stock after the standard rate had been increased, the transferor was to be treated as the person who made a payment which was in fact made by the transferee. The appellant trustees were, therefore, entitled to the repayment of the amounts claimed by them.

[**EDITORIAL NOTE.** This case deals with the incidence of tax where stock is transferred during a year in which there is an increase in the standard rate of tax by a second Finance Act. The deficiency in the deduction of tax at source is to be borne by the transferee out of the next payment and the transferor, being in the circumstances under consideration exempt from payment of income tax, cannot recover from the Revenue the increased deduction which he has not in fact paid. *E converso*, where the transferee is liable for the deficiency deduction he can on a claim for repayment as not being liable for income tax, recover not only the tax suffered but also the deficiency payment suffered by him.

FOR THE FINANCE (No. 2) Act, 1939, SCHED. 6 AND THE FINANCE (No. 2) Act, 1940, SCHED. 5, see HALSBURY's STATUTES, Vol. 32, p. 1218, and Vol. 33, p. 216 respectively.

CASE STATED under the provisions of the Income Tax Act, 1918, ss. 27 (5), 149, by the Commissioners for the General Purposes of the Income Tax for the division of the Duchy of Lancaster in the county of London, for the opinion of the King's Bench Division of the High Court of Justice. The respondents, the managers of eight pension and provident funds for the benefits of the employees of Cable and Wireless, Ltd., preferred in their capacity as such managing trustees a claim for the repayment of income tax, the question in dispute being the amount of tax repaid in respect of the respondents' investment income for the years 1939-1940 and 1940-1941, and the basis upon which the repayment of that tax had been made. The following facts were admitted:

The company was formed in April, 1929, to acquire the " communications " assets of [various undertakings] . . . At the time of acquiring these assets the company took over the employees of the various undertakings . . . and all the pension and provident funds of the undertakings were brought under the management of one set of trustees . . . At the same time an unlimited company known as Cables and Wireless Pension Fund Trustee was incorporated under the Companies Act, 1929, in order that it might act as custodian trustee and the investments of the funds were transferred to it in that capacity . . . There are now eight funds, of which the respondents are the present managing trustees. Of these eight funds . . . five have been fully approved for the purposes of the Finance Act, 1921, s. 32 by the Inland Revenue Commissioners, two have been approved to the extent of 81.5 per cent. and 99.36 per cent. respectively, and one had not been approved . . . Under the Finance Act, 1921, s. 32, the respondents are entitled to exemption from income tax on (i) the whole of the investment income of the first five of the . . . funds, (ii) on the other two to the extent stated . . . It has been the practice of the respondents . . . to make quarterly claims for repayment of income tax in respect of the investment income received on behalf of the funds under deduction of tax for the quarters ended respectively Mar. 31, June 30, Sept. 30, and Dec. 31, in each year . . . The claims so made were allowed by the Inland Revenue Commissioners and repayments of tax were duly made quarter by quarter.

By the Finance Act, 1939, s. 11, which became law on July 28, 1939, it was provided that income tax for the year 1939-1940 should be charged at the standard rate of 5*s.* 6*d.* in the pound. By sect. 7 of the Finance (No. 2) Act, 1939, which became law on Oct. 12, 1939, it was provided that the standard rate of income tax for the year 1939-1940 should as respects the last three-quarters of the year be increased by 2*s.* to 7*s.* 6*d.* in the pound and that the increase should be averaged over the whole of the year, thus making the average rate 7*s.* in the pound. By sect. 11 of the Finance Act, 1940, which became law on June 27, 1940, it was provided that income tax for the year 1940-1941 should be charged at the standard rate of 7*s.* 6*d.* in the pound. By sect. 6 of the Finance (No. 2) Act, 1940, which became law on Aug. 22, 1940, it was enacted that the standard rate of income tax for the year 1940-1941 should be 8*s.* 6*d.* in the pound . . . Pursuant to these enactments tax was deducted from interest and dividends paid during the first half of each of the years 1939-1940 and 1940-1941 at the rates of 5*s.* 6*d.* and 7*s.* 6*d.* in the pound respectively. Adjustments to give effect to the said increases of rate were made by deducting from interest and dividends paid during the second half of each of the said years income tax at the rates of 8*s.* 6*d.* and 9*s.* 6*d.* respectively.

During the second half of each of the said years 1939-1940 and 1940-1941 certain changes occurred in the investments of the Pension and Provident Funds . . . The result of these changes was that in certain cases the income of the funds suffered tax at a rate greater or less than the standard rate of tax for the years 1939-1940 and 1940-1941 as fixed by the Finance (No. 2) Act, 1939, and the Finance (No. 2) Act, 1940. In making their claims the respondents claimed repayment of the actual amounts of tax deducted from the payments of interest and dividends they received. Having considered the claims . . . the appellant [inspector of taxes] expressed the view that in respect of all items of income that arose in the years in question tax was repayable at the standard rate fixed by the second Finance Act of the year . . . The changes [which occurred] all took place in investments the income whereof in the year 1939-1940 fell within the proviso to para. 1 of Sched. 6 of the Finance (No. 2) Act, 1939, and therefore within para. 2 of that Schedule, and in the year 1940-1941 fell within the proviso to para. 1 of Sched. 5 to Finance (No. 2) Act, 1940, and therefore within para. 2 of that Schedule.

If the contentions of the respondents were upheld, the total tax repayable to them in respect of the year 1939-1940 would be £80,776 8*s.* 1*d.*, and in respect of the year 1940-1941 would be £100,134 5*s.* 11*d.*, whereas if the contentions of the Inland Revenue Commissioners were upheld the amounts repayable for those years would be £81,168 5*s.* 2*d.*, and £99,003 6*s.* 5*d.*, respectively, involving an increase of the amount repayable in respect of the year 1939-1940 of £391 17*s.* 1*d.*, and a reduction of the amount repayable in respect of the year 1940-1941 of £1,130 19*s.* 6*d.* (*i.e.*, a net reduction in respect of the two years of £739 2*s.* 5*d.*) . . .

On these facts the Commissioners held that the respondents were entitled to the amounts claimed by them. The Crown appealed.

The Attorney-General (*Rt. Hon. Sir Hartley Shawcross, K.C.*) and *Reginald P. Hills* for the appellant.

Cyril King, K.C., and *Heyworth Talbot* for the respondents.

Cur. adv. vult.

Macnaghten, J.: The respondents are the managing trustees of seven superannuation funds established for the benefit of employees of Cable and Wireless, Ltd. Under the Finance Act, 1921, s. 32, income derived from investments belonging to the trustees is exempt from the payment of income tax. In the case of five of these funds, the whole of the investment income is exempt: in the case of the other two, the exemption extends, in the one case, to 81.5 per cent., and, in the other, to 99.36 per cent.

It might have been thought impossible to raise any question of law as to the effect to be given to so simple an enactment, and down to the tax year 1939-40 no such question was ever raised. It was the practice of the trustees to make quarterly claims for repayment of income tax in respect of the income received under deduction of tax for the quarters ended respectively Mar. 31, June 30, Sept. 30, and Dec. 31, in each year. In each of those claims, the trustees set out the particulars of the gross amount of interest received from each holding of stock, and the amount of tax deducted therefrom, and its allocation to the respective funds. The claims were, in all cases, supported by the production of interest warrants and counterfoils, and the claims so made were allowed by the Inland Revenue Commissioners, and repayments of tax were duly made quarter by quarter.

In each of the tax years 1939-40 and 1940-41, there were two Finance Acts; and the standard rate of income tax for the year imposed by the first Act was increased by the second Act. By the Finance Act, 1939, which became law on July 28, 1939, the standard rate was fixed at 5*s.* 6*d.* in the pound, but, by the Finance (No. 2) Act, 1939, which became law on Oct. 12, 1939, the rate was increased to 7*s.* So, too, by the Finance Act, 1940, which became law on June 27, 1940, the standard rate was fixed at 7*s.* 6*d.*, and by the Finance (No. 2) Act, 1940, which became law on Aug. 22, 1940, the standard rate was increased to 8*s.* 6*d.* In each of those years the trustees held securities on which the interest was paid partly before and partly after the rate of tax was increased. It was provided by the Acts which increased the standard rate of tax that, in the cases where the taxpayer suffered tax by deduction before the rate was increased, and the deduction had been made at the original rate, the deficiency in the amount of tax so deducted should be made good by increasing the deduction from the next payment by an amount equal to the amount of the deficiency. No question has been raised by the Crown as to the income derived by the trustees from investments which they held continuously throughout the tax year. On the income derived from those investments, the trustees suffered tax at the increased standard rate, and it is conceded that they were entitled to repayment in full, no more and no less. But, as to investments which the trustees sold before the standard rate was increased, and as to investments which they bought after it had been increased, a contention is raised by the Crown which certainly has the merit, if it be a merit, of ingenuity.

During the tax year 1939-40, it so happened that the trustees sold certain investments before the standard rate was increased, and the trustees received interest thereon subject to deduction at the original rate, with the result that their transferees had to make good the deficiency. The contention put forward by the Crown is that the amount paid by the transferees in respect of the deficiency must be deemed to have been paid by the trustees, and that the trustees are therefore entitled to recover from the Inland Revenue Commissioners, not only the tax which they actually suffered by deduction, but also the deficiency which was in fact paid by their transferees. The tax which the trustees actually suffered by deduction in tax year 1939-40 was £80,776 8*s.* 1*d.*; but, according to the contention put forward by the Crown, they should be treated as if they had paid tax to the amount of £81,168 5*s.* 2*d.*, and the Inland Revenue Commissioners ought to pay that sum to the trustees. That certainly seems a very surprising result.

In the following year the trustees made a number of investments after the standard rate had been raised. On the income derived from those investments, the trustees had to pay by deduction, not only tax at the increased standard rate, but they also had to pay the sum that was required to make good the deficiency in the amount of the tax which their transferors had suffered by deduction on income received by them before the rate was increased. In that year the amount of tax which the trustees suffered by deduction was £100,134 5*s.* 11*d.*, but, according to the contention put forward by the Crown, they must be treated as having only suffered a deduction to the extent of £99,003 6*s.* 5*d.*

This contention is based upon the provisions to be found in the Schedules to the Finance (No. 2) Act, 1939, and the Finance (No. 2) Act, 1940. Those Schedules provide that the deficiency payment "shall be accounted for and assessed in the same manner as the tax deducted from the original payment," and it is said, if I rightly understand the argument, that those words support the contention advanced by the Crown The words "accounted for" plainly mean that the paying agent who has deducted the tax must account for it, and the words "and assessed in the same manner as the tax deducted from the original payment" mean, I think, no more than that the deficiency payment is to be treated as if it had been included in the original assessment; they cannot, in my opinion, be construed as containing by implication a provision that, in the case of a transfer of stock after the standard rate had been increased, the transferor is to be treated as the person who made a payment which was in fact made by the transferee.

In my opinion, the decision of the General Commissioners was right, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Bircham & Co.* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

ASSOCIATED LONDON PROPERTIES, LTD. *v.* SHERIDAN.

[King's Bench Division (Wrottesley, J.), November 12, 1945.]

Landlord and Tenant—Notice to quit—Construction—Lease for two years and thereafter for consecutive periods of two quarters—Lease determinable on or after given date by two quarters' previous notice in writing—Lease determined by landlords by notice expiring on given date—Notice invalid.

By a lease, dated Mar. 25, 1942, certain premises were demised by the plaintiffs to the first defendant from Dec. 25, 1942, for a term of two years and thereafter for consecutive periods of two quarters "determinable nevertheless as hereinafter mentioned." By cl. 6 of the lease, providing for termination, it was stipulated that if on or after June 24, 1945, either party should desire to determine the lease and should give to the other of them two quarters' previous notice in writing of such desire, then, immediately upon the expiration of such notice the lease and everything contained therein should cease and be void. On the strength of that clause the plaintiffs gave in writing two quarters' notice to quit expiring on June 24, 1945, and, the notice having expired, they claimed possession of the flat and mesne profits. It was contended for the defendants that, on a proper interpretation of the lease, the landlords were not entitled to give notice until or after June 24, 1945 :—

Held : on a true construction of cl. 6, the earliest date on which a notice to quit, which must be a notice covering two quarters, could be given, was June 24, 1945. Consequently, the notice given by the plaintiffs was not effective.

Gardiner v. *Ingram* (1), *Re Lancashire & Yorkshire Bank's Lease, Davis (W.) & Son* v. *Lancashire & Yorkshire Bank* (4) *followed.*

[**EDITORIAL NOTE.** This case decides that where a lease contains provision for determination "on or after" a specified date, notice cannot be given to expire *on* that date, which itself constitutes the earliest date when notice can be given. This conclusion is arrived at equally by consideration of the literal meaning of the lease, or by applying the reasoning of Lord Coleridge in *Gardner* v. *Ingram* (1).

As to Determination of Notice to Quit, see HALSBURY, Hailsham Edn., Vol. 20, pp. 130-132, para. 140; and for Cases, see DIGEST, Vol. 31, pp. 439, 440, Nos. 5846-5857.]

Cases referred to :

*(1) *Gardner* v. *Ingram* (1889), 61 L.T. 729 ; 31 Digest 446, *5931*.
*(2) *Thompson* v. *Maberly* (1811), 2 Camp. 573 ; 31 Digest 439, *5847*.
(3) *Brown* v. *Symons* (1860), 8 C.B.N.S. 208 ; 34 Digest 55, *296* ; 29 L.J.C.P. 251 ; 2 L.T. 323.
*(4) *Re Lancashire & Yorkshire Bank's Lease, Davis (W.) & Son* v. *Lancashire & Yorkshire Bank*, (1914) 1 Ch. 522 ; 31 Digest 439, *5853* ; 83 L.J.Ch. 577 ; 110 L.T. 571.

Action for the possession of a flat and mesne profits. The facts are fully set out in the judgment.

H. J. Astell Burt for the plaintiffs.

Serjeant Sullivan, K.C., and *H. O. Danckwerts* for the defendants.

Wrottesley, J. : In this case, by a lease appearing to be made on Mar. 25, 1942, between the plaintiffs in this action and the first defendant, a residential flat was let to the first defendant for her :

> . . . to hold the same unto the lessee from the twenty-fifth day of December 1942 for a term of two years and thereafter for consecutive periods of two quarters (determinable nevertheless as hereinafter mentioned),

so that the two years would expire on Dec. 25, 1944, and then the "consecutive periods of two quarters" would begin to run.

The words "determinable nevertheless as hereinafter mentioned" refer, as all parties agree, to cl. 6 of the lease which reads as follows ;

> If on or after the twenty-fourth day of June 1945 either party shall desire to determine this lease and shall give to the other of them two quarters previous notice in writing of such desire and in case of such notice being given by the lessee the lessee shall up to the time of such determination pay the rent and observe and perform the covenants on the part of the lessee and the agreements and conditions herein contained then immediately upon the expiration of such notice this lease and everything herein con-

> tained shall cease and be void but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant.

Upon that clause the plaintiffs gave in writing two quarters' notice to quit expiring on June 24, 1945; and, that notice having expired, they claim possession of the flat and mesne profits. The defendants contend that, properly understood and read, the lease—the relevant provisions of which I have read—does not enable a notice to be given at all until on or after June 24, 1945, the very day upon which the plaintiffs claim to have the right to possession, and, therefore, of course, that the claim is bad; and, if they are right, these proceedings must fail.

Whether I construe the language literally, or whether I appeal to authority, I am led to the same conclusion, namely, that cl. 6 says what it means, and that notwithstanding the *habendum*, no notice can be given to determine this lease —which is not for a fixed term, but which is for a fixed term and thereafter for consecutive periods—until June 24, 1945; that is the earliest date upon which any notice can be given under cl. 6. That is what the clause says, that if on or after June 24, 1945, "either party shall desire to determine this lease and shall give to the other of them two quarters previous notice in writing," then certain results follow. It is quite clear in this case that no notice was given (whatever the desire may have been) on or after June 24, 1945; no other notice is relied upon or suggested, than that which expires on June 24, 1945.

I get the same result if I appeal to authority. *Gardner* v. *Ingram* (1) was the case of an agreement for a lease for five years commencing on Sept. 29, 1885, and contained this clause:

> The tenancy might be determined after the expiration of the term of three years out of the term of five years hereinbefore mentioned by six calendar months' notice in writing from either of the said parties to the other of them, and that such notice must expire at the corresponding quarter-day at which the tenancy commenced.

Under that clause the tenant gave a notice—which was, as it happened, a bad notice—to expire at the end of the three years, that is to say, on Sept. 29, 1888, which was the expiration of the three years. Apart from the fact that the notice was equivocal in its terms, and, therefore, bad, LORD COLERIDGE, L.C.J., dealt with the case of *Thompson* v. *Maberly* (2), which had been thought to be authority for the proposition that such a lease might be determined at the expiration of the three years, although the language of the clause dealing with it said that it might be determined after the expiration of the three years, LORD COLERIDGE said (61 L.T. 729, at p. 730):

> That case is not, however, quite satisfactory, as it appears to have been decided on the meaning of the word certain [the phrase in *Thompson* v. *Maberly* (2) was "for twelve months certain, and six months notice to quit afterwards"] and as LORD CAMPBELL points out in a note, the decision was for the plaintiff on another point, so that LORD ELLENBOROUGH'S observation was *obiter*. It is true that in the case of *Brown* v. *Symons* (3) in the Common Pleas, which was an apprenticeship case and turned upon the words "for twelve months certain," *Thompson* v. *Maberly* (2) was cited in the argument, and was not disapproved of. But I think that in a case of a similar agreement where the word "certain" does not occur, it would be very doubtful whether *Thompson* v. *Maberly* (2) should be treated as an authority.

In that case, therefore, LORD COLERIDGE, L.C.J., was of opinion that the earliest date at which that tenancy could have been determined was twelve months after the expiration of the three years, on Sept. 29, 1889, because the notice could not be given until after the expiration of the term of three years; and, inasmuch as it had to expire on the same day as the tenancy commenced, that would bring it to the end of the fourth year. BOWEN, L.J., said (61 L.T. 729, at p. 730), quite shortly, that on that point he entirely agreed with LORD COLERIDGE, L.C.J.

The reasoning in that decision was adopted by EVE, J., in *Re Lancashire and Yorkshire Bank's Lease* (4). That was the case of a lease for a term of five years from Mar. 25, 1911, and it contained a proviso that:

> . . . after the expiration of the first three years of the term hereby granted, if the lessees shall desire to determine this lease, and shall give to the lessors six calendar months' previous notice in writing of such their desire, such notice to determine on any quarter day, and shall, up to the time of such determination, pay the rent and perform and observe the covenants on their part hereinbefore contained, then and immediately

> on the expiration of such notice this present demise and everything herein contained shall cease and be void.

In that case the three years expired, as will be seen, on Mar. 25, 1914; it had to be a six months' notice; and on Nov. 14, 1913 (and, therefore, before the expiration of the three years):

> . . . the plaintiffs gave notice in writing to the defendants that it was their intention to quit and deliver up possession of the premises on June 24, 1914.

The case was held to be indistinguishable from *Gardner* v. *Ingram* (1); the notice in question was held to be invalid; and EVE, J., in dealing with the matter pointed out that the notice purporting to determine the tenancy on June 24, 1914—which was at the expiration of one quarter only after three years, and did not allow for a six months' notice after the expiration of three years—was bad. In other words, the judge said that the notice given after the expiration of the first three years must be given after the expiration of those three years—the language makes that quite plain. Whether, therefore, I look at the matter from the point of view of the literal meaning of the clause or in the light of authority, I reach the same result.

It is true that it was suggested to me by counsel for the defendants that even the *habendum* upon which counsel for the plaintiffs relies was by no means clearly in the plaintiff's favour, for it was not for a term of two years and for one period, but it was for a period of two years " and thereafter for consecutive periods of two quarters." I think counsel for the defendants desired me to infer from that that there must be at least two of these periods. I cannot accept that argument because I think the word " periods " there is used in the ordinary way to cover the case of one period or more, according to when the notice came to be given. That point, however, in my view it is unnecessary for me to decide because I found my judgment in this case upon the other grounds to which I have referred.

The argument put forward by counsel for the plaintiffs really amounts to this, that I am to read cl. 6 as though, instead of as it does read, it were altered in two ways. The first is that it should be read as though it were worded:

> If either party shall desire to determine this lease on or after June 24, 1945, and shall give to the other of them two quarters' previous notice in writing.

Even then it would not be strictly accurate grammatically, for in that event there should be the further alteration so as to have the appropriate grammar that it should be also altered to read:

> . . . and shall *have given* to the other of them two quarters' previous notice in writing.

There can be no doubt that if cl. 6 had been framed in those terms, it would have been open to the plaintiffs in this case to give notice which determined on June 24, 1945; but in fact the language is not that. The language is that which I have read at the beginning of this judgment, and, interpreting that language literally, there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *Clifford-Turner & Co.* (for the plaintiffs); *Edward Montague Lazarus & Son* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

Re WELFORD'S WILL TRUSTS, DAVIDSON *v.* DAVIDSON AND OTHERS.

[CHANCERY DIVISION (Romer, J.), October 24, November 5, 1945.]

Powers—Exercise—Special power to appoint by deed or will—Whether intention to exercise expressed in will—Gift, subject to payment of debts, of " all my real and personal estate whatsoever and wheresoever and over which I shall have any disposing power at the time of my decease "—Gift to objects of the special power—" And "—Failure to use " appoint."

Under her father's will, Mrs. D. had a special power of appointment among her children and grandchildren over a settled legacy. The power was exercisable by deed or will, and, in default of appointment, on Mrs. D.'s death the legacy was, in the events which had happened, to be divided equally among her five children. By her will, made on Oct. 18, 1938, Mrs. D. provided (by cl. 3) : " Subject to the payment of my just debts funeral and testamentary expenses I give devise and bequeath all my real and personal estate whatsoever and wheresoever and over which I shall have any disposing power at the time of my decease to my children E.I.N.K., and E.S.D., in equal shares absolutely." She did not exercise the special power during her lifetime and the question to be determined was whether the words in her will " and over which I shall have any disposing power at the time of my decease " were a sufficient exercise of the power. She was not the donee of any other general or special power of appointment either at the date of her will or at the date of her death. It was contended by the children who were not beneficiaries under her will (i) that the words in question were used in an explanatory sense or to introduce an additional quality to the property already mentioned ; (ii) that the reference to payment of debts negatived any intention to exercise the power of appointment ; (iii) that the failure to use the word " appoint " also negatived such intention ; and (iv) that, properly construed, the words referred to a power of appointment which might be acquired after the date of the will and not to the special power which Mrs. D. already had :—

HELD : (i) the use of the word " and " before the words " over which I shall have any disposing power at the time of my decease " was not intended merely to introduce an additional quality to the property disposed of. The clause must be regarded as elliptical and its true meaning was " and all real and personal estate over which I shall have any disposing power at the time of my decease."

(ii) the reference at the beginning of the gift to the payment of debts was not an intention to charge with their payment each item of the property subsequently referred to, but the rule of *reddendo singula singulis* must be applied, so that the debts were payable only out of property properly chargeable therewith.

Re Teape's Trusts (2) *applied.*

(iii) failure to use the word " appoint " did not necessarily imply that a special power of appointment had not been exercised.

(iv) the words " over which I shall have any disposing power at the time of my decease " did not refer to property subject to a disposing power which Mrs. D. might subsequently acquire, but to property over which she should have a disposing power at the time of her death. The language was, therefore, accurate in relation to a power which was operative at the date of the will but which could subsequently be executed by deed.

(v) though the interests of those entitled in default of appointment were vested subject to divesting by the exercise of the power, it was not essential to such divesting that the words used by the person exercising the power should contain no element of doubt.

(vi) upon the true construction of the will, and in view of the fact that this was the only power of appointment that Mrs. D. had ever had, Mrs. D. had exercised by her will the special power of appointment over her settled legacy.

[**EDITORIAL NOTE.** In *Grey* v. *Pearson* ((1857) 6 H.L. Cas. 61), LORD WENSLEYDALE referred to the wisdom of the rule that in construing wills the " grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency." In this case "and" is accordingly given its ordinary conjunctive meaning, although involving an ellipsis, since the more unusual sense of introducing an explanatory sentence would add nothing to the preceding words.

The intention to execute the special power of appointment, notwithstanding the omission of the word "appoint" is decided by the application of the rule laid down by SARGANT, J., in *Re Ackerley* (1), namely, that: "In order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it; and that either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose." Here the reference is to the property subject to the power.

AS TO INTENTION TO EXERCISE POWER OF APPOINTMENT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 549-554, paras. 986-981; and FOR CASES, see DIGEST, Vol. 37, pp. 446-460, Nos. 491-617.]

Cases referred to:

*(1) *Re Ackerley, Chapman* v. *Andrew*, [1913] 1 Ch. 510; 37 Digest 454, *562*; 82 L.J.Ch. 260; 108 L.T. 712.

*(2) *Re Teape's Trusts* (1873), L.R. 16 Eq. 442; 37 Digest 451, *541*; 43 L.J.Ch. 87; 28 L.T. 799.

(3) *Re Weston's Settlement, Neeves* v. *Weston*, [1906] 2 Ch. 620; 37 Digest 451, *540*; 76 L.J.Ch. 54; 95 L.T. 581.

*(4) *Von Brockdorff* v. *Malcolm* (1885), 30 Ch.D. 172; 37 Digest 480, *771*; 55 L.J.Ch. 121; 53 L.T. 263.

(5) *Re Holford's Settlement, Lloyds Bank, Ltd.* v. *Holford*, [1944] 2 All E.R. 462; [1945] Ch. 21; 114 L.J.Ch. 71; 171 L.T. 379.

*(6) *Re Hayes, Turnbull* v. *Hayes*, [1901] 2 Ch. 529; 37 Digest 425, *335*; 70 L.J.Ch. 770; 85 L.T. 85.

(7) *Re Bower, Bower* v. *Mercer*, [1930] 2 Ch. 82; Digest Supp.; 99 L.J.Ch. 17; 141 L.T. 639.

ADJOURNED SUMMONS to determine whether Mrs. Elizabeth Scott Davidson had exercised by her will the special power of appointment over her settled legacy which was conferred upon her by her father's will. The facts and the relevant clauses of the wills are fully set out in the judgment.

R. R. Formoy for the plaintiff.

Wilfrid Hunt for the first defendant.

G. D. Johnston for the second defendant, a beneficiary under the will.

John Pennycuick for the third defendant, a beneficiary under the will.

The fourth defendant did not appear.

Cur. adv. vult.

ROMER, J.: By his will dated May 9, 1865, William Henry Welford, after appointing executors and trustees and making certain pecuniary and specific bequests, directed as follows:

> I direct my trustees to raise out of my residuary estate the legacy or sum of £1,500 for or in respect of each and every daughter of mine together with interest for the same after the rate of £5 per cent. per annum computed from my decease And I direct that the legacy of each such daughter shall be held upon the trusts following that is to say upon trust during the life of the same daughter to permit her whilst unmarried to receive the annual income thereof or to pay such income into her proper hands being covert to be enjoyed by her during every coverture for her separate use free from marital control and engagements but without any power for her to anticipate the growing payments thereof and from and after the decease of the same daughter the same legacy together with the annual income thereof shall be held upon such trusts for such interests and with under and subject to such powers restrictions and limitations and in such manner in all respects as the same daughter by any deed or deeds or by her will shall at any time or times whether covert or sole appoint. So only that every such appointment be made in favour of a child or children of the same daughter who shall have attained or who shall attain the age of 21 years or who shall marry under that age or of a grandchild or grandchildren of the same daughter and in default of such appointment Upon trust for the child if only one or all the children equally if more than one of the same daughter who shall be living at my decease or born afterwards and who being a son or sons shall live to attain the age of 21 years or dying under that age shall leave issue surviving or being a daughter or daughters shall live to attain that age or be previously married but no child of the same daughter in favour of whom or of whose issue an appointment shall be made under the power aforesaid shall participate in the unappointed fund without the appointed share being brought into distribution unless the same daughter shall declare a contrary intention in writing.

The testator died on Apr. 25, 1876. He left, among other children, a daughter, Elizabeth Scott Davidson, whom I will hereinafter refer to as Mrs. Davidson. The question which I have to determine is whether or not Mrs. Davidson exercised by her will the special power of appointment over her settled legacy which was conferred upon her by her father's will.

Mrs. Davidson died on Jan. 7, 1945. By her will, which was dated Oct. 18, 1938, after appointing two executors (naming as one of them her son Edward Selby Davidson) and giving some pecuniary legacies, Mrs. Davidson, by cl. 3 thereof, expressed herself in the following terms :

> Subject to the payment of my just debts funeral and testamentary expenses I give devise and bequeath all my real and personal estate whatsoever and wheresoever and over which I shall have any disposing power at the time of my decease to my children Ellen Isabel Naysmith Kydd and the said Edward Selby Davidson who shall be living at my death and if more than one in equal shares absolutely.

The first thing to be observed about this language of Mrs. Davidson is that, whatever may have been the property with which she was intending to deal, she has not expressed herself with perfect grammatical accuracy, and a question arises as to the meaning and effect of the word " and " which appears between the words " wheresoever " and " over." The word was not, in my judgment, intended to be used in an exegetical or explanatory sense. Such a sense is not in accordance with the normal use of the word " and," which has primarily a conjunctive meaning. I think this primary meaning should be attributed to the word rather than a secondary and unusual meaning, in the absence of some compelling context to the contrary. Reading, then, the word " and " in a conjunctive sense, two alternatives seem possible : (i) that she was introducing an additional quality to the property of which she was disposing, *viz.*, that it should not only be her own property, but that at the time of her death she should have a disposing power over it ; or (ii) that she was bringing into the scope of the gift property different from, and additional to, her own real and personal estate which she had already mentioned. It seems to me that the first of these alternatives would result in no effect being given to the words which follow the conjunctive. It is plain that she could dispose of what belonged to her and nothing effectual therefore is added to the words " all my real and personal estate " if this alternative is adopted. In my judgment, the second alternative is to be preferred, notwithstanding that, if adopted, it involves an ellipsis. I think the true meaning of the testatrix would be expressed by the words " I give devise and bequeath all my real and personal estate whatsoever and wheresoever and all real and personal estate over which I shall have any disposing power at the time of my decease," etc. So read, the word " and " which follows upon the word " wheresoever " receives its primary conjunctive signification and effect is given to the language which it introduces.

Before considering whether the disposition, as so construed, operated as an exercise of the power now in question, it is necessary to note one or two facts which were established by the evidence filed in support of the originating summons. This evidence consisted of an affidavit of the plaintiff Alfred Newall Davidson. He says that Mrs. Davidson had issue five children only, namely, himself and the four defendants, all of whom have long since attained the age of 21 years. To the best of the plaintiff's information and belief, his mother did not at the date of her will or of her death have any power of appointment other than the special power of appointment over the said settled legacy under the testator's will ; and he states that she did not in her lifetime exercise that power by deed. The investments representing the said settled legacy (including accruers thereto) are of the value of about £2,100 subject to estate duty. The net estate of Mrs. Davidson at her death (*i.e.*, her own estate) was sworn for probate at the value of £2,178. She had no real estate at the date of her will or of her death.

The general principle to be borne in mind in considering whether or not a special power has been executed in any given case is not in doubt and was stated in *Re Ackerley* (1) by SARGANT, J., in the following words ([1913] 1 Ch. 510, at p. 515) :

> . . . in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it ; and that either a reference to the power or a reference to the property subject to the power

constitutes in general a sufficient indication for the purpose.

Sargant, J., then explained what he meant by the words " in general." This statement of the general rule has frequently been referred to, and approved, in subsequent cases.

Having regard to the conclusion which I have formed and expressed upon the question whether Mrs. Davidson was intending by her will to deal with one class or with two classes of property, and to the fact that the special power now under consideration was the only power of appointment that she ever had, it would seem reasonable, at first sight, to suppose that her intention was to exercise the power ; for the second class of property consisted of real and personal estate which was not her own but which was property over which she had a power of disposal and there was in fact one such item of property, and only one, *viz.*, the settled legacy. In other words, there would appear, *prima facie*, to be a sufficient reference to the property subject to the power. The donees, moreover, were objects of the power and, apart from one consideration, the disposition contained no directions which were in conflict with the legitimate treatment, or destination, of the settled legacy.

On behalf, however, of the children of Mrs. Davidson who are not beneficiaries under her will, certain considerations were advanced as showing that no sufficient expression or indication is to be found of an intention by her to exercise the special power, and that the will, taken as a whole, is only consistent with the view that the testatrix was directing her mind exclusively to property over which she should at her death have an unqualified power of disposition. In the first place, it is said that she has subjected the whole of the property of which she was affecting to dispose to the payment of her debts and funeral and testamentary expenses, and that accordingly each and every item of property within the scope of the disposition is stamped with a charge which the testatrix was at perfect liberty to impose upon her own property, or property over which she had a general power of appointment, but which she had no authority to impose upon the settled legacy. Secondly, it is observed that there is a significant omission of the word " appoint." Thirdly, it is contended that the words " over which I shall have any disposing power at the time of my decease " are irreconcilable with the view that there was present to her mind the intention of exercising the special power which she already had ; and, fourthly, it is pointed out that the onus is on the persons claiming to be appointees to satisfy the court that the power was exercised and that, if there is a doubt about the matter, it should be resolved in favour of those who take in default of appointment, inasmuch as they take vested interests liable to be divested only by a clear appointment to other objects.

As to the first of these considerations, it is true that the words of gift are preceded by the qualification " subject to the payment of my just debts funeral and testamentary expenses." I read these words, however, as a warning to the executors that these outgoings have got to be met, in priority to the beneficial interests, rather than as an intention to charge with their payment each and every item of the property subsequently described. The rule of *reddendo singula singulis* may I think be fairly and legitimately applied : compare, for example, *Re Teape's Trusts* (2) ; and the case does not in this respect fall within the class of which *Re Weston's Settlement* (3) is an example.

Then, secondly, as to the omission of the word " appoint," this omission is undoubtedly an element which has to be taken into account when weighing up the considerations as a whole, but I do not think it is of any considerable importance in itself. It is not as though the words " I give " or " I bequeath " are altogether inapt or unsuitable when used in relation to property which is subject to a special power. All that can be said is that the words " I appoint " are more apt and more suitable and that the use of them would in some cases be decisive of an intention to exercise a power.

I come now to the third contention, *viz.*, that the language used is not fairly referable to the special power of appointment which the testatrix had at the time of making her will, but is applicable only—or, at all events, is far more applicable—to a future possibility, *viz.*, that at the date of her death the testatrix should possess a power of appointment of which she had no knowledge at the date of her will, and that, as the language used is, at the very least, equally applicable to this conception, it is insufficient to operate as an exercise of the special power now in question. This view of the matter would appear to be inconsistent with the decision of Pearson, J., in *Von Brockdorff* v. *Malcolm* (4). In that case a testator had at the date of his will a power of appointment, under a settlement, over certain property in favour of his children and remoter issue. By his will, without making any express reference to the power, he gave :

> . . . all the real and personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease, I shall have any beneficial disposing power by this my will " to trustees, upon trusts partly for persons who were objects of the power, and partly [for persons who were not]

It was held by Pearson, J., that this language sufficiently indicated an intention on the part of the testator to exercise the power. Counsel, who argued before me on behalf of those entitled in default of appointment, says that the point I am now considering was not argued in that case. The argument and judgment in the case certainly appear to have been mainly concerned with the effect of the word " beneficial " and I do not know whether the point I am now considering was raised or not. If it was raised, it certainly was not dealt with specifically, nor apparently was any express reference to the point made (as it might have been) in *Re Holford's Settlement* (5).

Having regard to the interpretation which I have placed on the language which Mrs. Davidson used, it follows that she had in mind two kinds of property, *viz.*, that which was her own and that which, though not her own, she could dispose of in some direction which, at all events, included her children Ellen and Edward. For the purposes of the argument it must be assumed that Mrs. Davidson was contemplating the possible subsequent acquisition either of a general power or of a special power. The suggestion that she had in view some general power of appointment, which she might subsequently acquire, results in no real effect being given at all to the words " and over which I shall have any disposing power at the time of my decease." The reason for this is that, by virtue of the Wills Act, 1837, s. 27, any property over which she had a general power of appointment at her death would pass under the general words of gift, devise and bequest which she had already used. To adopt this view of the matter accordingly involves a departure from the ordinary principle of construction that, if possible, some effect should be given to every part of a will. The second alternative is that the testatrix had in mind some special power of appointment which she might subsequently acquire. It seems to me inherently improbable that any testator should have it in his mind to exercise a special power of appointment at a time when he is necessarily unaware of the conditions or limitations which might be attached to the power, when created. This improbability formed the foundation of the Court of Appeal's decision in *Re Hayes* (6). As to whether a donee of such a power can in fact exercise it by anticipation, even if so minded, see *Re Bower* (7). I am, accordingly, not prepared to accept this alternative as reasonably possible.

The only remaining view would appear to be that Mrs. Davidson was in fact intending to pass to her two named children the property subject to the power which she had at the date of her will, provided that at her death such property, or some of it, still remained subject to the power. I am unable to see why the language which she used is, so far as the present point is concerned, unsuited to the purpose. In the first place, the testatrix does not refer to property subject to a disposing power which she might subsequently acquire, but to property over which she should have any disposing power at the time of her decease, which seems to me to be a very different thing. Secondly, the language used is, as I think, perfectly accurate and apt in relation to a power which was fully operative at the date of the will, but which could subsequently be executed by deed or released. Upon these contingencies would depend the question whether, at Mrs. Davidson's death, she still had a disposing power over the settled legacy or not. Apart altogether, then, from the decision in *Von Brockdorff* v. *Malcolm* (4) I am of opinion that the language used in Mrs. Davidson's will is more applicable to an intention to pass the settled legacy than to an intention to exercise some subsequently acquired general or special power.

Taking, as I have tried to do, all the relevant circumstances into consideration, and attributing to each of them such weight as I think it deserves, I have arrived at the conclusion that Mrs. Davidson did exercise the special power over her settled legacy. With regard to the fourth contention of counsel for those entitled in default of appointment (*i.e.*, the contention dealing with onus of proof), it is, of course, impossible to say that no uncertainty arises as to the intentions of a testatrix who expresses herself in such language as Mrs. Davidson employed. I cannot, however, accept the view that the vested interests of persons who are entitled in default of appointment can only be divested in cases in which, practically speaking, there is no element of doubt; and, having come to a reasonably clear conclusion on the present case, I propose to give effect to it by declaring, in answer to question 1 of the summons, that Mrs. Davidson did exercise the special power of appointment over her settled legacy.

Declaration accordingly. Costs of all parties, as between solicitor and client, out of the capital of the settled legacy.

Solicitors: *Clifford-Turner & Co.*, agents for *Ingledew, Mather & Dickinson*, Newcastle-on-Tyne (for the plaintiff and the first defendant); *Hyde, Mahon & Pascall*, agents for *Keenlyside & Forster*, Newcastle-on-Tyne (for the second and third defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Re COOPER'S ESTATE, BENDALL *v.* COOPER AND OTHERS.

[CHANCERY DIVISION (Cohen, J.), October 30, November 9, 1945.]

Wills—Construction—Gift of testator's residuary estate to his sons in the event of testator and his wife dying "during the present war"—Substitutionary dispositions if sons should also die "during the present war"—"The present war"—Strict legal meaning displaced by context.

On Oct. 17, 1941, the testator made a codicil to his will. By cl. 1, he declared that the provisions therein should be substituted for those in his will in the event of his wife dying before having obtained beneficial ownership of the estate bequeathed to her by his will, and provided that both he and his wife should die "during the present war." Then, after giving certain pecuniary legacies, he gave the whole of his residuary estate to his two sons, A.R.C., and F.S.C., or the survivor of them, absolutely. By cl. 2, the testator directed that the provisions therein should be substituted for those in his will and in cl. 1 of the codicil in the event of the death of both his sons, his wife and himself "during the present war." After making the substitutionary dispositions, the testator continued: "Finally I declare that the provisions of this codicil to my will are to be operative only during the present war and are intended to cover the eventuality of my wife and myself or my wife myself and both sons (as the case may be) dying during the continuance of the war." The testator and his wife both died on July 22, 1943, but the two sons (who were both in the Royal Air Force) were still alive. The court was asked to determine the meaning of the words "during the present war." It was contended by the beneficiaries other than the sons that "the present war" would continue until a treaty of peace had been signed because international law, while recognising the existence of a state of war and a state of peace, knew nothing of an intermediate state which was neither peace nor war:—

HELD: (i) if the words were construed in their strict legal sense, "the present war" would continue until a treaty of peace had been signed; but, in construing a will, where words could have more than one meaning, regard must be had to the context in which the words were used, rather than to their strict legal meaning.

Perrin v. *Morgan* (3) *applied.*

(ii) upon the true construction of the will, the testator's intention was to provide (by cl. 2 of the codicil) for the possibility of the extinction of his whole family by enemy action, but he wished his sons to have absolute possession of his residuary estate when the risk of their death by enemy action ceased; and that risk had ceased with the end of hostilities by the final and unconditional surrender of Germany and Japan. The words "during the present war," as used by the testator, meant "during the continuance of hostilities," and "the present war" had come to an end with the effective end of hostilities.

[**EDITORIAL NOTE.** In strict legal theory the war which commenced in 1939 has not yet ended, since no Treaty of Peace has been signed, and no statutory provision relating to the end of the war similar to the Termination of the Present War (Definition) Act, 1918, has been made. Even under that Act, however, it was necessary to consider the context of the document under construction in order to decide whether the statutory date for the end of the war was applicable, and the court here similarly has regard to the whole purpose of the codicil in construing the phrase " during the present war." As that purpose is fulfilled at the termination of hostilities the phrase is so construed.

As to General Principles of Construction, see HALSBURY, Hailsham Edn., Vol. 34, pp. 187-197, paras. 204-251 ; and for Cases, see DIGEST, Vol. 44, pp. 530-532, Nos. 3472-3488, and pp. 536-539, Nos. 3528-3560.]

As to a Legal State of War, see HALSBURY, Hailsham Edn., Vol. 6, pp. 523-525, paras. 648-650 ; and for Cases, see DIGEST, Vol. 11, pp. 544, 545, Nos. 480-488, and Supplement.]

Cases referred to :

*(1) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484 ; 11 Digest 544, *485* ; 71 L.J.K.B. 857 ; 87 L.T. 372.

*(2) *Kotzias* v. *Tyser*, [1920] 2 K.B. 69 ; Digest Supp. ; 89 L.J.K.B. 529 ; 122 L.T. 795.

*(3) *Perrin* v. *Morgan*, [1943] 1 All E.R. 187 ; [1943] A.C. 399 ; 112 L.J.Ch. 81 ; 168 L.T. 177.

Adjourned Summons to determine the meaning of the words " during the present war " as used by the testator in the second codicil to his will. The facts and the relevant provisions of the will are fully set out in the judgment.

A. C. Nesbitt and *B. A. Bicknell* for the plaintiff.

John Pennycuick for the testator's two sons.

Sir Norman Touche and *W. F. Waite* for the defendants other than the testator's two sons.

Cur. adv. vult.

Cohen, J. : This summons raises a question as to the disposition of the residuary estate of Arthur Stewart Cooper, who died on July 22, 1943. He made a will and two codicils, but the only portions of his testamentary dispositions which are material to the question before me are those to be found in the second codicil dated Oct. 17, 1941. By cl. 1 thereof he directed that, in the event of his death and the death of his wife before she should have obtained beneficial ownership of such of his estate as was bequeathed to her absolutely by his said will, or should have received the first of the quarterly payments directed to be paid to her by para. 4 (2) (*a*) of his said will, or any part thereof, and provided that both such therein mentioned deaths should occur " during the present war," the following provisions should have effect in substitution for those contained in his said will. Then he bequeathed certain legacies including legacies of £1,000 each to the defendant Ethel May Flatt (in the codicil called Ethel Flatt) and the defendant Stephanie Mary Rathbone, and a legacy of £500 to Florence Jessie Fowler. Then he gave, devised and bequeathed all the residue of his real and personal estate unto and equally between his two sons, Alan Richard Cooper and Frank Stewart Cooper, or the survivor of them, absolutely. By cl. 2 of the codicil he directed that in the event of the death of both of his said sons, his wife and himself " during the present war "—I stress those words—the following provisions should have effect in substitution for those contained in his said will and thereinbefore contained. The testator then bequeathed the following pecuniary legacies, *viz.*, to the defendant Stephanie Mary Rathbone, £5,000 ; to the defendant Florence Jessie Fowler, £3,000 ; to the Royal Air Force Benevolent Fund, of which Lord Riverdale, a defendant in this action, is the chairman of the council, £2,000 ; to the defendants Florence Driver and Emily Clarke (subject as therein mentioned) £250 each, and to the plaintiff £100. He gave his furniture and personal effects to be equally divided between the defendant Stephanie Mary Rathbone and the defendant Ethel Flatt. He gave the whole of the residue of his estate to the defendant Ethel Flatt absolutely. Then the testator continued as follows :

> Finally, I declare that the provisions of this second codicil to my will are to be operative only during the present war and are intended to cover the eventuality of my wife and myself or my wife myself and both sons (as the case may be) dying during the continuance of the war And in all other respects I confirm my said will dated June 11, 1937, and my first codicil thereto dated Feb. 10, 1941.

The testator died on July 22, 1943, and his wife died about $1\frac{1}{2}$ hours after the testator. The two sons were both in the Royal Air Force, but both are, happily, still alive.

The dispositions that I have read give rise to obvious difficulties, and on Nov. 8, 1943, a summons was issued raising the following, among other, questions:

> 1. Whether upon the true construction of the said will and codicils the executors of the testator ought (*a*) to treat the dispositions made by cl. 1 of the second codicil as final and effectual dispositions under which the beneficiaries therein named have now acquired indefeasibly vested interests or (*b*) to treat the said dispositions as liable to be displaced or superseded by virtue of cl. 2 of the said second codicil in some and what event and if so that the meaning of the expression "during the present war" may, if necessary, be determined and further directions given. 2. If it be determined that the dispositions made by the said cl. 1 of the second codicil are liable to be so displaced or superseded whether the executors ought nevertheless (*a*) to pay the pecuniary legacies bequeathed by the said cl. 1 to the several pecuniary legatees therein named and in particular the legacy of £50 bequeathed to the plaintiff and (*b*) to pay the rents profits and income as from the death of the testator of the residuary estate of the testator to the defendants Alan Richard Cooper and Frank Stewart Cooper in equal shares until such dispositions are displaced or how otherwise should they deal with the estate.

On Feb. 16, 1944, Simonds, J., made the following order:

> This court doth declare that upon the true construction of the testator's will and codicils the executors ought to treat the dispositions made by cl. 1 of the second codicil as liable to be displaced or superseded by virtue of cl. 2 of the said second codicil. And the question of the meaning of the expression "during the present war" is to stand over with liberty to apply. And this court doth declare that the executors ought to pay the pecuniary legacies bequeathed by the said cl. 1 to the several pecuniary legatees therein named and in particular the legacy of £50 bequeathed to the plaintiff and to pay the rents profits and income as from the death of the testator of the residuary estate of the testator to the defendants Alan Richard Cooper and Frank Stewart Cooper in equal shares until such dispositions are displaced.

From this order there was an appeal to the Court of Appeal, but, as it was thought that the matters at issue might be more readily disposed of when "the present war," whatever that expression might mean, was ended, the appeal stood over.

Hostilities between this country and her Allies, on the one hand, and Germany and her Allies, including Japan, on the other, being now at an end, the summons was restored before me in order to determine the question which Simonds, J., directed to stand over, *viz.*, the meaning of the expression "during the present war." In deciding this point, I have no statutory guidance, for the Validation of War-time Leases Act, 1944, s. 2 (2), applies only to tenancy agreements, and there has been no legislation corresponding to the Termination of the Present War (Definition) Act, 1918. I should add that such legislation would probably not carry the matter further, as under the 1918 Act it was still necessary to look at the context of the particular instrument to see whether the date fixed by Proclamation under the statute was applicable thereto.

Counsel for the defendants other than the sons says that I am bound by principle to hold that "the present war" is still continuing. His argument may be summarised as follows: the law recognises the existence of a state of war, but "it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace, nor war": see *Janson* v. *Driefontein Consolidated Mines, Ltd.* (1), *per* Lord Macnaghten ([1902] A.C. 484, at p. 497). This country must, therefore, be at peace or at war. It is not at peace, for "the general rule of international law is that as between civilised Powers who have been at war, peace is not concluded until a treaty of peace is finally binding upon the belligerents," and that such is not reached "until ratifications of the treaty of peace have been exchanged between them": see *Kotzias* v. *Tyser* (2), *per* Roche, J. ([1920] 2 K.B. 69, at p. 77). It is admitted that no treaty of peace has been signed, much less concluded, in the present war; accordingly, "the present war" still continues.

I agree that, if I construed the words "the present war" in their strict legal sense, I should be forced to the conclusion to which counsel for the defendants other than the sons seeks to drive me. But the court is not bound, in construing a will, to give to each word its strict legal meaning. The principles to be applied are conveniently stated in a passage from the speech of Viscount Simon, L.C., when considering the meaning of the word "money" in *Perrin*

v. *Morgan* (3). VISCOUNT SIMON, L.C. said ([1943] 1 All E.R. 187, at p. 193) :

> Notwithstanding this long tradition I would urge the House to reject the view that, in construing a will, the court must start with a presumption in favour of a particular narrower meaning of the word " money " (though not indeed its narrowest meaning) and that in the absence of contradictory context the court is bound to apply this narrower meaning, even though the inference is that this is not what the testator really meant by the term. As I have already said, the word " money " has more than A one meaning, and it is in my opinion a mistake to pick out one interpretation of the word and to call it the " legal " meaning or the " strict legal " meaning, as though it had some superior right to prevail over another equally usual and not illegitimate meaning. The context in which the word is used is, of course, a main guide to its interpretation, but it is one thing to say that the word must be treated as having one particular meaning unless the context overrules that interpretation in favour of another ; it is another thing to say that " money " since it is a word of several possible meanings must be construed in a will in accordance with what appears to be its meaning in that B document, without any presumption that it bears one meaning rather than another.

Those observations, in my view, apply to the words " the present war " in Mr. Cooper's will. When a person refers to " the end of the present war," he may mean the date on which, in accordance with strict legal principles, the war is brought to an end by ratification of a treaty of peace ; but the ordinary man would, I think, be much more likely to have in mind the effective end of hostilities. C I am, of course, not dealing with words used in casual conversation, but with words in a will which appears to have been drafted under competent legal advice. None the less, I think that, having regard to the objects of the provisions under consideration and to the surrounding circumstances, the testator had in mind not the conclusion of a treaty of peace but the effective end of hostilities between the United Kingdom and her Allies, on the one hand, and D Germany and her Allies on the other. What was the object of cl. 2 of the second codicil ? Plainly, as I read the codicil, to provide for the possibility of the extinction of his family from enemy action, and to give directions as to the distribution of his property if that event occurred. This seems to me to be plain from the concluding words of cl. 2 where the testator says :

> Finally I declare that the provisions of this second codicil to my will are to be operative E only during the present war and are intended to cover the eventuality of my wife and myself or my wife myself and both sons (as the case may be) dying during the continuance of the war.

The risk of this event occurring ceases with the end of hostilities, not, of course, by mere armistice, but by final and unconditional surrender. It seems to me equally plain that the testator desired his sons to become absolute masters of F his residue when the risk of their extinction by enemy action ceased. The last thing he intended was that, on their return to civil life, their enjoyment of the property should be indefinitely postponed ; yet it is clear that this may well happen if I attribute to the words " during the present war " their strict legal meaning. But it may be said that the testator would not necessarily have realised this possibility when he made his will. It is true that in Oct., 1941, the United States of America and Japan were still neutral, but the war had G already reached such dimensions and was raging over so vast an area that I think the possibility of prolonged negotiations after the permanent conclusion of hostilities before a peace treaty could be ratified must have been present to the mind of any reasonable man.

On the whole I think, applying the principle laid down by VISCOUNT SIMON, L.C., in *Perrin* v. *Morgan* (3) that I must come to the conclusion that " during the present war " in this will means " during the continuance of hostilities," and H that " the present war " had come to an end with the effective end of hostilities. Some argument was addressed to me on the question of whether " the present war " meant only the war with Germany and such other Powers as were enemies of the United Kingdom at the date of the testator's will, or whether it embraced the war with Japan. Having reached the conclusion that the material factor is the effective end of hostilities, I am spared a decision on this further point, since there can, to my mind, be no doubt that unconditional surrender, unlike an armistice, puts a final end to hostilities, and both Germany and Japan have signed documents of unconditional surrender.

Accordingly, I propose to declare that the residuary estate is now divisible between the first two defendants.

Declaration accordingly.

Solicitors : *Preston, Lane-Claypon & O'Kelly*, agents for *Evershed & Tomkinson*, Birmingham (for the plaintiff and the first five defendants) ; *Charles Russell & Co.* (for the sixth defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re CASSEL'S WILL TRUSTS, PUBLIC TRUSTEE AND OTHERS *v.* H.M. ATTORNEY-GENERAL AND OTHERS.

[CHANCERY DIVISION (Romer, J.), October 25, November 15, 1945.]

Estate Duty—Assessment of duty—Property passing on death—Annuity—" To Mrs. E. J. an annuity of £5,000 *and after her death an annuity of* £5,000 *to her two daughters, C. and N., and to the survivor of them "—Cesser of annuity on Mrs. J.'s death and springing-up of a new annuity—Finance Act,* 1894 (*c.* 30), *ss.* 1, 2 (1) (*b*).

By his will dated July 9, 1920, the testator gave certain annuities including : " to Mrs. E. J. an annuity of £5,000 and after her death or if she shall predecease me then from the date of my death an annuity of £5,000 to her 2 daughters, C. and N., and to the survivor of them." The testator authorised his trustees to appropriate, if necessary, a fund sufficient by its income to answer the several annuities given by his will, or such of them as were for the time being payable, and he declared that, if the income of the appropriated fund should at the time of the appropriation be sufficient to satisfy the said annuities, such appropriation should be a complete satisfaction of the trusts to provide for such annuities (the annuities being charged on the capital and income of the appropriated fund). No fund was, however, appropriated (except with regard to certain annuities payable in foreign currency) and the annuities were paid out of the income of the residuary estate. The testator died on Sept. 21, 1921, and Mrs. E. J. died on June 11, 1944, leaving the two daughters mentioned in the will. The question to be determined was whether, in regard to the annuity enjoyed by Mrs. E. J., there was, on her death, a cesser of an interest in respect of which estate duty became payable under the Finance Act, 1894, s. 2 (1) (*b*), or whether there was a passing of property under sect. 1 of the same Act. The Estate Duty Office contended that, upon the true construction of the testator's will, there was a cesser of one annuity and a springing-up of a new annuity of the same amount in favour of Mrs. E. J.'s daughters. The residuary legatees contended that, for the purpose in question, the language in which the annuities were given was immaterial and the substance of the matter was that there was an annual sum payable without intermission to successive takers ; therefore (it was contended) estate duty should only be charged as on the passing of property (*viz.*, a share of the annuity) in accordance with the practice now prevailing in regard to successive interests in a single annuity :—

HELD : upon the true construction of the testator's will, Mrs. E. J. and her daughters were not successive takers of one item of property, but separate proprietors of different and independent interests the difference between, their interests being a matter of substance and not merely a matter of form. The annuity to which Mrs. E. J. was entitled ceased to be payable by reason of her death, and the Finance Act, 1894, s. 2 (1) (*b*), therefore, applied.

(**EDITORIAL NOTE.** It is the practice of the Estate Duty Office, in the case of successive interests in a single annuity, not to levy estate duty on a cesser of interest until the death of the last annuitant. It is argued in this case that, although as a matter of construction the annuity given to the mother is a different annuity to those given to the daughters, being something apart and independent, yet there is no rational ground for not applying a practice of the office so calculated to avoid hardship. The court, however, refuses to extend the conception of one single annuity with successive takers as a separate item of property to a case where, on the construction of the will, there are separate proprietors of different and independent interests.

As to Property Passing on Death, see HALSBURY, Hailsham Edn., Vol. 13, pp. 232-237, paras. 222-226, and Supplement; and for Cases, see DIGEST, Vol. 21, pp. 7-10, Nos. 21-42.]

Case referred to:

(1) *Re Palmer, Palmer* v. *Palmer*, [1916] 2 Ch. 391; 21 Digest 35, *220*; 85 L.J.Ch. 577; 115 L.T. 57.

Adjourned Summons to determine whether, on the death of Mrs. Ella Joshua, estate duty became payable in respect of the annuity given to her under the testator's will as property passing under the Finance Act, 1894, s. 1, or as property deemed to pass under sect. 2 (1) (*b*) of the same Act. The facts and the relevant provisions of the will are fully set out in the judgment.

Wilfrid Hunt for the trustees.

J. H. Stamp for the Crown.

Raymond Jennings, K.C., and *M. J. Albery* for Mrs. Joshua's daughters.

H. H. King for the other annuitants.

R. F. Roxburgh, K.C., and *M. G. Hewins* for the residuary legatees.

Cur. adv. vult.

Romer, J.: By his will dated July 9, 1920, the late Sir Ernest Cassel, after appointing executors and trustees and making certain pecuniary bequests, proceeded as follows:

> I bequeath the following annuities to the following persons during their respective lives to accrue from day to day but to be payable quarterly as from the date of my death (except where otherwise stated) namely: to my sister Wilhelmina Cassel an annuity of £30,000; to my brother-in-law Arthur Maxwell an annuity of £300; to Beatrice Maxwell wife of the said Arthur Maxwell an annuity of £300; to Minna daughter of the said Arthur and Beatrice Maxwell an annuity of £200; to Nellie Maxwell wife of my brother-in-law Ernest Maxwell an annuity of £240 and to each of her four children now living an annuity of £100; to Mrs. Ella Joshua of 20a Manchester Square an annuity of £5,000 and after her death or if she shall predecease me then from the date of my death an annuity of £5,000 to her two daughters, Cathy and Nellie, and to the survivor of them; to my old friend and relative Isidor Silverberg an annuity of £300; to the Hon. Mrs. Thomas Seymour Brand while living an annuity of £600; to her and the late Admiral the Hon. Thomas Seymour Brand's children or child living at her death and at the death of myself an annuity of £600 to commence from her death and to continue until the death of the last survivor of such children and to be payable to such of them as shall for the time being be living and if more than one in equal shares; to my old friend Mdlle. Berthe Guillaume of 6 Rue Allard Saint Mande Paris an annuity of 12,000 French francs; to her sister Mdlle. Marie Guillaume of the same address an annuity of 5,000 French francs to commence from the death of the survivor of myself and the said Mdlle. Berthe Guillaume.

There then followed certain annuities to other persons, but I need not notice them in any particular detail. After further dispositions, the testator directed his net residuary estate to be divided into eight equal parts which he settled upon trusts therein mentioned. He authorised his trustees, in case at any time with a view to the due administration or distribution of his estate it should be deemed convenient so to do, to appropriate and retain a sufficient part of his estate or of the investments representing the same for answering by the annual income thereof the several annuities thereinbefore bequeathed or such of them as should for the time being be payable, but without prejudice to the powers of sale and investment and transposing investments therein contained; and he declared that in case the income of the appropriated fund should at the time of appropriation be sufficient to satisfy the said annuities, such appropriation should be a complete satisfaction of the trusts to provide for such annuities and that in case the income of the appropriated fund should at any time and from any cause whatever prove insufficient for payment in full of the said annuities, resort might be had to the capital thereof respectively from time to time to make good such deficiency and the surplus income (if any) of the said fund from time to time remaining after payment of the said annuities should be applicable as income of his residuary estate; and the testator declared that as and when any of the said annuities should cease, a corresponding part of the appropriated fund should sink into his residuary estate.

The testator died on Sept. 21, 1921, and his will was duly proved on Oct. 7 of the same year. His estate is a very large one. No fund has up to now been appropriated to answer any of the annuities which the testator bequeathed, save that a fund in Funding Loan has been treated as set aside to answer the annuities which were given in French and Swiss francs. The other annuities have been paid out of the income of the general estate.

On June 11, 1944, Mrs. Ella Joshua died, leaving surviving her two daughters who were named in the testator's will. They are the second and third defendants to this summons and are aged respectively about 47 and 44 years. A difference has arisen between the Estate Duty Office and the trustees of the testator's will as to the proper principle to be applied in assessing the estate duty which became payable on Mrs. Joshua's death in respect of the £5,000 annuity which she enjoyed during her life. As stated in Sir Felix Cassel's affidavit sworn in support of the summons, the Estate Duty Office claim that on the death of Mrs. Joshua there was a cesser of one annuity for £5,000 in respect of which estate duty became payable under the Finance Act, 1894, s. 2 (1) (*b*), and a springing-up of a new annuity, also for £5,000, in favour of the daughters of Mrs. Joshua and the survivor of them, whereas the trustees claim that there was no cesser of an annuity, but a passing of an annuity of £5,000 on the death of Mrs. Joshua to her daughters and that estate duty was payable on the value of such an annuity. This and other matters are raised for determination in the summons, to which the Attorney-General is joined as a defendant. The question with which I am immediately concerned is the point of difference between the Estate Duty Office and the trustees to which I have just referred.

As a question of construction, solely and simply, it is, in my judgment, reasonably plain that the annuity of £5,000 bequeathed to Mrs. Joshua's daughters after her death is not the same annuity as that bequeathed to Mrs. Joshua during her lifetime. It is a distinct and different annuity, although of the same amount. Preliminary to the annuities which he specifies, the testator himself draws attention to the fact that some of them are not immediate, but future. An examination of them then reveals that, whilst most of them are to take effect at the testator's death, others are to await the deaths of certain named persons. In the latter category are (i) the annuity to Mrs. Joshua's daughters, (ii) the annuity to the children of Admiral and Mrs. Seymour Brand, and (iii) the annuity to Mdlle. Marie Guillaume. What the exact purpose was which the testator had in mind in giving one annuity of £5,000 to Mrs. Joshua for her life and a separate annuity of the same amount to her daughters after her death instead of carrying the same annuity to successive interests may be open to question, but in my opinion he could scarcely have effected the purpose by plainer language than that which he actually used.

On this view of the matter, counsel for the Attorney-General says that the case falls precisely within the language of the Finance Act, 1894, s. 2 (1) (*b*), which provides :

> 2 (1) Property passing on the death of the deceased shall be deemed to include . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . .

Mrs. Joshua, says counsel for the Attorney-General, had an annuity for £5,000 (payable out of residue) which ceased upon her death and duty is accordingly payable by reason of such cesser of interest. Counsel for certain infant defenfants who are interested in residue was not disposed seriously to challenge that, as a mere question of construction, the annuity bequeathed to Mrs. Joshua's children is different from that bequeathed to Mrs. Joshua herself. He contends, however, that what one has to consider is the substance of the matter and that, for present purposes, the language in which the annuities were bequeathed is of little or no materiality. The foundation of the case of counsel for those interested in residue is a practice which has grown up, and now apparently prevails, in the Estate Duty Office with regard to joint or successive interests in what I may describe as a single annuity. The practice may be illustrated in the following way : If an annuity of £x a year is bequeathed to A. for life, then to B. for life, then to C. for life, on the death of A. (B. and C. surviving) estate duty is charged as on the passing of property (*viz.*, a share of the annuity) and not as on the cesser of an interest. The same principle would be applied on the death of B., leaving C. surviving, and estate duty would not be levied on a cesser of interest (*i.e.*, on a capital value basis) until the death of C. The same practice is adopted where joint beneficial interests are created in one annuity. Thus, in a letter from the Estate Duty Office which is in evidence in the present case, it is stated that, as the official practice now stands, the interests of Mrs. Joshua's two daughters, which arose upon the death of their mother, would be treated as being in one annuity.

This practice evidently did not prevail at the time of *Re Palmer* (1), for, had it done so, duty would not have been charged on the death of Ronald Palmer on a cesser of interest basis so far as the £3,000 annuity there under consideration was concerned. It may have sprung up as a result of some of the observations which fell from the Court of Appeal in that case. Be that as it may, counsel for those interested in residue relies on the fact that the practice does prevail now and says that, if it is to be applied on the death of one of several successive takers in a single annuity, there is no rational ground for not applying it to the position which arose on the death of Mrs. Joshua. He says that the idea underlying the practice is that an annuity given to successive takers is a single item of property which subsists over a period, *viz.*, the period between its commencement and the death of the last taker, and that there is a passing of a proportionate part of this item of property upon the death of successive takers, with a cesser of interest on the death of the last. He questions whether this conception accords with strict legal theory, on the ground that every annuity (except a perpetual annuity) given to successive takers is in reality not one annuity but several successive annuities ; but he suggests that its adoption is justified as avoiding the hardship which the old practice would, and did, involve. He then proceeds to the conclusion that this conception is and must be equally applicable to every case in which the substance of the matter is that an annual sum of the same amount is payable, without intermission, to successive takers, and that such is the substance of the matter in the present case.

Now, inasmuch as the burden on the testator's estate does not differ in any respect from what it would have been had a so-called single annuity of £5,000 a year been bequeathed to Mrs. Joshua for life and after her death to her two daughters, it certainly does seem to be a matter of some hardship that the estate should be saddled with a burden from which it would or might have been free had the provision for Mrs. Joshua and her daughters taken that form. Whether or not the present practice of the Estate Duty Office to which I have referred is legally correct or not, I do not propose to determine. Certain it is that it tends to avoid hardship and I should, therefore, be reluctant to cast doubts upon its legitimacy in a case in which, as I see it, it is not necessary for my decision that I should express an opinion either way. But the conception of one single annuity with successive takers as a separate item of property, having a definite period of existence, and as such capable of passing under sect. 1 of the 1894 Act, which (whether right or wrong) seems to me to be quite an intelligible conception and which is the foundation of the principle, has, in my judgment, no application to a case in which the beneficiaries cannot in any sense be said to be successive takers in one item of property, but are separate proprietors of different and independent interests. It is true that the burden on the paying hand is the same in the one case as in the other. The difference, however, between the interests which are bequeathed to Mrs. Joshua and her daughters respectively is by no means merely a matter of form, but is a matter of real substance. Not only is the annuity bequeathed to the daughters not the same as the annuity bequeathed to their mother, but it is wholly apart from it and altogether independent of its fate. If investments had been appropriated to answer Mrs. Joshua's annuity, their depreciation or loss during her lifetime would have resulted in a disadvantage common to herself and her daughters, had the latter inherited in succession to their mother, but, having regard to the form in which the testator has bequeathed their beneficial interests, such loss or depreciation, had it occurred, would not have affected in the slightest degree the claim of her daughters to the payment of £5,000 a year in full from the moment of their mother's death.

As I find (*a*) that Mrs. Joshua was entitled to a life annuity of £5,000 payable out of residue, (*b*) that that annuity has ceased to be payable by reason of her death, and (*c*) that a position has accordingly arisen which is precisely within the language of the Finance Act, 1894, s. 2 (1) (*b*), I have no right to say that that provision does not apply merely because a disposition differently worded but identical in effect might have led to a different result. In my judgment, sect. 2 (1) (*b*) does apply and I will make a declaration to that effect.

Declaration accordingly.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the trustees); *Solicitor of Inland Revenue* (for the Crown); *Lewis & Lewis and Gisborne & Co.* (for Mrs. Joshua's daughters); *Cooper, Bake, Fettes, Roche & Wade* (for the other annuitants); *Vertue, Son & Churcher* (for the residuary legatees).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*] A

SCHERING, LTD. (IN VOLUNTARY LIQUIDATION) *v.* STOCKHOLMS ENSKILDA BANK AKTIEBOLAG AND OTHERS.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, Lord Porter and Lord Goddard), June 18, 19, 20, 21, 25, 26, 27, November 29, 1945.] B

Contract—Illegality—Enemy debt to neutral country guaranteed by English company—Contract completely performed except for payment—Whether contract abrogated on outbreak of war.

By a contract called a "contract of debt" made in Feb., 1936, the respondents, a Swedish bank, agreed to advance to a German company Reichmarks to the value of £84,000 sterling at the official rate of exchange, in respect of which the German company agreed to be indebted to them for the sum of £50,400 sterling without interest to be repaid in 8 years. The appellants, an English company (now in liquidation), and an Indian company (both of whom were controlled by the German company) constituted themselves jointly and severally guarantors of that debt, and they further agreed to purchase the Swedish bank's claim (£50,400) against the German company by instalments of varying amounts to be paid over a number of years. In Apr., 1936, the terms of the contract were varied, *inter alia*, by the appellants and the Indian company undertaking to pay the instalments as principals and not as guarantors, and the payment of each instalment was to be a *pro tanto* satisfaction of their liability under the guarantee. It was also agreed that the contract between the Swedish bank and the appellants should be governed by English law. Instalments were paid under the contract until the outbreak of war in 1939, and in 1941 the Court of Appeal held that it would be an offence under the Trading with the Enemy Act, 1939, to pay the instalment then due. The appellants contended that the April contract was dissolved on the outbreak of war on the ground, *inter alia*, that its continued existence would enure for the benefit of the German company to the detriment of English interests:— C D E F

HELD [LORD RUSSELL OF KILLOWEN and LORD MACMILLAN *dissenting*]: on a proper construction of the February and April contracts, the respondents having performed their obligations to the German company in full before the outbreak of the war, there only remained the liability of the appellants to carry out their part of the contract. The contract, therefore, being executed and no longer executory, the respondents' right thereunder was not affected by the war between England and Germany. G

Decision of the Court of Appeal ([1943] 2 All E.R. 486) *affirmed.*

[**EDITORIAL NOTE.** The principle underlying the law as to the effect of the outbreak of war on subsisting contracts in which an enemy is interested is that a country at war cannot allow transactions to proceed which would be of benefit to the enemy. Such contracts are, therefore, abrogated unless (*a*) they are executed, or (*b*) if executory, they are within an exception from the general rule, as being the concomitants of rights of property. The majority of the House of Lords find that the contract here in issue was executed and affirm the decision of the Court of Appeal in favour of suspension and not abrogation. H

LORD GREENE, M.R., in the Court of Appeal, stressed the fact that the contract in question was with a neutral and, therefore, deserving of special consideration. Recent experience, however, has shown that in modern war true neutrality is virtually impossible and LORDS RUSSELL and MACMILLAN in their dissenting judgments agree with SIMONDS, J., that the vital question is simply whether the performance of the contract would benefit the enemy.

As to Supervening Illegality due to War, see HALSBURY, Hailsham Edn., Vol. 7, pp. 218, 219, para. 297; and for Cases, see DIGEST, Vol. 12, pp. 386-404, Nos. 3172-3252.]

Cases referred to:

*(1) *Ertel Bieber & Co.* v. *Rio Tinto Co., Dynamit Act.* v. *same, Vereinigte Koenigs and Laurahuette Act.* v. *same*, [1918] A.C. 260; 12 Digest 395, *3211*; 87 L.J.K.B. 531; 118 L.T. 181

(2) *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 2 Digest 128, *49*; 71 L.J.K.B. 857; 87 L.T. 372.

(3) *Esposito* v. *Bowden* (1857), 7 E. & B. 763; 2 Digest 168, *371*; 27 L.J.Q.B. 17; 29 L.T.O.S. 295.

(4) *Halsey* v. *Lowenfeld*, [1916] 2 K.B. 707; 2 Digest 157, *272*; 85 L.J.K.B. 1498;
7.

h) & Sons v. *Akt. Fur Cartonagen Industrie*, [1918] A.C. 239;
, *416*; 87 L.J.K.B. 416; 118 L.T. 126.

l. v. *Hirsch*, [1916] 1 K.B. 541; 12 Digest 394, *3208*; 85 L.J.K.B.
T. 222.

(7) *Distington Hematite Iron Co., Ltd.* v. *Possehl & Co.*, [1916] 1 K.B. 811; 2 Digest 175, *403*; 85 L.J.K.B. 919; 115 L.T. 412.

*(8) *Stockholms Enskilda Bank Aktiebolag* v. *Schering, Ltd.*, [1941] 1 All E.R. 257; [1941] 1 K.B. 424; 165 L.T. 19.

*(9) *Re Badische Co., Bayer Co., etc.*, [1921] 2 Ch. 331; 12 Digest 397, *3219*; 91 L.J.Ch. 133; 126 L.T. 466.

*(10) *Ottoman Bank* v. *Jebara*, [1928] A.C. 269; 43 Digest 481, *188*; 97 L.J.K.B. 502; 139 L.T. 194.

*(11) *Ex p. Boussmaker* (1806), 13 Ves. 71; 2 Digest 157, *270*.

*(12) *Flindt* v. *Waters* (1812), 15 East. 260; 2 Digest 162, *317*.

Appeal by the respondents, an English company (now in liquidation) and an Indian company from a decision of the Court of Appeal (Lord Greene, M.R., Lord Clauson and du Parcq, L.J.), dated Oct. 12, 1943, reported ([1943] 2 All E.R. 486), reversing an order of Simonds, J., dated Mar. 10, 1943, and reported ([1943] 1 All E.R. 418). The facts are fully set out in the opinions of Lord Thankerton, Lord Russell of Killowen and Lord Porter.

N. L. C. Macaskie, K.C., and *J. A. Wolfe* for the appellants.

D. A. Scott Cairns and *I. J. Lindner* for the respondents.

The House took time to consider its opinion.

Lord Thankerton [read by Lord Goddard]: My Lords, this is an appeal from an order of the Court of Appeal (Lord Greene, M.R., Lord Clauson and du Parcq, L.J.), dated Oct. 12, 1943, which discharged an order of Simonds, J., dated Mar. 10, 1943, and dismissed the appellants' action.

By the order of Simonds, J., (i) it was declared that a contract dated Apr. 16, 1936, which I will call the April contract, and made between the appellants acting on behalf of themselves and on behalf of Schering Kahlbaum (India), Ltd., which I will call the Indian company, and the respondent bank, had been abrogated by the outbreak of war between Great Britain and Germany and could no longer be enforced against the appellants, and (ii) it was ordered *inter alia* that the respondents, Arthur Williams Edwards and Henry Morris, should release to the appellants £25,000 and any interest thereon which was standing in the joint names of the liquidator of the appellant company and these two respondents under the terms of a letter dated Apr. 16, 1936, to provide security to the respondent bank for the appellants' performance of their obligations under the April contract.

In this appeal the appellants seek restoration of the order of Simonds, J. Alternatively they maintain that the April contract, by reason of circumstances arising out of the war, became impossible of further performance, and that the parties were thereby excused from further performance.

Early in 1936 the respondent bank was possessed of a sum of German Reichsmarks, the value of which at the current rate of exchange was £84,000, which Schering-Kahlbaum Aktiengesellschaft, which I will call the German company, desired to acquire. The German company was the parent company of the appellant company, and owned or controlled all its share capital; it was also the parent company of the Indian company. The German company found it convenient, owing to restrictions in Germany, to provide for the sterling payments to be made to the respondent bank through its two subsidiaries, with whom it could settle its indebtedness by means of the manufactured goods which it supplied to them. The contractual relations between the parties were contained in three agreements, *viz*:

1. A contract in writing dated Feb. 24 and 28, 1936, which I will call the February contract, which was made between the respondent bank of the one part, the German company of the other part, and the appellants and the Indian company as sureties.

2. The April contract, made between the appellants, the Indian company and the respondent bank.

3. A letter dated Apr. 16, 1936, by the appellants to the respondent bank, which I will call the April letter.

The February contract was in German, and subject to German law, but for the legal relationship between the sureties and the respondent bank the English law was to apply. In the absence of evidence to the contrary, it may be assumed that, for the present purposes, the German law does not differ from the English law. Though there was some argument to the effect that the price payable by the German company for the Reichmarks was £50,400, I am satisfied, looking at the various provisions, that, on the Reichsmarks being placed at the disposal of the German company, the latter became debtors to the respondent in the sum of £84,000, payable without interest, in effective pounds sterling on the expiry of eight years thereafter. The Reichsmarks were placed at the disposal of the German company on Apr. 28, 1936. For the debt, the sureties became surety jointly and severally as principals to the amount of £50,400, with the proviso that, against the liability as sureties all payments must be set off which the respondent bank should receive from the sureties or one of them or from the principal debtor or from third persons for account of the sureties or of the principal debtor. Cl. 4 begins by providing that the sureties would acquire from the respondent bank its claims against the German company by a series of fourteen six-monthly instalments, gradually decreasing in amount, beginning one and a half years after Apr. 28, 1936, with an instalment of £6,300, and ending eight years after the said date with a final instalment of £1,680. The instalments make up a total of £50,400. Cl. 4 then proceeds:

> If, and to the extent that the sureties do not acquire the claim at the dates specified, the remission resulting from cl. 2 in conjunction with cl. 1 shall, without prejudice to the provisions of cl. 3, lapse rateably in respect to that amount of debt which remains in relation to Enskilda after setting off any payments which may have been made. (Example: Enskilda has received £6,300 and no further payments have been made; there remains a debt of Schering to Enskilda to the amount of £73,500). With regard to the due date and repayment of the remaining amount of debt the provisions of cl. 2 paras. 2 and 3 shall apply. The remaining amount of debt is owing free of interest.

It may be noted that this paragraph does not affect the amount of the liability of the sureties, that the remission referred to is clearly the reduction of the debt from £84,000 to £50,400, and that the effect of this paragraph was somewhat obscurely modified by a letter dated Mar. 17, 1936, from the respondent bank to the German company, but the effect of it would seem to be that the benefit of the remission was preserved to the latter, provided that the payment of the instalments, or some of them, though made after their due dates, was made prior to the expiry of the eight years. I will only add that the February contract is headed "Contract of Debt," and is so described at least four times in the body of the agreement.

By the April contract, which was in English, the liability of the appellants and the Indian company as sureties is not materially altered, but under cl. 8 they jointly and severally undertook as:

> . . . principals and not as guarantors to make the following payments to you in consideration of the assignment by you to us on the occasion of each such payment of a like sterling amount of your claim against the German company. Such payments shall be made as follows, namely . . .

Here followed a list of fourteen six-monthly instalments of decreasing amount, corresponding to those in cl. 4 of the February contract. Cl. 9 provided that each payment under cl. 8 should be a satisfaction *pro tanto* of their liability as sureties, and that they should not be liable to make such payment, in so far as the amount in question had been paid by the German company or any other person or company. Cl. 10 provided that default in payment of any one instalment should not accelerate the date for payment of any other instalment, provided that that provision should not prejudice the respondent bank's rights of proof in a liquidation of either the appellants or the Indian company.

On the same day, the appellants addressed the April letter to the respondent bank, providing for the pledging by them of goods to the value of £25,000 as security for the discharge by the appellants of their obligations to the respondent bank, whether as sureties or principals, under the April contract. The assets of the appellants have been realised in the liquidation, and the sum of £25,000 has now been placed as security in joint names as already mentioned.

Stripped of its somewhat intricate provisions, it appears that, in substance, the contract was for the sale of commodities, *viz.*, German Reichsmarks, for a price, which was to be paid in sterling. The commodities had been supplied and accepted, and all that remained was the payment of the price, and the only provisions remaining operative related to the payment of the debt due in respect of the price, and the relative safeguards for its payment.

Four instalments had been duly paid by the appellants to the respondent bank prior to the outbreak of war on Sept. 3, 1939. The fifth instalment, amounting to £3,360, became due on Oct. 28, 1939; the appellants took the view that such payment would contravene the provisions of the Trading with the Enemy Act, 1939, and the respondent bank raised an action for recovery of the amount in the King's Bench Division. The action was dismissed, and its dismissal was confirmed by the Court of Appeal. The appellants have now raised the present action, to have it declared that the April contract is no longer enforceable against them, and for the release to them of the £25,000.

My Lords, we had a very full citation of authorities and the able arguments of counsel on both sides have been very helpful, but I find little need to go beyond the speeches of Lord Dunedin and Lord Sumner in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1), in which the earlier authorities are reviewed. Lord Dunedin ([1918] A.C. 260, at p. 274) says:

> From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.

In his judgment Lord Greene, M.R., appears to draw a distinction, on matter of principle, between contracts between a British subject and an alien enemy, and a contract between a British subject and a neutral. In my opinion, the paramount consideration of public policy in either case is the unhampered carrying on of the war, without harmful intercourse with the enemy, or economic benefit to the enemy or economic disadvantage to this country. But the applicability of the principle is likely to be rare in the case of contracts between a British subject and a neutral, or not so obvious as in the case of a contract between a British subject and an enemy.

As regards the consequence of this contravention of public policy, I am of opinion that the courts have no choice between the abrogation and suspension of the contract, abrogation being the necessary consequence. I agree with Lord Sumner's statement on this point in *Ertel Bieber & Co.* (1) ([1918] A.C. 260, at p. 286):

> My Lords, if upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision.

After reference, by way of illustration, to the language of Lord Halsbury, in *Janson* v. *Driefontein Consolidated Mines* (2), Lord Sumner proceeded (*ibid.*, at p. 287):

There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Willes, J., in *Esposito's* case (3): "In all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well known rule, to meet cases of ordinary occurrence." To his mind I think it is clear that the rule was one made to provide certainty at the outbreak of war, where in itself everything is uncertain; that it was one made to apply generally, although taking its form from the needs of ordinary cases; and that, for the purpose of applying it, the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action.

The contracts which fall under this principle of public policy are clearly contracts the performance or further performance of which after the outbreak of war may involve the consequences which the principle, by its application, seeks to avoid, but it is equally clear that there are certain well established exceptions to the contracts thus broadly defined. I may quote the speech of Lord Dunedin in *Ertel Bieber & Co.* (1) ([1918] A.C. 260, at p. 269):

> Now *Esposito* v. *Bowden* (3) has been cited by learned judges in many cases, and no doubt has ever been cast on its authority. Nor has it ever been taken as dealing with any particular contract, but it has been held as dealing with contracts in general. So far as *Janson's* case (2) is concerned, the only matter there decided was that there must be an actual state of war to determine a contract: a mere imminence of war is not enough. It is true that Lord Halsbury's *dictum*, if applied as an universal proposition, would be counter to the doctrine of *Esposito* v. *Bowden* (3). But I am satisfied not only that the *dictum* was *obiter* and not binding, but that Lord Halsbury was not dealing with or thinking of executory contracts, but of contracts under which rights had already accrued. There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey* v. *Lowenfeld* (4). In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some way against public policy as that has been laid down in decided cases.

In the case of the established exceptions to which Lord Dunedin refers the necessity for intercourse with an enemy is obviated by the postponement of the right of action, and non-forfeiture of an existing right supersedes any question of an immediate or future benefit to the enemy. This is well illustrated in the order made in the *Ertel Bieber* case (1), to which I will refer later. In the present case Simonds, J., applied that test at once without considering whether the case fell within the class of exceptional cases, and, coming to the conclusion that continued performance of the contract would involve both such intercourse and such benefit, he held that the contract was abrogated on the outbreak of war. The question of whether the present case fell within the class of exceptional cases was also not considered by the Court of Appeal, but, in considering the test of intercourse and benefit, they drew a distinction between the case of a contract between a British subject and an enemy subject and the case of a contract between a British subject and a neutral subject, and this appears to have led them to differ from Simonds, J., and they reversed his decision. As already expressed by me, I am not prepared to accept that, as a matter of principle, there is any distinction between these two classes of contract, but it is unnecessary for me to deal further with the judgments of the courts below, as I have come to the conclusion that the present case does fall within the exceptional class, and that, for that reason, the April contract was not abrogated by the outbreak of war, so that the appeal fails so far as rested on that ground.

I am inclined to agree with SIR ARNOLD MCNAIR's suggestion (LEGAL EFFECTS OF WAR (1944), 2nd Edn., at p. 93), that the distinction between "executed" and "executory contracts" may not be very helpful in this connection, and that it may be safer to say that the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war. In this view, I proceed to consider what is included in the phrase "a liquidated sum of money, which will be treated as a debt."

The appellants' counsel admitted that a debt payable by instalments would be so included, and that provision for discount on anticipation of the instalment dates would not alter the position, nor would express provision for the acknowledgment in writing of each sum paid affect the matter. In my opinion the fact that the creditor held security for the payment of the debt, which would fall to be restored to the debtor on payment of the debt, would make no difference even though the security had been absolutely assigned to the creditor, and would require retransfer to the debtor. In my opinion, the present case only raises one further point, *viz.*, the fact that the appellants were bound as principals to the respondents to discharge the debt in respect of which the German company were the original principal debtors, and were, therefore, entitled under the April contract on payment to the respondents of each instalment, to an assignment by the latter of a like sterling amount of their claim against the German company. My Lords, I cannot think that this makes any difference to the position. The appellants, under the April contract, were bound to discharge the whole debt within a period which would terminate before the elapse of the eight years, when the liability of the German company to make any payment towards the debt would first arise; in other words, the appellants were bound to acquire the debt, and their being placed by assignment in the shoes of the respondents is merely incidental to the discharge of the debt owed to the respondents, and is not different in substance from the case of the return of securities to which I have already referred.

It is important to make clear that the principle of abrogation does not involve destruction of the contract so far as already performed. That which is abrogated is the further performance of the contract, as from the outbreak of war; or, as LORD DUNEDIN expresses it in the passage already quoted, the continued existence of the contractual relationship is prohibited. As LORD FINLAY, L.C., in *Hugh Stevenson & Sons* v. *Aktiengesellschaft fur Cartonagen-Industrie* (5) states ([1918] A.C. 239, at p. 244): "It is not the law of this country that the property of enemy aliens is confiscated." This important point is well illustrated by the form of order that was made in the *Ertel Bieber* case (1), which related to contracts for the sale of large quantities of cupreous sulphur ore, to be delivered by instalments extending over a number of years. The order made by SANKEY, J., which was affirmed in the Court of Appeal and by this House, was in similar terms to that made in *Zinc Corporation* v. *Hirsh* (6), which related to contracts of sale of zinc concentrates to be delivered by monthly instalments. In both cases the contracts had been partly performed before the outbreak of war. In the *Zinc Corporation's* case (6), BRAY, J., made a declaration, which was affirmed by the Court of Appeal, that the contracts were dissolved as from the outbreak of war, by the existence of a state of war between Great Britain and Germany, and that the plaintiffs as from the said time were and are released and absolved from any obligation at any time to supply to the defendants or their assigns any zinc concentrates; but the declaration was without prejudice to the rights of either party in respect of concentrates supplied or which ought to have been supplied prior to the said time or to moneys paid to the special trust account mentioned in the agreement of Dec. 14, 1908, or to any cause of action which had arisen prior to Aug. 4, 1914. It seems clear to me that this reservation included matters involving intercourse with the enemy, but, as LORD DUNEDIN points out, the right of action is postponed. It seems equally clear it might involve substantial economic benefit to the enemy. The declaration of SIMONDS, J., contains no such reservation, and the result, in my opinion, is to confiscate the right of debt, which had arisen to the respondents on the delivery of the Reichsmarks on Apr. 28, 1936. I am not aware of any precedent for such confiscation, and it is clearly not justified under the decision of this

House in the *Ertel Bieber* case (1). Indeed, it is inconsistent with it. I may add that in *Esposito* v. *Bowden* (3) the performance of the contract had not commenced prior to the outbreak of war.

As regards the appellants' alternative argument that the April contract, by reason of circumstances arising out of the war, became impossible of further performance, and that the parties were thereby excused from further performance, that argument is clearly out of place in the view that I have already expressed that all that remained to be done was the discharge of an accrued debt by A instalments, subject to an assignment of the right of ultimate recourse against the German company and I have nothing to add to the views expressed by Lord Greene, M.R., on this matter.

It follows that, in my opinion, the appeal fails, and I propose that it should be dismissed with costs.

Lord Russell of Killowen [read by Lord Wright]: My Lords, this is a very exceptional case arising out of a very exceptional contract made between B a German company (called Schering-Kahlbaum A.G. Berlin, and hereinafter called the German company), a Swedish bank (called Stockholms Enskilda Bank Aktiebolag and herein called Enskilda), and two companies called respectively Schering, Ltd. (a company registered in England) and Schering-Kahlbaum India, Ltd. (a company registered in India). As may be gathered from their names the English company and the Indian company were subsidiaries of the German company, and dealt, in their respective spheres, in drugs and chemicals C manufactured by the German company. The German company owned all the shares in the English company, which was, therefore, completely under its control.

In 1936 Enskilda and others owned a large quantity of Sperrmarks in Germany which the German company was anxious to acquire. Sperrmarks were Reichsmarks spendable only in Germany. Throughout the transaction with which D we are concerned Enskilda was in fact acting for this group of owners, who were willing to sell for sterling, which the German company could only furnish through its two subsidiaries. Thus it was that the English company and the Indian company became involved in the transaction between Enskilda and the German company.

The rights and obligations of the four contracting parties were first defined and recorded in a document (referred to as the February contract) in the E German language and dated Feb. 24 and 28, 1936, a translation of which has been agreed between the parties. It is headed "Contract of Debt," but it is really a contract for the sale of Reichsmarks. By cl. 1 Enskilda agrees to sell "an amount in Reichsmarks to the amount of the equivalent of £84,000 sterling." Cl. 2 provides that in respect of the Reichsmarks the German company shall be indebted to Enskilda in £50,400 free of interest; and then follow these words "The debt shall fall due on the expiry of 8 years reckoned from the day F of paying out." It is agreed that the due date became Apr. 28, 1944. By cl. 3 the English company and the Indian company constituted themselves surety for "the debt" jointly and severally as principals "to the amount of £50,400." Then followed cl. 4 which requires to be set out *verbatim*, and which runs thus:

> The sureties will acquire from the Enskilda its claims against Schering by instalments, G with the proviso that they shall pay to Enskilda:

1½ years after day of paying over of the loan	£6,300	0	0	
2 ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£6,300	0	0	
2½ ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£6,300	0	0	
3 ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£6,300	0	0	
3½ ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£3,360	0	0	
4 ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£3,360	0	0	
4½ ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£2,940	0	0	H
5 ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£2,940	0	0	
5½ ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£2,520	0	0	
6 ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£2,520	0	0	
6½ ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£2,100	0	0	
7 ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£2,100	0	0	
7½ ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£1,680	0	0	
8 ,, ,, ,, ,, ,, ,, ,, ,, ,, ...	£1,680	0	0	

> If, and to the extent that the sureties do not acquire the claim at the dates specified, the remission, resulting from cl. 2 in conjunction with cl. 1 shall, without prejudice

to the provisions of cl. 3, lapse rateably in respect to that amount of debt which remains in relation to Enskilda after setting off any payments which may have been made (Example : Enskilda has received £6,300 and no further payments have been made ; there remains a debt of Schering to Enskilda to the amount of £73,500). With regard to the due date and repayment of the remaining amount of debt the provisions of cl. 2, paras. 2 and 3 shall apply. The remaining amount of debt is owing free of interest.

A The other clauses need not be referred to : but it will be convenient at this stage to state my view of the true construction of this agreement, which became operative on Apr. 28, 1936. The primary debt for which the German company became liable to Enskilda was the sum of £84,000 referred to in cl. 1. I am of opinion that this must be so, notwithstanding the meaning to the contrary which would *prima facie* be gathered from cl. 2, because any other view is not consistent with the words " to the amount of £50,400 " in cl. 3 and is hopelessly B inconsistent with the second half of cl. 4. The German company made itself liable to pay £84,000 to Enskilda at the end of 8 years, but the liability might be reduced by degrees throughout the 8 years according as the sureties made some or all of the payments specified in cl. 4, and might ultimately amount to no more than a debt of £50,400, owing, not to Enskilda, but to the sureties. The sureties, it is to be observed, whose liability as sureties is limited to £50,400, and cannot mature for 8 years, assume under cl. 4 a most unusual burden, *viz.*, C the obligation to pay off portions of their principal's debt before any part of it is due from the principal, and so reduce their principal's liability by an amount for which the sureties can never be liable ; but this unusual feature is easily accounted for when one remembers that these sureties were bound to do whatever the principal debtor told them to do.

Notwithstanding the existence of the February contract, a further document D was executed, in the English language, by Enskilda, the English company and the Indian company, which is known as the April contract. Why this document was executed has never been explained. Both sides agree that the relationship and obligations as between Enskilda and the two companies are the same as the relationship and obligations which were established as between them by the February contract, and that the latter have never been terminated and still subsist. It may be that the parties desired a record in the English E language of their obligations *inter se*, or it may be that they wished to make it clear that cl. 4 of the February contract was obligatory and not merely optional on the part of the two companies. But whatever the object in view, the April contract is the contract in relation to which this action is brought. Nevertheless, in my opinion, it is quite impossible to treat that contract as a matter apart and separate from the February contract ; it is part and parcel of one transaction between Enskilda and the German company, into which the two F companies are introduced by the German company in order to provide sterling and thus enable the German company to achieve its object, *viz.*, the purchase of the Sperrmarks.

The April contract takes the form of a document addressed to Enskilda, dated Apr. 16, 1936, and signed by one Edwards, both as managing director of the English company and as attorney of the Indian company. It opens thus :

> G In consideration of your making on our joint and several request an advance of £84,000 sterling to be made available in Sperrmarks to [the German company] we hereby jointly and severally guarantee the payment in sterling of the amount hereinafter mentioned by the German company.

The amount thereinafter mentioned is £50,400. This opening statement may be characterised as a gentle fiction. It is clear from the February contract, and a letter of Nov. 5, 1935, from London to Bombay, that the initiative and H the request came from the German company and that the suretyship was undertaken under the German company's instructions. The April contract contains usual provisions relating to the suretyship. In addition it contains three clauses which, although not numbered in the original, were conveniently referred to during the arguments as Nos. 8, 9 and 10. Cl. 8 ran thus :

> Further we hereby jointly and severally undertake as principals and not as guarantors to make the following payments to you in consideration of the assignment by you to us on the occasion of each such payment of a like sterling amount of your claim against the German company. Such payments shall be made as follows, namely . . .

Then follows a list of amounts in sterling, and the dates on or before which each payment shall be made, corresponding exactly with the amounts and dates set out in cl. 4 of the February contract. The subsequent part of cl. 4 naturally does not appear in the April contract, as it deals with a matter which concerns only Enskilda and the German company. Cl. 9 of the April contract in effect corresponds with cl. 3 of the February contract. Cl. 10 provides that default in payment of one instalment shall not accelerate the date for payment of any other instalment. There was no suggestion in the February contract that it would. On the same date (Apr. 16, 1936) the English company gave security for its liability under the April contract "whether as guarantors or as principals." The nature and terms of the security are set out in what has been called the April letter, but in the view which I take of this case it is unnecessary to refer to that document in detail. One other document should be mentioned. Some doubt seems to have arisen as between Enskilda and the German company as to the true construction to be placed upon that part of cl. 4 of the February contract, which (as I have stated) was omitted from cl. 8 of the April contract, and the construction which was agreed between them is set out in a letter from Stockholm to Berlin of Mar. 17, 1936. But again, in the view which I take of this case, it is unnecessary to set out the contents of this letter, or to discuss its exact effect upon the provision as originally drafted.

All went smoothly under the February and April contracts. The German company acquired the Reichsmarks, the first four payments by the two companies mentioned in cl. 4 of the February contract and cl. 8 of the April contract were made, and the corresponding claims of Enskilda against the German company were assigned, with the result that the liability of the German company to Enskilda which would become due at the end of the 8 years became reduced to £42,000, instead of £58,800. The fourth payment and assignment took place on Apr. 28, 1939. The fifth payment and assignment fell to be made on Oct. 28, 1939, but in the meantime, on Sept. 3, 1939, war broke out between this country and Germany. The crucial question on this appeal can now be stated, *viz.*, was the April contract abrogated on the outbreak of war, so that it can no longer be enforced at any time thereafter ?

As a matter of history it is right to state that on Oct. 30, 1939, Enskilda commenced an action in the King's Bench Division claiming payment of the fifth payment, *viz.*, £3,360, but the action was dismissed by Hawke, J., whose decision was affirmed by the Court of Appeal. The ground of the decision was that the payment would be for the benefit of the German company, and was therefore prohibited by the Trading with the Enemy Act, 1939. Subsequently the English company went into voluntary liquidation, and its assets have been sold, but a sum of £25,000 has been placed in joint names to answer its obligations (if still subsisting) under the April letter. On Jan. 29, 1942, the English company issued the writ in the present action, claiming a declaration that the April contract can no longer be enforced against it and an order for the release to it of the £25,000 above mentioned. This claim was based upon allegations that the April contract was a contract the continued existence of which would be for the benefit of the enemy, or would involve intercourse between the English company and the enemy. It was also alleged that the contract had been frustrated.

Simonds, J., was of opinion that the April contract was one the performance or continued existence of which after Sept. 3, 1939, would benefit the enemy, and would involve intercourse with the enemy. He did not deal with frustration. He accordingly made an order declaring that the April contract had been abrogated by the outbreak of war and could no longer be enforced against the plaintiffs, and ordering the release of the £25,000.

On appeal, this order was discharged and the action was dismissed. As I read the judgment of the Court of Appeal the reasoning proceeded thus. It was admitted that further performance of the April contract during the war "must benefit the enemy"; it was also apparently agreed that a contract with a neutral the further performance of which during the war "would in fact confer an immediate or future benefit on the enemy would be abrogated by the outbreak of war"; nevertheless the court was of opinion that the April contract, being a contract with a neutral, might continue in existence after the outbreak of war on the basis of suspension during the war. Upon that footing, it was said, the benefit to the German company (and, therefore, to the enemy) became so vague and uncertain that no valid ground existed on which a British subject could be freed from his obligation to a neutral.

My Lords, I confess I feel great difficulty in following this reasoning. By the very terms of the bargain struck between all the parties in February, and formally recorded as between Enskilda and the two companies in April, the further performance by the English company during the war, either of cl. 4 of the February contract (*eo nomine*) or of cl. 9 of the April contract (*eo nomine*), must inevitably result in a clear and direct benefit to the German company (which was stipulated for by the German company and assented to by Enskilda in order to obtain sterling), *viz.*, a large reduction in the German company's indebtedness of £84,000. The four payments made before the war had already reduced it to £42,000, leaving outstanding a liability of £42,000. The carrying out of the April contract during the war according to its terms would relieve the German company from a further liability of £16,800. But the axe falls when war breaks out. At that moment there was nothing vague or uncertain about the benefit to the enemy which would result from carrying out the very terms of the bargain. All the necessary conditions existed for abrogation under the common law rule. Illegality does not suspend, it dissolves: see *per* LORD SUMNER in *Ertel Bieber* v. *Rio Tinto* (1) ([1918] A.C. 260, at p. 285). What justification then can there be for saying, we will not declare this contract to be abrogated because it is a contract with a neutral, but we will declare it to be only suspended, and then suspension will only involve a vague and uncertain benefit to the enemy, insufficient to justify freeing a British subject from his obligation to a neutral? I know of none, and can imagine none. Indeed, a fatal difficulty seems to arise. If a contract, the further performance of which (like this one) requires acts to be done on or before fixed dates, from the doing of which on those dates stated consequences clearly beneficial to the enemy are to flow, is *prima facie* abrogated at common law on the outbreak of war, it can be no answer to say that the contract need only be suspended during the war if the benefit to the enemy thereby becomes vague and uncertain, for you would by the suspension be substituting a new and different contract into which the parties had never entered: see *e.g.*, *Distington* v. *Possehl* (7).

The case for the respondents on the appeal before this House was argued on different grounds. It was conceded that contracts the further performance of which would confer upon the enemy an immediate or future benefit or involves intercourse with the enemy are abrogated on the outbreak of war. To quote LORD DUNEDIN in *Ertel Bieber* v. *Rio Tinto* (1) ([1918] A.C. 260, at p. 274):

> From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunity for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law.

It was also conceded that the same principle would apply to a contract between British subjects, or between a British subject and a neutral if according to its very terms further performance of it would give the opportunity or tend to the increase indicated above. It was, however, contended that this contract fell within certain exceptions to the rule. That certain exceptions do exist is well established. To quote LORD DUNEDIN once more, he states the exceptions thus in *Ertel Bieber* v. *Rio Tinto* (1) (*ibid.*, at p. 269):

> There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey* v. *Lowenfeld* (4).

Thus a contract which is completely executed on one side, and under which nothing remains to be performed except payment to be made by the other of a liquidated sum whether already due, or *debitum in praesenti solvendum in futuro*, is unaffected by the outbreak of war. The payment cannot in fact take place between enemies in war time; so long as the war lasts the payment is suspended. Nor is enemy property confiscated at common law by the outbreak of war, and consequently contractual rights and obligations incidental to the ownership of property are not put an end to at common law by the outbreak of war. The enforcement of them during the war may be impossible, but they will survive the war.

It was first contended that the April contract fell within the exceptions because the April contract was a contract wholly executed by Enskilda and under which nothing remained to be done by the English company except the payment of money. This was the main contention advanced by the respondents before us, and it is this contention which is adopted by those of your Lordships who favour the dismissal of this appeal. But they reach this conclusion on two grounds, concerning the construction and effect of the April contract, which appear to me fundamentally wrong, and I feel bound to state in detail my reasons for so thinking.

One ground is of this nature. The payments to be made by the English company under the April contract are treated as payments made at the request of the German company, and it is then said that the English company would, independently of the provisions of cl. 8, and whether it paid as a surety or a principal, be entitled to reimbursement. Equity, it is said, would transfer to the English company the right vested in Enskilda to recover from the German company the amounts paid. The April contract added nothing in this respect; cl. 8 conferred on the English company no right which it would not have obtained by the mere fact of making the specified payments. Surely this view is misconceived. That the English company entered into both the February contract and the April contract in obedience to the instructions of the German company, no one can doubt. But the right in Enskilda to receive, and the obligation on the English company to pay, the instalments rests on the April contract. They are payments which will become payable by the English company to Enskilda before anything is payable to Enskilda by the principal debtor at all. Nor are they made by the English company as a surety, or at the request (express or implied) of the German company. They are made by the English company as a principal under compulsion of the April contract. Even if the pre-war instalments could (contrary to my view) be treated as being payments made at the request of the German company, no post-war instalment could possibly be treated as having been made at the request of an enemy. But for the existence of the April contract, there would have been no obligation on the English company to pay any of the "instalments"; any such payment would have been a purely voluntary act, creating no right, legal or equitable, in the payer. Even if the first portion of cl. 4 of the February contract was not (as between the parties to the April contract) superseded by cl. 8 of the April contract, but still remained binding, the legal position would remain unchanged. The English company would make the payments not as a surety, or at the request of someone who was indebted to the payee, but as a principal under the compulsion of a contract with the payee.

The other ground is of this nature. It is said that the provision in the April contract for the assignment of Enskilda's rights against the German company is only a provision as to the method of payment, that the April contract had been wholly executed by Enskilda before the outbreak of war, that Enskilda had then an accrued cause of action in debt for each instalment, that the tender of an executed assignment by Enskilda was a mere formality, and that Enskilda could sue for an instalment, if unpaid on the specified date, upon an allegation that Enskilda was always ready and willing to execute an assignment on payment. I cannot agree. It is, in my opinion, impossible to treat cl. 8 as a mere agreement to pay fixed amounts on stated dates, constituting debts to be paid on those dates, subject to the fulfilment by Enskilda of conditions. It is a contract to pay the instalments (I quote the words) "in consideration of the assignment by you to us on the occasion of each such payment of a like sterling amount of your claim against the German company." This is nothing but a contract for the sale and purchase of a number of choses in action on specified dates. As was pointed out in the judgment of Sir Wilfrid Greene, M.R., in *Stockholms Enskilda Bank Aktiebolag* v. *Schering, Ltd.* (8) (see [1941] 1 All E.R. 257, at p. 264), the remedy thereunder would be not by action for debt, but by proceedings for specific performance of the contract of purchase, after execution and tender of a proper assignment of the subject-matter of the purchase. When war broke out no cause of action had accrued to Enskilda in respect of post-war instalments. The only obligation to pay is on receipt of a tendered executed assignment of the property agreed to be sold; the only obligation to part with the property sold is on receipt of the purchase price. A "ready and willing" plea may well be a proper and necessary plea in an action for breach of a contract, for the purpose of alleging and establishing that the plaintiff who sues for breach is not himself in breach. But we are here considering the position in relation to an action for the enforcement of this contract, not in relation to an action for its breach. In order to enforce it, Enskilda would have to sue for specific performance, and except upon allegation and proof of execution and tender of an assignment of the property sold, there would be no cause of action for the purchase money. In other words the April contract, so far from having been fully performed by Enskilda before the outbreak of war, remained completely executory on both sides in relation to the post-war instalments. On each instalment date each party had to complete the sale and purchase, Enskilda by delivering an assignment of the property sold in exchange for the purchase money, the English company by paying the purchase money in exchange for an assignment of the property sold.

Another argument advanced on behalf of the respondents was to the effect that so far as concerns that part of the April contract which deals with suretyship, Enskilda had wholly performed its part. It had complied with the request of the two companies, and had made over the marks to the German company which constituted the consideration for the suretyship, and the carrying out of that obligation involved neither intercourse with nor benefit to the enemy. I have already drawn attention to the fact that in sober truth no consideration for the suretyship had moved from Enskilda to the two companies who had made no request; but assuming the truth of this fiction, it is in my opinion impossible to sever the April contract and to treat it as if there were two separate and independent contracts, one for suretyship and the other for the sale and purchase of Enskilda's claims against the German company. The April contract is one entire and essential constituent of a transaction between Enskilda and the German company. In order that the German company might induce Enskilda to let it have the Reichsmarks for the reduced price of £50,400 sterling, it was necessary that the two companies should, under instructions from Germany, both guarantee the larger price up to £50,400, and agree to buy Enskilda's claims against the German company at prices in sterling sufficient to provide in sterling the reduced price of £50,400. Unless this twofold liability had been undertaken by the two companies (as it was undertaken both in the February contract and the April contract) the bargain between Enskilda and the German company could not have been struck.

Reliance was also placed upon the exception which was described by LORD DUNEDIN ([1918] A.C. 260, at p. 269), in these words:

> Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated.

I am not sure that I understand correctly one argument on this contention. I think that it was said that the April contract was a concomitant of the right of property which Enskilda had acquired by its contract with the German company. But that is not the kind of property to which LORD DUNEDIN refers. He is not referring to choses in action or contractual rights. He is referring to contracts such as covenants running with the land, the right to enforce which belongs to the owner for the time being of the land. The interest in the land is not confiscated at common law by the outbreak of war; the power to enforce the covenant cannot be exercised during the war, but when the war ends the power of enforcement revives. It may be difficult to define with exactitude or exhaustively the class of "concomitants." Each case must be considered when occasion arises. But I am of opinion that the present case cannot be treated as a contract which is a concomitant of rights of property within the exception.

Finally it was suggested that the existence of the security created by the April letter brought the case within this exception. This appears to me an argument which must fail. So far from the April contract being a concomitant of the right of property created by the security, it is the security which is a concomitant of or ancillary to the April contract; and the argument when brought to bedrock comes to this, that obligations which (if unsecured) would be abrogated at common law, are saved from this fate by the fact that security has been given for their performance. That will not do. With the disappearance of the obligations the security for their performance necessarily disappears as well.

My Lords, I am in agreement with the views of Simonds, J., on this part of the case. I agree with him when he says, that the simple question is whether A the performance of the April contract after Sept. 3, 1939, would benefit the enemy, by increasing his resources or crippling those of His Majesty's subjects. That it must do so is as he and the Court of Appeal thought, and is, as I think, plain: and I will add that it is equally plain that the pecuniary benefit to the German company was one of the very objects for which, in the first instance the February contract, and subsequently the April contract, were entered into.

Whether the performance of the April contract would involve intercourse B with the enemy, is a point with which I need not deal, but the course of dealing between the parties in the days of peace affords strong support for the view expressed by Simonds, J. I express, however, no view of my own, nor do I say anything on the question of frustration. One cannot but regret the unsatisfactory outcome of the argument in this House. The appeal fails for reasons which differ from those which prevailed in the Court of Appeal and which differ, *inter se*. To me two decisive points stand out crystal clear, C unanswered and, I venture to think, unanswerable; (i) the April contract, if performed in war-time confers a distinct and immediate benefit on the enemy; and (ii) as regards post-war instalments it was at the outbreak of war wholly executory.

I would allow this appeal and restore the order which the Court of Appeal discharged.

D

Lord Porter: My Lords, I have found the solution of this case a matter of difficulty, primarily, I think, because of the complexity of the arrangements between the parties and the necessity of safeguarding the rights of neutrals whilst not diminishing the ability of this country to preserve its interests in time of war. It is, no doubt, generally true that the further performance of contracts made before the outbreak of war and not fully performed on either side is prohibited as contrary to public policy provided that such performance E involves intercourse with an enemy or benefits him. For the sake of brevity I speak of this result as abrogation of the contract though the contract itself is not abrogated, but further performance alone forbidden. There are, however, exceptions and limitations upon this doctrine. So far, at any rate, as concerns benefit to the enemy, the further performance of contracts which have been completely performed on one side and in which all that remains is payment F by the other are suspended, not dissolved, and in the same category are to be placed certain contracts, particularly those which are really concomitants of the rights of property though still executory: see *per* Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1) ([1918] A.C. 260, at p. 269).

In each case, therefore, before deciding whether a contract is abrogated or merely suspended on the outbreak of war it is essential to determine its exact construction and effect. In the present instance there are four documents G which must be considered.

(1) A contract dated Feb. 24 and 28, 1936, originally in German of which your Lordships have been furnished with an English translation. This, headed "Contract of Debt," is made between the respondents, as creditors of the one part and a German company, the Schering-Kahlbaum A.G., of Berlin, as debtor of the other part. The appellants and the Schering Kahlbaum India, Ltd., of Bombay, called the sureties, are also parties; H

(2) A contract dated Apr. 16, 1936, made between the respondents, the appellants and the Schering Kahlbaum India, Ltd.;

(3) A contract between the respondents and the appellants contained in a letter dated Apr. 16, 1936; and

(4) A letter dated Mar. 17, 1936, written by the respondents to Schering-Kahlbaum A.G. modifying the terms of the contract of February in so far as those two companies were concerned but to which the appellants were not parties.

(1) By the first of these contracts the respondents, as I think, undertook

to provide Reichsmarks of the value of £84,000 at the rate of exchange current in Berlin on the day when the Reichsmarks were handed over in return for the promise of repayment by the German company, in eight years time, of that sum in sterling or, if that was impossible, in blocked marks at the rate of exchange current in Berlin for payment in London at the date of repayment. For the repayment of this sum the English and Indian companies became sureties to the extent of £50,400 and bound themselves as principals to repay it with the proviso that they should have credit for all repayments by themselves or the German company or third persons. Cl. 4 contained certain special terms under which the sureties were to acquire the claims of the respondent against the German company "with the proviso that" (by which I understand is meant, "provided that") they should pay at stated intervals terminating after eight years certain fixed instalments amounting in all to £50,400. £50,400 is 60 per cent. of £84,000 and if and to the extent that these payments were made at the agreed dates the German company was to enjoy the remission of the extra 40 per cent., but if prompt payment of any one instalment was not made the German company was to cease to have this remission in respect of any sums still due, and was to pay the remitted and unremitted portions at the end of the eight years. In my view this clause gave the sureties an option to furnish the stipulated instalments if they chose but did not compel them to do so. It is, however, as I think, unnecessary to determine whether it was left to them to pay or not to pay or whether they obliged themselves to make the payments. In case the German company or the sureties should become bankrupt or should make an arrangement with their creditors the debt became immediately payable and, whereas the relationship between the German company and the respondents was to be governed by German law, that between it and the sureties was to be governed by English law. The marks to be supplied were Sperrmarks for internal use in Germany and the actual value in a European market may well have been nearer to £50,400 than to their nominal value of £84,000, but this consideration is, I think, immaterial.

(2) On Apr. 16 of the same year two further contracts were entered into apparently to clarify the position and possibly to make what had been only an option in the earlier contract obligatory for the sureties. The first of these two contracts was between the sureties and the respondents and by its first seven paragraphs guaranteed payment of £50,400 out of the £84,000 advanced to the German company. Para. 8 contained a joint and several undertaking by the sureties as principals and not as guarantors to make the payments stipulated in the earlier contract at the appointed dates in consideration of the assignment on the occasion of each payment of a like sterling amount of the Swedish company's claim against the German company. Para. 9 contained the proviso that each payment by the sureties should satisfy *pro tanto* their liabilities under the guarantees and that they should not be liable to make any of the payments stipulated in whole or in part in so far as they had been paid by the German company or from any other source. Default in payment of any one instalment was not to accelerate the date for payment of another and the agreement was to be governed by English law. It contained no provision for any remission in the amount to be paid by the German company as a result of the prompt payment of the stipulated instalments.

(3) The second of these two contracts of Apr. 16 was made between the appellants and respondents only and provided for the retention in the hands of trustees of certain goods the property of the English company in order to furnish security for their due fulfilment of the other April contract. The release of the goods held under it forms part of the claim in this action, but in my view this contract itself is not otherwise material.

(4) The fourth contract is of more importance. It is made between the appellants and the German company only and is, so far as that company is concerned, a modification of that part of the first contract which stipulated that non-payment at the due date of any one of the instalments by the sureties should deprive the German company of all future remissions. Under the new arrangement, as I understand it, failure to pay an instalment on the part of the sureties was no longer to prove fatal to the remission: in future any payment from any source, including a recovery by execution upon the property of the sureties, was to keep it alive. The time by which these recoveries were

to be made is not stipulated. In these circumstances it is said by the appellants that they are absolved by the outbreak of war from any future performance of their obligation to pay the instalments payable after that date, are entitled to have the goods held as security for their guarantee released and are freed from their obligation as sureties to pay the sum of £50,400. The actual relief claimed is a declaration that the April contract can no longer be enforced against the appellants and an order for the release of the security.

Strictly speaking it might be contended that the German company was not a party to either of the April contracts and that neither of them contained any term which would benefit the German company unless it could be said that the assignment of their debt to the respondents in favour of the appellants portion by portion as the instalments were paid brought about this result, inasmuch as the respondents might recover it from the German company at the end of the eight years if it were still due to them, but so long as England and Germany were at war, the appellants could not do so. So also it might be contended that the sureties were not parties to the fourth contract and therefore, so far as concerned any contract to which they were parties, the right to remission ceased when it was held (as it was held by the Court of Appeal in *Stockholms Enskilda Bank* v. *Schering, Ltd.* (8)) that it was illegal to pay the instalments whilst England and Germany were at war and when consequently they were not paid at the due dates.

These suggestions, however, in my opinion, take too narrow a view of the contracts between the parties. Their relationship must, I think, be judged by the agreements as a whole and indeed the case was so argued before your Lordships. But though the consideration of the problem must be approached in this way I do not think it proper to neglect the form of the contract between the parties or the development of the arrangements which finally took shape in four separate sets of provisions, none of which purported to put an end to those which preceded them.

What then are the principles to be considered ? It is not true to say as a general proposition that a state of war avoids all contracts even between subjects and enemies : see *per* LORD DUNEDIN in *Ertel Bieber* v. *Rio Tinto* (1) ([1918] A.C. 260, at p. 269). One such exception at any rate is the case of an executed contract where all that remains to be done is the payment of money by a subject of this country to an enemy : see *Ottoman Bank* v. *Jebara* (10) where it is said ([1928] A.C. 269, at p. 276) :

> . . . it is not every contract that is abrogated by . . . war ; it is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy.

It was said that the present contract was still executory and necessitated intercourse with the enemy, since the appellants would require to ascertain from the German company what, if any, payments it had made. I see no reason for such intercourse ; the appellants could and would in the normal course ask the respondents what payments had been received from the enemy or other persons and need not make any enquiries of the enemy and the same considerations are equally true of the appellants' obligations as surety. Whether the contract was still executory or not I leave for consideration later on. But executory contracts with an enemy are not dissolved only where they involve intercourse : they are also dissolved where they may tend to increase the resources of the enemy or cripple the resources of the King's subjects : see *per* LORD DUNEDIN in *Ertel Bieber* v. *Rio Tinto* (1) [1918] A.C. 260, at p. 274).

In the contract under consideration there does not appear to be any question of crippling the resources of the King's subjects, but four questions remain : (i) is this an executed contract, *i.e.*, one which has been wholly performed on one side ; (ii) does it bring any substantial advantage to the enemy ; (iii) is it one of the class which, executory or executed, is excepted from those abrogated by war, and in any case (iv) is it wholly abrogated by the existence of a state of war between Great Britain and Germany.

(i) So far as concerns any obligation to the German company, the respondents have performed their contract in full. They had to provide and they have provided £84,000 worth of Reichsmarks : all that remained was for the German company to perform its part by paying its debt to whoever was found to be entitled in 1944. They had, however, still to receive from the appellants or from elsewhere the remainder of the instalments and in return for any payments by the appellants to give the partial assignments of the German company's debt. That part of the April contract, therefore, which stipulated for the payment of £50,400 by instalments was wholly executed on the respondents' side as between them and the German company, but is still uncompleted as between the respondents and the appellants to the extent that the rest of the instalments have still to be paid and the rest of the debt to be assigned.

(ii) There is no certainty of benefit to the German company but the contract makes provision for it. By the earlier case between the same parties already referred to it was held by the Court of Appeal that the payment of any of the instalments was an offence under the Trading with the Enemy Act, 1939, as it would result in (*a*) the respondents having financial dealings for the benefit of an enemy within sect. 1 (2) (*a*) of the Act; (*b*) making a payment for the benefit of an enemy within sect. 1 (2) (*a*) (ii); and (*c*) discharging an obligation of an enemy within sect. 1 (2) (*a*) (iii). The decision was a decision with regard to certain instalments then due under the provisions of the February and the April agreements and was arrived at by a consideration of the wording of the 1939 Act. It does not deal with the position at common law now in dispute before your Lordships' House. As, however, the instalments were not paid at the dates prescribed the German company would have lost the remission had the original agreement of February not been modified. It was modified by the letter of Mar. 17, 1936, which altered the rights of the German company as to remission of the sum of £33,600, *i.e.*, 40 per cent. of the original debt. Whereas by the original agreement failure on the part of the sureties to pay the instalments on the prescribed dates would have prevented the German company from obtaining any remission after the date of such failure, the result of the March agreement was that the remission would not be forfeited unless the respondents were not satisfied by payment from third parties or by execution on the sureties' property or in some other way in full. The agreement is obscurely expressed and nowhere stipulates a date by which this repayment has to be made but the reference to execution suggests that repayment at the prescribed time or even immediately after the accruing of the German company's obligation to pay the whole sum was not required. It was not contended that the right to earn the remission was lost provided that payment was made at or before the eight years' intermission, granted by the contracts to the German company, had elapsed, and having regard to the provision as to "execution" I should myself say that some additional time after that date must be allowed. What additional time is permissible it is perhaps unnecessary to determine. The result of the change would, therefore, appear to be that the German company was to have the advantage of this remission if from any source or by any means the respondents were to obtain payment of £50,400 within a reasonable time after Apr., 1944.

In these circumstances the German company was said to derive two benefits from the continued existence of the contract (*a*) a transfer of the liability of the German company to repay Enskilda to a liability by that company to repay the English or Indian companies, (*b*) an undertaking by the English company to pay at some unspecified time instalments which if made in time, would insure remission, whether the German company paid or not, whereas the German company might be unable or unwilling to repay in time and so would fail to avoid liability for the larger payment to the respondents or their assigns. If this be the position, the question to be determined is whether these contracts are abrogated on the ground that they may benefit the enemy if the instalments are duly paid, though fulfilment of the guarantee may not be open to any objection.

(iii) Admittedly contracts which are wholly performed on one side and certain contracts which are really the concomitants of rights of property are not abrogated by war and this is true of the latter even though they are still executory on both sides. There is, indeed, no such general proposition as that a state of war avoids all contracts between subjects and enemies. "Accrued rights are not affected though the right of suing in respect thereof is suspended" are LORD DUNEDIN'S words in *Ertel Bieber* v. *Rio Tinto* (1) ([1918] A.C. 260, at p. 269).

In the present case the respondents had fulfilled all their obligations to the

German company: they had handed over Reichsmarks of the nominal value of £84,000. It is true that they had still to tender to the appellants an assignment of part of the debt in return for the payment of each instalment, and one view of the transaction is that the suretyship was only one and that an incidental part of the agreement. On this view the substance of the matter was that the English company had not contracted to repay the loan which the respondents had made to the German company but had agreed to purchase assignments of parts of the German indebtedness by payments of stipulated sums at stated times. A

This view, in my opinion, lays too great stress upon the contract of Apr. 16, to the exclusion of the original agreement of February and the letter of Mar. 17 which modifies its terms. Unless it be conceded, and I see no reason for the concession, that the April contract, by inference, put an end to the February agreement the abrogation of the former would still leave the latter in force. Indeed it is, I think, impossible to say that the February contract was superseded. B If it were, there would be no provision for remission and no corresponding benefit to the German company. The most that can be said is that it modifies it. Moreover, though the March letter is, as I have said, obscurely worded, yet it apparently enables the German company to earn the remission by means of a payment made by it or by some one on its behalf even up to or possibly beyond the date on which the German company was under contract to repay the loan. C

(iv) In these circumstances I think that the arrangement between the parties was not merely or substantially a purchase by the appellants of portions of a debt in which they were not otherwise interested. Rather I think it was a stipulation for repayment of a sum of money lent to the German company at, as the April contract states, the request of the appellants and the associated Indian company, on their undertaking to stand surety for its ultimate payment, D coupled, however, with an additional obligation to pay by instalments in consideration of an assignment of portions of the debt. In considering its import one has, therefore, to remember that the appellants were not merely under contract to pay by instalments but were also, and, as I think, primarily, guarantors of the debt. Indeed in my view they were bound, so far as the February contract was concerned, only to act as surety though given an option to earn remission of part of the debt by paying off sixty per cent. of it at earlier E agreed dates. So regarded, an important element in the matter was repayment, not purchase; the contract was not simply an agreement to sell and purchase instalments of a debt but to repay the money advanced to the German company. The whole method by which the negotiation was arranged and the form which it took appears to me to bear out this view.

Originally there was an obligation of suretyship with an option to make advance payments and take assignments of portions of the debt in return. F This was followed by a continuance of the suretyship but with an obligation instead of an option to make payments in advance of the time when the Germans must repay. This again was modified so that the incentive to prior payment was removed, since the obligation to fulfil the contract of suretyship and the right to earn remission coincided in time, whereas originally remission was lost if punctual payment of the prescribed instalments was not made. In a G conflict of views as to whether the contract was primarily for payment of a debt or purchase of portions of it, I ask myself what in substance the final bargain was. One thing is certain: the contract, so far as it was a contract of guarantee, has been fully performed on the part of the respondents and they have nothing more to do than require the guarantee to be implemented. If the contract as a whole is declared to be abrogated—and by the contract as a whole I mean not only the April contract of which alone abrogation is claimed, H but also the February contract and the March letter as regards which no claim is made—then the guarantee as well as the contract to pay by instalments is gone. I see no reason for so drastic a step. The fulfilment of the guarantee can give no benefit to the German company, beyond that existing in every case where there remains no obligation except the payment of a debt due presently or in the future. Such an obligation, it is conceded, is suspended, not abrogated.

The question of the right of the respondents to claim payment of the instalments is now academic; the time for payment by the German company has arrived and a claim on the guarantee can be made, unless guarantee and instalments are abrogated together. For the reasons I have given I do not think they are. There remains only the fact that the neutral might sue at a date when the Englishman being still at war could not do so. I do not think this is enough to dissolve the contract. If it were then any assignment of an enemy debt to a British national in time of war by a neutral would be invalid, since the result would prevent any immediate recovery—a consequence which would appear at least unlikely. I agree with LORD THANKERTON that there is no ground for applying the doctrine of frustration. The agreement is, as I think, a very special one and I cannot say that I have found the solution other than difficult. Nevertheless for the reasons which I have stated, I would dismiss the appeal.

LORD MACMILLAN [read by LORD PORTER]: My Lords, Schering, Ltd, the plaintiffs and now the appellants in this action, claim that a contract with a Swedish bank dated Apr. 16, 1936, to which they were a party, ceased to be enforceable against them on the outbreak of war between this country and Germany on Sept. 3, 1939. They base their claim on the ground that the further performance of the contract would be to the benefit of the King's enemies and that it has accordingly at Common Law become illegal and ought to be abrogated.

The law as to the effect of the outbreak of war on subsisting contracts in which an enemy of this country is interested cannot be said to have reached a high degree of precision. It has to be gathered from a series of decisions, each of them concerned with the circumstances of a particular case, in which the principle involved has been progressively though not always consistently formulated. The root of the matter is that a country at war cannot allow transactions to proceed which are calculated to aid the enemy in the prosecution of hostilities. A subject of this country must have no truck with the enemy. It is illegal for him to do anything which may tend to increase the war potential of the enemy in goods, money, credit or information. The growing complexity of international transactions and the increasingly pervasive character of modern warfare have combined to render more difficult the problems which confront the common law in this sphere, with the result that the Legislature has found it necessary to come to its aid by statutes relating to trading with the enemy, but with these statutes the present case has no concern.

I do not propose to narrate in detail the terms of the contract under challenge, for they are sufficiently set out in the judgments of the courts below and in the opinions of my brethren. I shall confine myself to drawing attention to the features of the transaction which in my view are material. I note in the first place that although no enemy subject is formally a party to the contract, the plaintiffs are a subsidiary, and entirely under the control of, a German company. It is only by way of compliment that I shall call them "the English company." Then I note that it is in consideration of the Swedish bank making an advance of £84,000 sterling (to be made available in Sperrmarks) to the German company that the English company, in association with another subsidiary of the German company registered in India, guarantee payment in sterling of the German company's debt to the Swedish bank to the extent of £50,400. Next I find the English and the Indian companies jointly and severally undertaking as principals to make a series of fourteen payments to the Swedish bank of varying sums amounting cumulatively to £50,400 at various dates between Oct. 28, 1937, and Apr. 28, 1944, in consideration of the assignment to the companies by the Swedish bank, on the occasion of each such payment, of a like sterling amount of the Swedish bank's claim against the German company. Each payment is to be a satisfaction *pro tanto* of the liability of the English and Indian companies under their guarantee and they are not to be liable to make such payment in so far as the amount in question has been paid by the German company or any other person or company.

The April contract which it is sought to abrogate cannot be considered in isolation. It is part of a transaction which, as the respondents state in their printed case to this House, was "carried into effect by three agreements," *viz.*, a previous February contract to which the German company was a party, the April contract now challenged and a contract by letter of the same date as the April contract between the English company and the Swedish bank. It is accordingly necessary to a true appreciation of the position, as the respondents say, "to consider the terms of the February contract." From the February contract it appears that in respect of the Swedish bank placing at the disposal of the German company Reichsmarks to the amount of the equivalent of £84,000 sterling the German company is to stand indebted to the Swedish bank in a sum of £50,400 free of interest repayable on the expiry of eight years and that the English and Indian companies are to acquire from the Swedish bank its claims against the German company by a series of instalment payments, being the same as those repeated in the April contract. If the English and Indian companies do not acquire the claim of the Swedish bank against the German company by paying the stipulated instalments then the "remission" or reduction of the principal debt of £84,000 to £50,400 is to "lapse rateably." Thus if the English and Indian companies pay only the first instalment of £6,300 the German company's debt to the Swedish company will be £73,500. In point of fact, four instalments had been paid before the outbreak of war. Thereafter further payments during the war were, in other proceedings, declared illegal under the Trading with the Enemy Act, 1939. When the transaction is seen in its entirety there can be no question that it was highly beneficial to the German company. As the managing director of the English company says in a letter to the Indian company—"this is an extremely interesting business for Berlin."

Now, can the contract of Apr., 1936, forming part as it does of this transaction highly beneficial to the enemy, be allowed to subsist after the outbreak of war? Lord Greene, M.R., is in agreement with Simonds, J., that the further performance of the contract during the war would be illegal at common law, but differs from him on the question of abrogation, holding that the effect of the outbreak of war has been only to suspend the operation of the contract during hostilities. Lord Greene, M.R., lays stress on the fact that the April contract is a contract not with an enemy subject but with a neutral and is, therefore, deserving of specially considerate treatment. To my mind the question turns upon the nature of the transaction, not upon the parties to it. I cannot do better than quote and adopt the words of Lord Russell of Killowen, then Russell, J., in *Re Badische Co.* (9) ([1921] 2 Ch. 331, at pp. 373, 374):

> . . . assume a contract between British subjects, but of such a nature that either its further performance involves intercourse with the enemy or its continued existence would confer upon the enemy an immediate or future benefit. Does such a contract become void on the ground of illegality upon the outbreak of war? The illegality being based upon considerations of public policy, I can see no reason why a contract of such a nature should not become void on the outbreak of war, irrespective of any question whether the parties thereto are enemies or friends. The test should be, in my opinion, not whether one of the parties to the contract is an enemy, but whether the contract involves intercourse with the enemy or confers an immediate or future benefit on the enemy.

I have already pointed out that, although the German company was not formally a party to the April contract, it was a party to the transaction of which that contract forms a part, but, agreeing with Lord Russell, I think that the question is one not of parties but of substance. Applying his test I ask whether the contract involves intercourse with the enemy or confers an immediate or future benefit on the enemy. Not much was made by the appellants of the point of intercourse, although I think that Simonds, J., was justified in his view that in the execution of the contract communication between the English company and the German company would in ordinary course inevitably have taken place, especially in view of the fact that the English company is not to be liable to pay any instalment to the Swedish bank "in so far as the amount in question has been paid by the German company or any other person or company."

The main point, however, is whether the contract confers an immediate or future benefit on the German company. It plainly does. Every instalment paid by the English company to the Swedish bank not only discharges *pro tanto* the liability of the German company to the Swedish bank, substituting a corresponding liability to the German company's own subsidiary in England, but also earns for the German company a substantial discount or rebate of their capital indebtedness to the Swedish bank. Each instalment as it is paid by the

English company to the Swedish bank progressively improves the financial position of the German company by diminishing its liabilities. That being so, I cannot see how the contract can be allowed to stand.

The argument of LORD GREENE, M.R., in his very full discussion of the problem, does not convince me. He agrees with SIMONDS, J., that the further performance of the contract during the war "must benefit the enemy," yet he says ([1943] 2 All E.R. 486, at p. 497) that:

> . . . it cannot be the case that a contract with a neutral is abrogated on the outbreak of war merely because its performance or existence is detrimental to this country.

With all respect, I regard as vital in the light of the authorities the fact that the continued performance or the continued existence of a contract after the outbreak of war is beneficial to the enemy and detrimental to this country; and I do not agree that the possibility of benefit accruing to the enemy is in the present case vague or speculative. It seems to me very real.

SIR ARNOLD MACNAIR, in his learned treatise on the LEGAL EFFECTS OF WAR (1944), 2nd Edn., to which I express my indebtedness, finds "the clue" to the decision of the Court of Appeal in the present case in their view that the contract on the outbreak of war was an executed and not an executory contract. He is probably right. LORD GREENE, M.R., says ([1943] 2 All E.R. 486, at p. 491):

> In the case of an executory contract with an enemy it is not merely performance so long as the state of war persists that is prohibited. The whole contract is abrogated. The reason for this is that, even if performance were postponed until after the war, the mere existence of the contract during the war might benefit the enemy by, for example, improving his credit or assisting him in his prosecution of the war by the knowledge that after the war the contract will remain on foot for his benefit.

Subject to the observation that this doctrine applies not only to contracts with the enemy but also to contracts between British subjects and neutrals or between British subjects themselves if they may benefit the enemy, the proposition is clearly well-founded. But LORD GREENE, M.R., finds it inapplicable to the present case inasmuch as in his view the contract was executed and not executory. The Swedish bank had before the war handed over the stipulated marks to the German company; it had done all that was incumbent upon it; nothing remained for it but that it should receive payment. This, it is said, is an accrued right, acquired before the outbreak of war, and accrued rights, as LORD DUNEDIN has pointed out, "are not affected though the right of suing in respect thereof is suspended." (*Ertel Bieber & Co.* v. *Rio Tinto Co* (1) ([1918] A.C. 260, at p. 269)).

I cannot agree with this account of the matter. The distinction between an executed and an executory contract is not always easy to draw but I do not regard the present contract as having ceased to be executory before the outbreak of war. The whole transaction and in particular the consequences of payment by the English company to the Swedish bank were very special. As each instalment payable by the English company fell due and was paid, assuming that it had not been paid by the German company or otherwise, the Swedish bank was bound to grant an assignment to the English company of a like sterling amount of their "claims against the German company." This has reference to the description in the February contract of the contemplated procedure as a progressive acquisition by the English and Indian companies of the Swedish bank's claims against the German company by instalments. As each instalment is paid a *pro tanto* discount is to be granted by the Swedish company to the German company on its principal debt of £84,000. It is by no means a simple case of the Swedish bank having an accrued right to a liquidated sum of money, as to which it had nothing more to do than to collect what was due to it. Suspension may be appropriate in the case of an accrued right. It means that the contract is not affected by the war and only the right to exact performance of the accrued obligation is in abeyance. Accrued rights are not forfeited at common law because the common law does not confiscate enemy property in this country. But where as here benefit would accrue to the enemy during the war as a consequence of the further performance of the contract, the contract in my opinion becomes illegal on grounds of public policy on the outbreak of war, and is abrogated. I am accordingly in favour of allowing the appeal and restoring the judgment of SIMONDS, J.

LORD GODDARD: My Lords, but for the fact that there is a difference of opinion among your Lordships I should content myself with saying that I entirely agree with the opinion of LORD THANKERTON which I have had the advantage of reading. As, however, there is a difference I will very briefly state in my own words my reasons for thinking that this appeal should be dismissed. It is unnecessary for me to set out the terms of the various documents which give rise to this action, as they have been fully dealt with in the opinions of those of your Lordships who have preceded me. In my opinion it is not open A to question that where one party to a contract has fully performed his part and all that remains is that the other party has to pay a sum of money, the contract is executed and no longer executory. That payment is to be made by instalments is immaterial, nor in my opinion does it make any difference that in the present case the appellants were entitled to assignments of the respondents' claim against the German company. A surety who pays the debt is entitled without any assignment to indemnity from the principal debtor just as he is B entitled to have the security, if any, transferred to him by the creditor. So, too, if a payment is made by one, not as surety, but at the request, express or implied, of another, the former is entitled to recover the amount from the latter on the common count for money paid for and at his request.

There can be no doubt that in making payments which, as between themselves and the respondents they did as principals, the appellants were acting on the implied request of the German company, who were all along parties to the main C transaction. Indeed, it seems to me that so far as their obligation to pay is concerned, the April contract added nothing to what had already been undertaken by the appellants under the February contract. I, therefore, regard the contract between the appellants and respondents as executed, and one which gave rise to a debt incurred when the marks were put at the disposal of the German company. In the events which happened the debt was, therefore, D incurred under a contract made before the war and it was payable in part before and in part after the outbreak. A series of cases has firmly established that war does not abrogate or discharge a debt incurred before the declaration, though the obligation to pay and the right to recover are suspended during the war. An early example is *Ex parte Boussmaker* (11). A petition was there presented on behalf of an enemy to prove a debt in bankruptcy. LORD ERSKINE, L.C., said (13 Ves. 71, at p. 71): E

> . . . if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue: but, the contract being originally good, upon the return of peace the right would survive. It would be contrary to justice, therefore, to confiscate this dividend.

He allowed the proof, but directed that the dividend should be reserved. In *Flindt* v. *Waters* (12) a policy of marine insurance had been effected on goods F and a loss incurred before the owners of the goods became enemies. LORD ELLENBOROUGH, C.J., said (15 East. 260, at p. 266):

> The insurance, the loss, and cause of action had arisen before the assured had become alien enemies: when therefore they became such, it was only a temporary suspense of their own right of suit in the courts here, as alien enemies . . .

That case was expressly approved by LORD LINDLEY in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (2). Coming to more recent times, in the *Ertel Bieber* G case (1), LORD DUNEDIN held ([1918] A.C. 260, at p. 289), that accrued rights were not abrogated by war and in *Ottoman Bank* v. *Jebara* (10), LORD DUNEDIN said ([1928] A.C. 269, at p. 276):

> . . . it is not every contract that is abrogated by . . . war; it is only a contract which is still executory and which for its execution requires [I emphasise that word] intercourse between the English subject and the enemy.

H

I take it, therefore, to be well settled that the effect of war upon a debt arising out of a contract made before the war is to suspend the right of action and not to abrogate or discharge the debt. The present is a true case of *debitum in praesenti solvendum in futuro*; the cause of action, the debt, is unaffected; the right of action is postponed until after the war. If this is true of a debt due to an enemy, it must *a fortiori* be so of one due to a neutral, though I agree that in matters relating to trading with the enemy there is no room for more tender treatment of the one than the other. There is this difference, that by reason of the Trading with the Enemy Act, 1939, had the debt been due to an enemy it would have had to be paid to the custodian of enemy property, while in the case of a neutral the money will remain with the debtor to be paid by him to the neutral at the end of the war. In passing one may observe that the fact that this Act makes debts payable to the custodian shows that the Legislature recognised that they were not abrogated, for there is nothing in the Act to revive debts or obligations which had become abrogated by operation of law.

But it is said that there is here an overriding consideration, namely, that the payment will preserve the remission of 40 per cent. for the benefit of the German debtor. It is beyond question that if the result of performance of a contract would be beneficial to the enemy or detrimental to this country the further performance is forbidden and the contract abrogated, though again rights, such as debts, accrued before the war are unaffected. This is illustrated by the order in the *Ertel Bieber* case (1) made by the Court of Appeal and affirmed in this House and which your Lordships have seen in the printed book. Now one of the reasons why a suspensory clause to operate in the event of war in a contract for the sale of goods to an enemy will not save the performance of the contract from abrogation as illegal is that to ensure to an enemy a supply of goods or raw material after the war is or may be to enhance his resources during the war. If this consideration were taken to its full logical extent it might be said to apply to debts, as it would certainly be of some benefit to an enemy to have an English debt remaining due to him even though it is not payable until the end of the war. He might be able to raise money from neutrals upon an assignment of his rights which could be enforced at the conclusion of the war. But this doctrine never has been applied to debts arising out of previous contracts, and I am not prepared now for the first time to apply it and to hold that accrued causes of action are destroyed and not suspended because otherwise an enemy might obtain a discount or some other benefit by reason of the continued existence of the obligation. The matter cannot, I agree, be tested by considering whether a benefit must or only may result, and I do not, therefore, discuss the true meaning of cl. 4 of the February contract as amended by the March letter, which is certainly somewhat obscure. It may be that by the application of German law which governs the contract between the German company and the respondents the former has lost the benefit of the discount as the instalments have not been paid; but the matter must be determined on the rights of the parties as they existed on Sept. 3, 1939, and I base my opinion on the grounds which I have already stated. It was also submitted that the contract was still executory because of the provision for the assignment by the respondents to the appellants of their rights against the German company. I regard this as no more than a provision as to the method of payment and perhaps as some additional precaution, and, as I have already said, whether the appellants paid as sureties or as principals, in either case they would without any assignment be entitled to reimbursement, though in this particular case the right to reimbursement could not be enforced until the expiration of eight years from the date of the agreement. I do not agree with the opinion expressed by the Court of Appeal in the former action brought by the respondents, that their true remedy was by an action for specific performance. I think they could, but for the war, have sued at law, alleging either that they had made tender of an assignment or that they were always ready and willing to execute one on payment. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellants); *Slaughter & May* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

cKinnon and Tucker, L.JJ.,
pp. 59, 63, *applied.* Inland
venue Comrs. v. Electric and
sical Industries, Ltd. [1948]
All E.R. 514.

Approved. Tootal Broadhurst Lee
Co., Ltd. *v.* I.R.C. [1949] 1 All E.R.
261

INLAND REVENUE COMMISSIONERS *v.* DESOUTTER BROTHERS, LTD.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Tucker, L.JJ.), November 22, 23, 1945.]

Revenue—Excess Profits Tax—Royalties received from licences of patented inventions—"Income received from investments"—Finance (No. 2) Act, 1939 (c. 109), *s.* 12 (1), (4), *Sched.* 7, *Pt. I, para.* 6 (2), (9).

The appellant, a British company manufacturing electrical and pneumatic tools, was the registered proprietor of British patents covering improvements in electrically operated hand tools. It also owned patents taken out in the United States of America covering the same subject-matter. By two agreements, dated June 3, 1937, and Aug. 1, 1940, respectively, the appellants granted to an American company an exclusive licence to manufacture and sell, within a defined territory, drills made in accordance with the patents mentioned in the agreements. A royalty was reserved to the appellant company in respect of the tools manufactured or sold by the American company. On the question whether those royalties ought to be included in the computation of the appellant company's profits for the purpose of assessment to excess profits tax with regard to the chargeable accounting period for the twelve months ended on Dec. 31, 1940, it was contended for the appellant company (i) that on a true construction of the Finance (No. 2) Act, 1939, s. 12, this particular income was, as a matter of law, excluded from the profits of which account was to be taken; (ii) that, as a matter of fact, this income was not profits of the trade or business, and, since the Commissioners failed to come to any finding on it, the case should be remitted to them; (iii) that the royalties were income received from investments within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Pt. I, para. 6, and ought, therefore, to be excluded from the computation of the profits for the purpose of assessment to excess profits tax:—

Held: (i) on a true construction of the Finance (No. 2) Act, 1939, s. 12 (1), (4) the profits derived from the royalties were liable to tax. Subsect. (4) of the Act did not restrict the application of subsect. (1).

(ii) on the facts as found, the royalties were profits arising from the company's trade or business, and, therefore, there was no case to be sent back to the Commissioners.

(iii) the exploitation of a patent in the hands of a manufacturer differed from that of a mere passive owner, in that only in the latter case could the income from the patent be properly described as income from an investment. In the circumstances of the case, therefore, the income received by the appellant company under the agreements was not income derived from investments within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Pt. I, para. 6, but income of the trade or business and, as such, liable to tax.

Decision of Macnaghten, J. ([1945] 2 All E.R. 532) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal affirm the court below upon a somewhat different ground. Macnaghten, J., held that royalties received from licences of patented inventions were not income received from "investments," following his own decision in the *Rolls-Royce* case (1), where he laid down the test that in order to have an "investment" there must be a laying out of money in order to acquire it. Lord Greene, M.R., regards this test as fallacious, and lays stress upon the distinction between a patent in the hands of a manufacturer engaged in exploiting his monopoly, and a patent in the hands of a mere passive owner. The profits received by the latter would, he considers, be properly regarded as profits of an investment, whilst those received by the former are mere trading receipts. The quality of the receipts appears, therefore, to be a question of fact in each case.

For the Finance (No. 2) Act, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 1180.]

Case referred to:

*(1) *Inland Revenue Comrs.* v. *Rolls-Royce, Ltd.*, [1944] 2 All E.R. 340.

Appeal by the taxpayer from a decision of Macnaghten, J., dated July 27, 1945, and reported ([1945] 2 All E.R. 532), where the facts are fully set out.

F. Grant, K.C., and *F. N. Bucher* for the appellants.
D. L. Jenkins, K.C., and *Reginald P. Hills* for the respondents.

LORD GREENE, M.R.: In this case the question is whether or not certain income—and I use a neutral word for the moment—is to be brought into account in ascertaining the profits arising from the appellants' trade or business in the year in question for the purposes of the excess profits tax.

The appellants have raised three arguments. The first argument is that, on the true construction of the relevant sections of the legislation, this particular income is, as a matter of law, excluded from the profits of which account is to be taken. The second argument is that, if that be not right as a matter of law, then, as a matter of fact, this income is not profits of the trade or business. That is a question of fact, and it was said that, as the Commissioners did not come to any finding upon it, the case must accordingly go back to them. The third argument is that, within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Pt. I, para. 6, the income in question is income received from investments, and is expressly excluded from being brought into account for the purposes of this legislation by that paragraph.

The first argument is based on the language of the Finance (No. 2) Act, 1939, s. 12 (4), which deals with excess profits tax. The first subsection speaks of:

> . . . the profits arising in any chargeable accounting period from any trade or business to which this section applies . . .

It is in respect of those profits that the tax is exigible. It will be observed that the language only extends to the profits arising from "any trade or business." Subsect. (4) says:

> Where the functions of a company or society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company or society.

I should have thought that the objects of that subsection were manifest. In my view, it was intended, and quite clearly intended, to bring into the net a type of corporation which otherwise would or might have escaped it. The commonest type of corporation with which the subsection is dealing is what may be called a trust investment company, whose business is the holding of investments and deriving income from them. Such a corporation would not be said to be carrying on a "trade or business" within the meaning of subsect. (1). Anyhow, if it were not absolutely clear, subsect. (4) makes it quite certain that that type of corporation is to be included, and its operations are to be regarded as the carrying on of a trade or business. That seems to me to be the real and sole object of subsect. (4). The argument really amounted to this: by implication the profits from investments or property held by any other type of corporation are excluded. I cannot begin to see the shadow of a foundation for any such argument. In my opinion, it breaks down completely, once the real significance of subsect. (4) is appreciated.

The second argument was that the income here in question was not in fact a profit arising from the company's trade or business. I am not at all sure whether that argument was put before the Commissioners. It is, if not impossible, extremely difficult to discover it in the contentions as set out in the case, and the Commissioners do not appear to have been invited to make the findings of fact which would be necessary to carry the argument to success. I do not propose at this moment to go into the details why I think that that argument also breaks down; but I may say, concisely, that, on the facts as found, and the documents, there is only one conclusion to be drawn, in my opinion, namely, that the income in question is a profit of the trade or business. That being so, even if the argument were acceptable in other respects, there would be no case to send back to the Commissioners at all. My reasons for thinking that the income is the profit of the trade or business will, I think, sufficiently appear from a brief—I hope it will be brief—analysis which I propose to make in reference to the third argument.

The third argument was the one that was dealt with by the Commissioners. The situation was this. In a somewhat similar case, *Inland Revenue Comrs.* v. *Rolls-Royce, Ltd.* (1), a question relating to income derived from patent licences came up for decision. MACNAGHTEN, J., there held that the particular income in that case was not income from an investment within the meaning of para. 6 of the Schedule.

I should, perhaps, at this stage, to make what I am saying more intelligible, read the relevant words of Sched. 7, Pt. I, para. 6, of the 1939 Act. Sub-para. (1) is as follows :

> Income received from investments shall be [observe, it does not say " investments and property," but simply " investments "] included in the profits in the cases and to the extent provided in sub-para. (2) of this paragraph and not otherwise.

Sub-para. (2) says :

> In the case of the business of a building society, or of a banking business, assurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, being income to which the persons carrying on the business are beneficially entitled.

In order, therefore, that income from an investment is to be treated as a profit, it must be an investment which falls within the language of sub-para. (2).

In the *Rolls-Royce* case (1), MACNAGHTEN, J., held that an income derived from the patent licences in that case was not income from an investment within the meaning of para. 6. When the present case was before the Commissioners, that decision of MACNAGHTEN, J., had not been given. The Commissioners, not being bound by that decision, came to this conclusion :

> We, the Commissioners who heard the appeal, were of opinion that the word ' investment ' in the said para. 6 was apt to include patents which had been licensed and which were yielding a royalty income and that the said royalties were income from investments.

MACNAGHTEN, J., reversed that decision, following, without further comment, his own decision, in the *Rolls-Royce* case (1).

Attempts have been made by counsel on both sides to suggest some comprehensive test or definition which would enable the court to discover whether a particular piece of income is income received from an investment or not. MACNAGHTEN, J., in the *Rolls-Royce* case (1) applied a test which was, put shortly, this : that before you can have anything properly called an investment, you must have the placing of money into it in order to acquire it or bring it into existence. Applying that test, MACNAGHTEN, J., came to the conclusion that the patents in that case were not investments because they had come into existence not by putting money into them but by making the invention which the patent protected.

Speaking for myself, I am always disinclined to accept any general definition or test for the purpose of solving this type of question. The question whether or not a particular piece of income is income received from an investment must, in my view, be decided on the facts of the case. The facts must be ascertained, and then the question has to be answered. For the court to find itself fettered by some apparently comprehensive attempt at a definition directed to the solution of the problem in relation to one type of property, I cannot help thinking is unfortunate. It may well be that a definition or test, when applied to one type of property, is a useful method of approaching the particular problem in the particular case ; but to take it as a guide in other cases is apt to be extremely dangerous, and certainly, in the present case, I do not propose to do it.

As I view this case, it falls to be decided in rather a different way. The facts of the case, for the present purpose, are shortly these. Here is a manufacturing company carrying on a manufacturing business in this country. It makes and sells certain specialities protected by patents here, and in the United States of America. A patent is a peculiar type of property. In considering what it is and what is the nature of the income from it, it seems to me to be only confusing to attempt to find analogies and comparisons with war loan, real property, and other types of property. One has to remember exactly what a patent is. I am not concerned to dispute the proposition that in some cases, and in some sets of circumstances, a patent may fall within the description of investment within the meaning of para. 6. But the question in the present case, whether the income derived from these patents is or is not an investment, must be determined by the true character of that income, and the true nature of the source of the income which is derived by this particular company in this particular way.

Before these agreements were made—and they are only temporary agreements—the American patents conferred upon the appellants—and I must assume that the patent law to this extent is the same in the United States as in this country—the right to exclude others from manufacturing in the United States, and from selling in the United States, the specialities of the appellant company. The appellants were in a position, if they so wished, to manufacture in the United States; but, if they did not wish to manufacture in the United States, their United States patents gave them the exclusive right to sell in the United States articles manufactured in this country under the English patents. It is merely, in effect, a shield against competition. It is the right to exclude competitors from all operations, whether manufacturing, or vending, or using the patented article in the territory covered by the patents. That is all a patent is. The advantage to the patentee, if he manufactures and sells but does not grant licences, is merely this: he has reflected in the price of his article the benefits of the monopoly which the patent confers upon him. The benefits of that monopoly he can secure either by manufacturing and selling himself, in which case he gets the benefit in the price of the article, or, if he chooses, he can grant a licence which will, in principle, affect the price that he gets because the licensee immediately becomes a competitor. The patent licence may, and frequently does, specify the prices, or the minimum prices, at which the patented article may be sold; but, in effect, the grant of a licence is merely lifting in favour of the licensee the embargo which is the trade protection of the patentee's speciality.

To my mind, it is obvious that a patent in the hands of a manufacturer is quite a different type of property, both in the business and in the practical sense, to a patent in the hands of somebody who is a mere passive owner of the monopoly right. For instance, a member of the Bar, who was fortunate enough to have bequeathed to him a patent, or who had purchased a patent, the validity of which had been established by the court, might continue, without any active participation in manufacturing himself, merely to exploit that monopoly by granting licences. He would then be merely passive; he would be the passive recipient of income from that particular piece of property. In such a case it might very well be, and I strongly suspect it would be, held, if members of the Bar were subject to excess profits tax, that the income from that patent could properly be described as income from an investment. But directly the patent is held by a manufacturer of the patented article, it seems to me that the situation is entirely changed. When you have a manufacturer who is exploiting his monopoly right, not merely by excluding all competitors, but by letting one competitor in on terms, to say that the profits so derived are profits from an investment seems to me to be a misuse of language. It is contrary to what one may call the popular conception of the word "investment," which is not a word of art, but has to be interpreted in a popular sense. The contrast, I venture to think, is brought out exactly in the two examples I have put. One is that of a private individual not concerned with manufacture at all, but merely holding a patent, as he might hold a copyright in a book, and simply drawing the income from the royalties payable under the copyright. He would merely be a passive person drawing the income which flows from that particular chose in action. That is one example. The other example is the manufacturer who can, if he likes at any moment, exploit his monopoly in a number of different ways—either by manufacturing himself, or by vending himself, or by allowing somebody else to manufacture and vend or manufacture but not vend, or to vend but not manufacture. The mere granting of such licences does not seem to me to take the income out of the category of income of the business.

I have said that what I was proposing to say on this argument would dispose also of the second argument, namely, the question whether the income is profits of the business. It will be seen that the considerations which I have mentioned, if they are right, answer that question just as much as they answer the question whether or not it is to be regarded as income from an investment. If my view is right, it leads to a decision on a ground different to that adopted by MACNAGHTEN, J., in the *Rolls-Royce* case (1). The decision in that case, if I may respectfully say so, was, in my opinion, perfectly correct, but the reasons on which he based it do not satisfy me. The reasons were really founded on a definition of investment as involving the laying out of money. I think that is unsatisfactory, because one can think of cases where, if that test were applied, it would not really satisfactorily describe the property in question. One perfectly simple illustration is the case where a manufacturer had made an invention and obtained a patent which he bequeaths to his son, who is not a manufacturer, but merely a professional man, and the son proceeds to derive income from it. Nobody in that case has put money into the invention, except the expenditure on fees. No money has been invested in the popular sense. The father made the invention and he acquired the patent. The son has not put anything into it because he has not bought it from his father. Nevertheless, I venture to think that the profits derived from the patent in the hands of the son might properly be described as the profits of an investment, and the patent would be properly described in the hands of the son as an investment. I express no concluded opinion upon that. I merely mention it to illustrate what I consider to be the dangers of the suggested definition.

I have dealt with this question so far without reference to the special argument which counsel for the respondents put forward in connection with the particular agreements under which the income is derived in this case. Counsel for the appellants in reply vigorously disputed the right of the Crown in this court to raise that point. He suggested the question would be one of fact, or, at any rate, would involve a finding of fact, and, therefore, it ought to have been raised before the Commissioners. As I have said, on the face of the stated case, it is extremely doubtful whether some of the arguments of counsel for the appellants were technically open to him, and it looks to me very much as if he were engaged in a form of activity which is sometimes engaged in by persons who inhabit glass houses. But there is really nothing in the point because, in my opinion, no question of fact is involved. It is a question which arises on the construction of the documents. The argument is this. The profits derived by the company in the present case cannot be said to be derived entirely from the mere ownership of the patents, but are attributable also to certain other obligations which the company undertakes under these agreements.

The first agreement of June 3, 1937, recites the granting of a sole and exclusive licence, and goes on to say that :

> . . . it is witnessed that in consideration of the royalties hereinafter reserved and of the mutual promises of the parties hereto, the owners agree . . .

The first paragraph of the undertakings given by the owners is :

> To grant to the licensee sole and exclusive licence and authority to manufacture and sell [in a number of countries] the drills made in accordance with the inventions of the patentees.

Then comes this obligation of the owners :

> To supply to the licensee drawings of the drills and of any tools used by them in the manufacture of drills or component parts thereof, and to give to the licensee information of their manufacturing methods, and to permit a representative of the licensee to inspect the manufacture of the drills and their component parts at their works at Hendon.

That undertaking could only be given by a company which itself was manufacturing in accordance with this invention. No mere passive holder of the patent could give an undertaking of that kind. Although it is a type of undertaking extremely common in patent licences, it is none the less an undertaking which the owners of the patent are giving, and can only give, by virtue of the fact that they are manufacturing and can give to the licensee valuable manufacturing information and experience which would otherwise not be available to them. That also brings out the difference between exploitation of a patent in the hands of a mere passive owner and the exploitation of a patent in the hands of a manufacturer. Then come these undertakings by the company :

> (3) After the date of this agreement they will not sell any of the said drills in the territories heretofore mentioned during the life of this agreement. (4) To sell to the licensee as many drills of their 'Mighty Atom ¼in.' design as it may require at the following prices.

The "Mighty Atom" we are informed, is one of the drills protected by these patents. Obviously there again that covenant could only be entered into by a manufacturing company. It is another example of the way in which this manufacturing company is exploiting its manufacturing position and its manufacturing experience and advantages in order to confer on the licensee the benefits of this agreement. Cl. 5 says: "To sell to the licensee all the component parts of the 'Mighty Atom ¼in.' drill it may require" at certain prices. That is all I need refer to in the provisions of that agreement.

The second agreement, which is dated Aug. 1, 1940, does not confer quite the same advantages on the licensees. It is a non-exclusive licence to manufacture and sell in the territories stated. It contains precisely the same undertaking in respect of trading and giving information as to manufacturing methods
A and allowing the representatives of the licensee to inspect the manufacture at Hendon. There is no undertaking to sell drills, the reason being, I suppose, that, by that time, the American company had got going and did not require a supply of these drills any more. Nevertheless, it was apparently contemplated that they might want to buy component parts, and they might want to buy drills, because cl. 6 contains an undertaking by the licensee "to pay for all component parts of drills purchased hereunder on terms as follows." But,
B as I have said, there was precisely the same obligation which could only be given by persons themselves manufacturing to provide drawings and give information and allow inspection.

The effect of these agreements in these respects is purely a matter of construction of the agreements. In my opinion, that circumstance alone, even if I were wrong on the major proposition which I discussed a moment ago, would be
C sufficient to justify, and, indeed, compel, the court to say that the profits in question are not income from investments, but they are the income of the trade or business, and are not excluded as being income from investments under para. 6 of the Schedule. In the result, the appeal must be dismissed with costs.

MACKINNON, L.J.: I agree. I think that the word "investments" in the relevant sections of the statute is not a word capable of legal definition.
D Like so many words in modern legislation, it is a word of current vernacular. On the facts of this case, I do not think that the income derived by the appellants under these American agreements was income from investments within the meaning of that English word, for the reasons so aptly stated by LORD GREENE, M.R.

TUCKER, L.J.: I agree. I agree that it is unnecessary and undesirable to attempt to define the word "investments." I think, on the facts of this case,
E the income in question was not income derived from an investment for reasons which I can express in two sentences. The company, whose business it is to invent, manufacture, and supply tools cannot, in my view, be said to be making an investment when it takes out patents for the protection of its own products. Nor can it be said to be making an investment when it enters into an agreement for the exploitation of the said patents taken out for that purpose. I agree that this appeal fails.

F *Appeal dismissed with costs.*

Solicitors: *Alfred Cox & Son* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

G FOSTER WHEELER, LTD. *v.* E. GREEN & SON, LTD.

[COURT OF APPEAL (Lord Greene, M.R., du Parcq and Morton, L.JJ.), October 30, 31, November 19, 1945.]

Patents—Contract—Covenant by patentees not to sell fuel economisers except exclusively through agents—Patentees becoming contractors to Government department —Written authority to use patents for service of Crown—Whether authority
H *rendered ineffective contractual obligation with third parties—"Agents, contractors, or others"—Patents and Designs Acts,* 1907-1942, *s.* 29—*R.S.C., Ord.* 53A, *r.* 22.

The respondents were the owners of a patent for the manufacture of fuel economisers for use in marine boilers. By an agreement with the appellants, dated Jan. 24, 1939, the respondents undertook to execute all orders received for such apparatus and to sell them through the appellants, at the same time covenanting not to sell or grant the manufacturing rights of the economisers to any person or corporation in Great Britain other than the appellants. In Jan., 1945, the Admiralty, acting under the powers conferred on a Government department by the Patents and Designs Acts, 1907-1942, s. 29, wrote to the respondents authorising them to make and sell the apparatus for the service of the Crown. The appellants then brought an action claiming an injunction to restrain the respondents from selling fuel economisers to any person other than themselves. The action was dismissed on the ground that, on a true construction of sect. 29, the authority conferred on the respondents by the Admiralty had the effect of making inoperative the terms of the agreement between the parties so far as concerned the making, use, exercise or vending, of the fuel economisers for the services of the Crown. On appeal, the question for the determination of the court was whether, when a Government department was empowered to act " by themselves or by such of their agents, contractors, or others as may be authorised in writing by them," the word " others " included the patentees, *i.e.*, the respondents, and so authorised them to use the invention in a manner inconsistent with the rights of third parties :—

HELD : (i) the word " others " read in the context of sect. 29 excluded the respondents from the category of persons described in the section as " agents, contractors or others."

(ii) the authority given by the Admiralty to the respondents was outside the provisions of sect. 29. Such authority, therefore, could not have the effect of rendering inoperative the terms of the agreement entered into by the respondents with the appellants.

Per cur. : The court will always lean against an interpretation of a statute which deprives the subject of rights without compensation.

[**EDITORIAL NOTE.** Sect. 29 of the Patents Act is primarily concerned with the relations between the Crown on the one hand and the patentee on the other. It is not intended to enable the patentee adversely to affect the rights of other parties. Consequently the patentee is not entitled, in breach of a contract with a selling agent, to sell patented goods in the service of the Crown, relying on the authority of the Crown as being within the term " others " in sect. 29. No compensation is provided by the statute for third parties in such circumstances, and the courts lean against any interpretation of a statute which deprives a subject of rights without compensation (see *Allhusen* v. *Brooking* (1884) 25 Ch.D. 559)).

AS TO USE OF PATENTS BY THE CROWN, see HALSBURY, Hailsham Edn., Vol. 24, pp. 532, 533, para. 1019; and FOR CASES, see DIGEST, Vol. 36, pp. 690, 691, Nos. 1668-1674.]

Case referred to :

*(1) *No-Nail Cases Proprietary, Ltd.* v. *No-Nail Boxes, Ltd.*, [1944] 1 All E.R. 528; [1944] 1 K.B. 629; 113 L.J.K.B. 353; 170 L.T. 384.

APPEAL by the plaintiffs from a decision of EVERSHED, J., dated July 4, 1945, holding that the agreement herein in issue was rendered inoperative by reason of the authority conferred under the Patents and Designs Act, 1907, s. 29, as amended by the Patents and Designs Act, 1942, s. 2, which provides as follows :

(1) A patent shall have to all intents the like effect as against His Majesty the King as it has against a subject :

Provided that any Government department may, by themselves or by such of their agents, contractors, or others as may be authorised in writing by them at any time after the application, make, use or exercise the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the Department and the patentee, or, in default of agreement, as may be settled in the manner hereafter provided. And the terms of any agreement or licence concluded between the inventor or patentee and any person other than a Government department, shall be inoperative so far as concerns the making, use or exercise of the invention for the service of the Crown . . .

(2) In case of any dispute as to the making, use or exercise of an invention under this section, or the terms therefor, or as to the existence or scope of any record or trial as aforesaid, the matter shall be referred to the court for decision, who shall have power to refer the whole matter or any question or issue of fact arising thereon to be tried before a special or official referee or an arbitrator upon such terms as it may direct. The court, referee or arbitrator, as the case may be, may, with the consent of the parties, take into consideration the validity of the patent for the purposes only of the reference and for the determination of the issues between the applicant and such Government department. The court, referee, or arbitrator, further in settling the terms

as aforesaid, shall be entitled to take into consideration any benefit or compensation which the patentee, or any other person interested in the patent, may have received directly or indirectly from the Crown or from any Government department in respect of such patent . . .

The facts are sufficiently set out in the judgment of the court delivered by du Parcq, L.J.

Valentine Holmes, K.C., and *C. Montgomery White* for the appellants.

G. H. Lloyd-Jacob and *J. N. K. Whitford* for the respondents.

Cur. adv. vult.

du Parcq, L.J. [delivering the judgment of the court]: On Jan. 24, 1939, an agreement was entered into between the plaintiff company (which will be referred to in this judgment as Foster Wheeler) and the defendant company (which will be referred to as Greens). The agreement contained this clause:

> Greens during the continuance of this agreement will sell and supply economisers to Foster Wheeler for sale in accordance with the terms of the agreement and will not knowingly sell nor grant manufacturing rights for any economiser for use in connection with marine boilers to any person or corporation in Great Britain other than Foster Wheeler except as provided by cl. 8 hereof. Foster Wheeler shall have no right to transfer the benefit of this provision.

Cl. 8 of the agreement is not material to the question now before us.

Foster Wheeler now appeals against a judgment of Evershed, J., dismissing an action in which Foster Wheeler claimed against Greens an injunction to restrain Greens from doing what they had agreed, by the clause which we have recited, that they would not do. The ground on which the judge dismissed the action was that a Government department, to wit the Board of Admiralty, had authorised Greens to make, use, exercise or vend a certain patented invention (which was said to be a constituent part of the economisers in question) for the services of the Crown. Greens are themselves the patentees of the invention, and their contention, which the judge accepted, was that, on the true construction of the Patents and Designs Act, 1907, s. 29, as amended by the Patents and Designs Act, 1942, s. 2, the authority conferred on them by the Admiralty had the effect of making inoperative the terms of their agreement with Foster Wheeler so far as concerned the making, use, exercise or vending, of the invention for the service of the Crown.

Shortly stated, the question for our decision is this: When sect. 29 empowers a Government department to act " by themselves or by such of their agents, contractors, or others as may be authorised in writing by them " is the word " others " to be read as including the patentee? If it cannot properly be so read, it must follow that the judge wrongly construed this difficult section, and that the appeal must be allowed. Sect. 29 was recently considered by this court, and it was then held that a Government department might lawfully authorise persons who were making patented articles under a licence from the patentee to make them on its behalf for the services of the Crown on terms to be agreed between the department and the patentee or settled as provided in the section: see *No-Nail Cases Proprietary, Ltd.* v. *No-Nail Boxes, Ltd.* (1). The question now before us is a different one, and is bare of authority. It must be answered, like all questions of construction, by reading the words of the section as a whole, with due regard to the apparent purpose of the section and to the context in which the words appear.

The section begins by enacting that " a patent shall have to all intents the like effect as against His Majesty the King as it has against a subject." This enacting part of the section, in our opinion, provides the key to the interpretation of the section as a whole. The legislature is concerned with the effect which letters patent granted by the Crown are to have as against the Crown. Is the monopoly granted to the patentee to avail him as against the Crown, or only as against his fellow-subjects? Having answered that question in favour of the patentee, Parliament has proceeded, by a proviso, seriously to qualify the right which it has conferred. Any Government department may do what, done by a subject, would *prima facie* be an infringement of the patent, namely, make, use, exercise and vend the invention. But this right is qualified in its turn. First, the department must be dealing with the invention in the permitted manner " for the services of the Crown." Secondly, the department must come to an agreement with the patentee (subject to the approval of the Treasury) as to the terms on which the invention is to be dealt with, or, failing agreement, must abide by such terms as may be settled in the manner prescribed by subsect. (2). Finally, not only may the Government department make, use, exercise or vend the invention "by themselves," but (to put the matter as briefly as possible) they may authorise "others" to do the like on their behalf. So far the section has dealt solely with the rights of the patentee as against the Crown. Then, having disposed of that question, it goes on to provide that the terms of any agreement or licence concluded between the inventor or patentee and any person other than a Government department shall be inoperative so far as concerns the making, use, exercise or vending, of the invention for the services of the Crown. The second proviso to subsect. (1) is irrelevant to the question which we have to decide, and we need not refer to it.

It is apparent, we think, from the foregoing summary of the material parts of the section that it is primarily concerned with the relations between the Crown on the one hand and the patentee as such on the other. The patent is to bind the Crown, but Government departments may nevertheless use the patented invention, not indeed without restraint but *sub modo,* and subject to the payment of proper compensation to the patentee. The Government department may under the prescribed conditions itself use the invention notwithstanding the right conferred in general terms on the patentee. It may authorise "others" to do the same thing, again notwithstanding the rights of the patentee. If due regard be had to the scheme and tenour of the section it is impossible, in our view, to read it as enacting that a Government department may effectively authorise the patentee himself to use his invention in a manner inconsistent with the rights of other parties. The concluding words of the first proviso, which affect agreements made with third persons, in substance do no more than limit the power of the patentee to confer rights on such third persons or to acquire benefits from them in return for such rights. The words follow necessarily upon the earlier part of the proviso, because the power given to Government departments cannot but diminish what would otherwise be the rights of the patentee. He can only grant what is his to grant. If he purports to grant more than the proviso leaves him with the power to grant it is reasonable that his purported grant, or any agreement to grant him benefits in return for it, should be *pro tanto* inoperative, and this the section enacts.

On this view of the section it is not a matter for surprise that no provision is made for the award of compensation to the third persons concerned. They know when they enter into agreements with the patentee, that there is this statutory limitation on his rights, and that a Government department may, at any time, use its powers under sect. 29. They cannot complain, therefore, if those powers are exercised with the result that their agreements are modified and their rights under them diminished. On the other hand, when it is suggested that the section must be read as empowering a Government department to authorise the patentee himself to use his invention in the prescribed manner, it is a legitimate comment that, if the proposed construction were adopted, rights would be taken away from third parties without compensation. In this respect the contrast between an authority to the patentee himself, and an authority to any other person, to use the invention for the services of the Crown is obvious and striking. If the authority is given to another person the patentee cannot help himself. He must put up with the consequences and content himself with the compensation which the section provides for him. If, however, a Government department is desirous of giving such an authority to the patentee, he is at liberty to refuse it. There is no power to compel him to become the agent of the Government department. If he chooses to act in pursuance of the authority which the Government department is minded to confer on him, he need not do so except on terms which are satisfactory to himself. He can have no claim to statutory compensation, and there is no need for the creation of statutory machinery to ensure that he will be dealt with fairly. In such circumstances, one would not expect to find that third persons, who find themselves deprived of the benefit of agreements with the patentee by reason of the patentee's voluntary submission to the will of the Government department, would be left without compensation. The court will always lean strongly against an interpretation of a statute which deprives the subject of rights without compensation, and if there be any ambiguity in the words of the section, this consideration must lend great weight to the contention advanced on behalf of Foster Wheeler.

It was indeed submitted by counsel for the defendant company, Greens, that the section did provide for the award of compensation to those who might be parties to an agreement or licence between themselves and the patentee, and he contended that subsect. (2) empowered the court to deal with claims by such parties. We cannot so read it. In our opinion the words " In case of any dispute . . . or the terms therefor " can only be read as referring back to the words " or in default of agreement " in subsect. (1). The " dispute " contemplated is a dispute between the Government department and the patentee. We can find nothing in the section which can fairly be interpreted as giving jurisdiction to the court to decide any question arising between the department and any other person. The final sentence of subsect. (2) does, it is true, refer to other persons, but only in order to insure that payments to other persons, which may enure for the benefit of the patentee, shall be taken into consideration in assessing the reward which the patentee is to receive. It is to be noted that this view of the section appears to have been acted on by the Rules Committee: see R.S.C., Ord. 53A, r. 22.

For all these reasons we have come to the conclusion that the authority given to Greens by the Admiralty is not covered by the provisions of sect. 29, and had not the effect of making inoperative any of the terms of the agreement of Jan. 24, 1939. The judge who, as we have said, came to the contrary conclusion, was influenced to some extent by his interpretation of words used by this court in the judgment given in the *No-Nail* case (1). He refers to the " somewhat wide " terms of the judgment, having in mind, no doubt, the passage in it ([1944] 1 All E.R. 528, at p. 530), in which the wide scope of the word " others " is emphasised. But, although the word " others " may, in a suitable context, embrace all the world except one person, it must always be read in its context. When Parliament is regulating the rights of A. and B. in relation to each other, it is not to be expected that the word " others " will include either A. or B., and in the present case we are of opinion, for the reasons which we have given, that the patentee is, by necessary implication, excluded from the category of persons described in the section as " agents, contractors or others."

It is unnecessary to express any opinion as to other points which were argued, or to which allusion was made, at the Bar. It was said on behalf of Foster Wheeler that Greens could have supplied the Admiralty with the specified economisers without using the patented invention. This allegation was disputed and it is unnecessary for us either to investigate its accuracy or to consider what effect the fact, if proved, would have on the rights of the parties. It was submitted for Greens that if the court came to a conclusion adverse to them, the case could be suitably dealt with by awarding damages against them, and that the injunction prayed should not be granted. In our judgment there is no sufficient reason why Greens should not be restrained from breaking their contract. The appeal is allowed with costs, and judgment must be entered for the plaintiffs for the relief claimed in the notice of motion with costs.

Appeal allowed with costs. Injunction granted. Leave to appeal to the House of Lords refused.

Solicitors: *Bristows, Cooke & Carpmael* (for the appellants); *Darley, Cumberland & Co.* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD. *v.* KERR (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Tucker, L.JJ.), November 23, 26, 1945.]

Income Tax—Capital or revenue expenditure—Company directors retiring from office—Covenants in restraint of trade—Payments made by company to retiring directors in consideration of covenants—Payments not deductible from company's trading profits as revenue expenditure—Capital expenditure—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I.*

Revenue—National Defence Contribution—Payments made by company to retiring directors—Payments made in consideration of covenants in restraint of trade—Whether payments capital or revenue expenditure—Finance Act, 1937 (*c.* 54), *Sched. IV.*

S. and C., directors of the appellant company, retired from office in 1939. By two similar agreements, dated July 3 and July 26, 1939, respectively, the two retiring directors covenanted with the appellant company that they would not, after Dec. 31, 1939, without the previous written consent of the company " carry on or be engaged or concerned in the manufacture of any kind of Portland cement . . . and other cements for building, constructional or decorative purposes, lime, whiting or bricks," within any part of the world. In consideration of those covenants the company covenanted to pay to S. the sum of £20,000, and to C. the sum of £10,000. The two sums having been duly paid by the company, the question for the determination of the court was whether, in the computation of the company's profits for the purposes of income tax and National Defence Contribution, these two sums ought to be regarded as trading expenses diminishing the company's profits for the year in question :—

HELD : by buying off two potential competitors the company had improved the value of their goodwill and had, accordingly, brought into existence an advantage for the enduring benefit of the trade. The payments were, therefore, in the nature of capital expenditure and were not an admissible deduction.

British Insulated & Helsby Cables, Ltd. v. *Atherton* (1) *applied.*

Decision of MACNAGHTEN, J. ([1945] 2 All E.R. 535) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal affirm the court below, holding that sums paid out in order to prevent competition by retiring directors come within the test laid down by VISCOUNT CAVE, L.C., in *British Insulated & Helsby Cables, Ltd.* v. *Atherton* (1), where he refers to an expenditure made " with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade." LORD GREENE, M.R., reviews the question from an accountancy point of view, and points out that in the majority of cases the question whether an item of expenditure is to be regarded as a revenue or capital payment depends upon the right acquired. On the one hand an item properly appearing as an asset in the balance sheet may be acquired out of revenue, while, on the other, a capital asset however acquired may be written down to nothing in the balance sheet. The mere payment out of revenue is, therefore, no sufficient test of whether a capital asset has been acquired.

AS TO CAPITAL EXPENDITURE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 158-161, paras. 325-327 ; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 237-258 ; DIGEST Supp., Income Tax, Nos. 244a-252h.]

Cases referred to :

*(1) *British Insulated & Helsby Cables* v. *Atherton*, [1926] A.C. 205 ; 28 Digest 52, *264* ; 95 L.J.K.B. 336 ; 134 L.T. 289 ; *affg.*, S.C., *sub nom. Atherton* v. *British Insulated & Helsby Cables, Ltd.*, [1925] 1 K.B. 421.

*(2) *Noble* (*B. W.*), *Ltd.* v. *Mitchell* (1926), 43 T.L.R. 102 ; Digest Supp. ; 11 Tax Cas. 372.

*(3) *Southern* v. *Borax Consolidated, Ltd.*, [1940] 4 All E.R. 412 ; Digest Supp.

*(4) *Collins* v. *Adamson* (*Joseph*) *& Co.*, *Adamson* (*Joseph*) *& Co.* v. *Collins*, [1937] 4 All E.R. 236 ; [1938] 1 K.B. 477 ; Digest Supp. ; 107 L.J.K.B. 121 ; 21 Tax Cas. 400.

(5) *Southwell* v. *Savill Brothers, Ltd.*, [1901] 2 K.B. 349 ; 28 Digest 57, *288* ; 70 L.J.K.B. 815 ; 85 L.T. 167 ; 4 Tax Cas. 430.

*(6) *Inland Revenue Comrs.* v. *Williams Exors., Williams Exors.* v. *Inland Revenue Comrs.*, [1942] 2 All E.R. 266; 167 L.T. 272.

APPEALS by the taxpayer, Associated Portland Cement Manufacturers, Ltd., from a decision of MACNAGHTEN, J., dated July 27, 1945, and reported ([1945] 2 All E.R. 535). The facts are fully set out in the judgment of LORD GREENE, M.R.

Cyril King, K.C., and *J. S. Scrimgeour, K.C.*, for the appellants.

D. L. Jenkins, K.C., and *Reginald P. Hills* for the respondents.

LORD GREENE, M.R.: In these two appeals the question which arises is whether the appellant company is entitled to deduct for tax purposes, income tax and National Defence Contribution, two sums of £20,000 and £10,000 which were paid in the circumstances mentioned in the case. In 1939, two directors of the appellant company, Stevens and Charleton, retired. They had each spent a working lifetime in the service of the appellant company, or of other companies engaged in the cement trade. Stevens apparently joined the company in 1900 as secretary, and in 1906 he became a managing director. He continued to hold that office until he retired on Dec. 31, 1939. He was then of the age of 69. Charleton had been associated with the company, or its predecessors, for some 40 years. He became a director in 1931, and from that date he had charge of an important branch of the company, the coastwise shipping part. In 1939, at the time of his retirement, he was about 60 years of age.

A person ignorant of the facts might have thought that the retirement of these two directors, which took place in entirely friendly circumstances, was a prelude to their enjoying during their declining years the leisure which their eminent services had earned them. A person who thought that would have been mistaken. Stevens, although 69 years of age, was in good health. He was a very hard worker and quite competent to give advice to, or steer the policy of, any other company. Charleton, although only 60 years of age, does not obtain in the case the same certificate of robust health as Stevens. No specific mention of his state of health is made. But it is found that the company thought that there would be a very definite danger of his acting in opposition to the company when his connection with it was severed. Of Stevens, it is said that as he would have been free, had no steps been taken to prevent him, to turn his abilities to account in the way of lending his name to any enterprise, he might compete with or otherwise act to the disadvantage of the appellant company.

The appellant company, as the case finds, with its associated companies, are the largest manufacturers of cement in Great Britain. The seriousness of the threat overhanging the prosperity of the company did not escape the vigilant eyes of the other members of the board. The fact that the two retiring directors might in future engage in competitive activities led the board to think that the appropriate method of protecting the company against such an attack would be to secure from both of them restrictive covenants which would insure that they should not enter into competition with the company. I use the phrase "enter into competition" as a convenient phrase to cover the various types of activities in connection with cement with which the contracts deal, and in which the two retiring directors are prohibited from engaging.

The unimpaired nature of their business abilities appears from the type of activity against which it was thought necessary to protect the company. Stevens although 69, was in the position when he might apparently become engaged in the manufacture of Portland cement in the British Isles, in Canada, in India, or in the Republic of Mexico, or in the Union of South Africa, or, indeed, in any other part of the world. Against such activities, and a number of others, he was precluded by the agreement. The same thing applies to Charleton because the contracts are the same in both cases. Therefore we have this position, that the company, having on the retirement of these two directors before its eyes the prospect of their competition and desiring to protect itself against that disadvantage, thought that it was worth £30,000 to impose upon them these restrictions. I should say that the contracts extend apparently during the rest of the lives of these two directors.

After the execution of the contracts, the two sums of £20,000 and £10,000 were paid. It must be taken, for the purposes of this case, that the benefits secured to the company, although they might well have been more valuable than the sums actually paid, were worth not a shilling, indeed not a penny, less than £20,000 and £10,000 respectively—not inconsiderable sums. It appears that the board, perhaps through a feeling of modesty, did not expose themselves to the congratulations of the shareholders upon this important achievement. In the company's accounts a rather remarkable entry appears. The accounts laid before the shareholders consisted of a profit and loss account and a balance sheet. In the profit and loss account appears this item on the receipts side : A

> By profit on trading (including compensation under a working agreement) after deducting management expenses, bad debts, sundry reserves and provision for taxation, £879,282.

The words with which we are concerned are the words " sundry reserves." That balance of £879,282 is a balance on trading account carried into the profit and loss account. The trading account was not put before the shareholders. Nobody can complain of that. But when one looks into the trading account, one finds an item entitled : " Sundry special reserves, £30,000." That £30,000 was the sum of the two amounts of £20,000 and £10,000 with which we are concerned. The words " sundry reserves " in the profit and loss account include that item. It was VOLTAIRE (who had a certain dislike of shams) who said of the Holy Roman Empire that it was neither Holy nor Roman, nor an Empire. He perhaps would have been less severe on this particular description. Although he might have quarrelled, and properly quarrelled, with the word " sundry " and with the word " reserves," he might very well have agreed that the expenditure in question was " special." Apart from that possibility, I cannot imagine a more inaccurate entry than this. However, we are not directly concerned with that. B C D

I only mention it for one reason. We were invited by counsel for the appellants to pay particular attention to the evidence of the company's auditors, who expressed the view that these sums could not be treated as a capital item in the accounts. Although there is no auditors' certificate attached to the profit and loss account, or to the trading account, it seems a reasonable inference that this particular entry did not pass the auditors unobserved. In those circumstances, I may not perhaps be thought peculiar if I feel some reluctance in allowing myself to be guided on the theory or practice of accountancy by this company's auditor. E

But before I leave the question of accounts, I should say this. On the question whether an item of expenditure is of a capital or a revenue nature, it is no doubt helpful to consider the circumstances from the accountancy point of view. But one must be careful to define one's terms. Whether or not an item of expenditure is to be regarded as of a revenue or capital nature must in many, and, indeed, in the majority of cases, I should have thought, depend upon the nature of the asset or the right acquired by means of that expenditure. If it is an asset which properly appears as a capital asset in the balance sheet, then that is an end of the matter. But it must never be forgotten that an asset which may properly, and quite correctly, appear, and only appear, in the balance sheet as an asset may be acquired out of revenue. There is nothing in the world to force a company or a trader who buys a capital asset to debit the cost of it to capital. Conservatively managed companies every day pay for capital assets out of revenue if they are fortunate enough to have the revenue available. It is, therefore, no sufficient test to say that an asset has been paid for out of revenue because the consequence does not, by any means, necessarily follow that it is an asset of a revenue nature as distinct from a capital nature. Similarly, there is nothing to prevent a company or a trader who has acquired a capital asset from refraining from placing any value on that asset in his balance sheet. I put to counsel for the appellants an example which I think is worth repeating. If a trader buys up somebody else's business and pays £10,000 for the goodwill, that being the price on which the vendor insists, there is nothing in the world to prevent the purchaser paying the £10,000 out of revenue and debiting it to revenue account, and then writing down the goodwill in his own balance sheet to nothing. The fact that he has written it down in his own balance sheet does not mean that he has not got an F G H asset. He has; he has the goodwill, but for his own domestic purposes he chooses not to put a value upon it; just in the same way as many companies, who have patents of very great value indeed, are in the habit of valuing them at a pound in their balance sheet, or at some other nominal sum. I venture to think, therefore, when one is considering the nature of an asset acquired by a piece of expenditure, it is by no means conclusive to find that the asset does not have any definite value set upon it in the balance sheet.

When one looks at what happened in the present case, first of all one finds that the company chose to make these payments out of revenue. As I have said, that is by no means conclusive as to their nature. In their balance sheet they did not put any item representing the value, which is £30,000, and not a penny less, of this asset. But that again is by no means conclusive, as I have just ventured to point out. They have not thought that a value could definitely by put upon this particular asset. From the business point of view, that is quite natural. It is not good business to put values on assets of a rather vague and intangible nature like this. A balance sheet does not commonly contain such things, and it might be depreciatory to the company if it did. The fact that you do not find a value put upon it is, to my mind, of comparatively little importance in the present case.

What is the true nature of the asset which the company has acquired? It has acquired two choses in action, the benefit of two restrictive covenants against competition, using that phrase again comprehensively, for which it has paid a total sum of £30,000. The danger against which these covenants protected the company was serious and imminent. It would be quite wrong to allow oneself to think for a moment that the company was not getting its money's worth. When the two directors left the board, they were free to compete, not merely in Great Britain, but in Mexico, and, indeed, in the South Sea Islands. Against that danger the company has protected itself. What is the true business result of all that? When the two directors left the company, the goodwill of the company would immediately have become extremely vulnerable. When the company had the monopoly of their services, it was in a very advantageous position. As soon as they became potential competitors there was ground for thinking that the goodwill of the company would receive a serious shock. The risk of competition and damaging competition was great. The company succeeded in protecting itself against that risk. In effect the company was buying off two potential competitors. It seems to me that the effect of buying off potential competitors must of its very nature affect the value of the company's goodwill. If all potential competitors could be bought off, the goodwill of the business would obviously be very greatly benefited. If some competitors are bought off, if they are dangerous potential competitors, the goodwill is affected substantially. The true nature of what they have done seems to me to be this. They have acquired these rights against the two retiring directors, and, by doing so, they have enhanced the value of an existing asset, to wit, their goodwill. In the balance sheet the company's goodwill is included in the global sum of £5,751,885. There is a note indicating that the amount of goodwill "included in the above figure is not shown in the books and is not otherwise ascertainable." That is a very good example of what I was referring to a moment ago, a capital asset on which no value is placed in the balance sheet at all. As the value of the goodwill was regarded as not ascertainable, it was not to be expected that the directors would treat this £30,000 as an addition to it. Accordingly, it does not appear in the balance sheet. But that cannot affect its nature. The fact that the directors for good business purposes did not choose to value the goodwill of the company in the balance sheet does not prevent the goodwill from being an asset.

Before turning to the authorities which counsel for the appellants principally relied upon, I might perhaps quote the well known words in the judgment of Viscount Cave, L.C., in *British Insulated & Helsby Cables, Ltd.* v. *Atherton* (1), where he says this ([1926] A.C. 205, at p. 213):

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue, but to capital.

That test which VISCOUNT CAVE, L.C., propounds is one which, though I think not by any means exhaustive, is an extremely useful test, and in many cases will give the clue to the right answer.

In my opinion, in the present case the language of VISCOUNT CAVE, L.C., is satisfied by the facts. This was an expenditure made once and for all with a view to bringing into existence "an advantage for the enduring benefit of a trade." There was nothing temporary about this advantage. It was to last during the lives of the two directors in question. That that advantage was a solid one, I have already endeavoured to point out. That it was "for the benefit of the trade" in a very true sense is again quite clear because, when analysed, its effect unquestionably was to add to the value of the goodwill. There was all the difference in the world, as it seems to me, between this case and the case of *Noble* v. *Mitchell* (2), on which counsel for the appellants principally relied. The payment made in that case was made to procure the retirement of a director who was regarded by the board as a person not desirable to retain on the board. It might have done the company great harm if it had become necessary to dismiss him from the board. But there seems to me to be all the difference in the world between getting rid of an unsatisfactory servant—and that was the principle on which the case was decided—and buying off a potential outside competitor. In the one case you are getting rid of a servant, and the sum you pay for that is no more of a capital nature, nor is the benefit any more permanent, than is the wage that you pay the servant for his services. But when you are buying off an outside competitor, the position is entirely different. Therefore I do not get any assistance from that case at all.

Southern v. *Borax Consolidated Ltd.* (3) was a case where the tax-paying company had spent money in defending its title to certain American land which it has acquired. The money that you spend in defending your title to a capital asset, which is assailed unjustly, is obviously a revenue expenditure. There again there is all the difference in the world between defending your assets against the claim of somebody who has no claim against them and acquiring a new asset, or adding to an existing asset. If you acquire the benefit of a covenant which improves the value of your goodwill, in my opinion you have acquired a capital asset, even though the goodwill has no value set upon it in the balance sheet. LAWRENCE, J., in the *Borax* case (3) said this ([1940] 4 All E.R. 412, at p. 418) :

> . . . if it could be said here that this expenditure had in any way altered the original character of the capital asset which was acquired by the respondent company, I should have taken the view that the payment was in respect of capital, but, as, in my opinion, the capital asset of the respondent company remained absolutely unaltered, that payment is properly attributable to revenue.

That brings out the distinction with the utmost clarity.

There is one last case of *Collins* v. *Adamson (Joseph) & Co.* (4). In that case a trade association, of which the company was a member, had bought the business assets of another member of the association with a view to prevent it from disposing of its business to an outside firm which was not a member of the association. The association, when it acquired the business in question, closed it down, and got rid of the assets. The share in cash which the company obtained was the subject-matter of the question at issue, the question being whether it was a profit which ought to be brought in for tax purposes. It is to be observed that in that case the company acquired no business asset which could figure in its balance sheet. If the company be regarded as having acquired through the association, an aliquot part of the assets of the company that was being bought out, the position was that before anything could be put in anybody's balance sheet the business acquired was closed down and the assets scattered. Therefore, the company never put into its balance sheet an item representing the benefit it had acquired. It could, I suppose, have written up its goodwill by an appropriate amount, but no board in their senses would dream of doing that, and no auditor in his senses would approve of such a course. It would not be business. It would be strictly correct, but it would not be good practice. In his judgment in that case, LAWRENCE, J., said this ([1937] 4 All E.R. 236, at pp. 240, 241), referring to a case of *Southwell* v. *Savill Brothers, Ltd.* (5) :

> From this case, I think it may be deduced that one cannot test the question as to whether the payment is properly a capital or a revenue payment by seeing whether

> it can be shown to be productive. Nor do I think that the argument of Mr. King, that what was produced by the expenditure in these cases was impalpable or intangible or incalculable, is a sound argument for holding that it must be treated as being of a revenue nature. In fact, in both these cases, the payments which were made had, as a result, the removal or the prevention of a trade competitor, who would not have been subject to the rules of the Association. In my opinion, those payments created for the members of that Association advantages of an enduring nature, and of such an enduring nature, I think, as properly to be treated as capital, and not to be treated as revenue . . . The fact that the value of that acquisition is doubtful is, of course, applicable to almost every trade acquisition, and was equally applicable to the value of the fund created in *Atherton's* case (1); but in both cases the trader had himself put a value upon the advantage which he was acquiring. In *Atherton's* case (1) the sum transferred to this pension fund was the sum which the directors of the company thought it wise to set aside, and here the sum paid by the Association was the sum which they thought it worth while to pay to remove from the arena a possible competitor, who was supposed to be going to purchase the business of Hewitt and Kellett, Ltd.

Those observations, in relation to the particular subject-matter with which the judge was dealing, in my opinion, were entirely correct, if I may respectfully say so, and are peculiarly applicable to the present case. They bring out what I have endeavoured in less felicitous language to bring out, namely, the caution with which one must regard entries in accounts in deciding these questions.

Counsel for the appellants [Mr. Scrimgeour, K.C.] then put forward this argument. He said that these contracts, when properly regarded, were not made to create a new asset, but to mitigate the loss to the business which the business would suffer from the loss of these two directors' services, and he referred to *Inland Revenue Comrs.* v. *Williams's Executors* (6). In my opinion, that case has no application to the present case at all. The circumstances were entirely different. The question was different, and the considerations on which the case was decided have no bearing on what is in question here. The real fact of the matter was that the loss which occurred from the loss of the services of the two directors could not be mitigated. Their services were lost to the company. By no means could the company take them back except by re-engaging them. Their departure from the company brought into existence something totally different, namely, the risk of a positive detriment to the company due to competition. It was against that, and that alone, that these contracts were directed.

As I have said, these benefits acquired by the company were solid; they were permanent; and they were world-wide. They protected the company against certain risks, and the value to be set on that protection was shown by the company itself in deciding to pay these amounts. No doubt it will be a disappointment to the company that they cannot crown their success in acquiring these solid advantages by passing on to the general taxpayer the privilege of paying for a large part of the expense so incurred. The appeal must be dismissed with costs.

MACKINNON, L.J.: I agree, and I have very little to add, but I am tempted to add a few remarks with regard to the rather singular transaction which gave rise to these proceedings. Stevens, a managing director, was subject to an agreement, which is annexed to tne case, of July, 1935, and by the terms of that agreement he undertakes during his term of office to devote the whole of his time, attention and abilities to the business of the company. This arrangement to pay him £20,000 was arrived at at a meeting on July 13, 1939, when it is stated that he expressed a desire to retire after Dec. 31, 1939. In accordance with the resolution then carried, he and the company entered into a deed dated July 26, 1939. By that deed the company undertakes to pay Stevens £20,000 in consideration of his not competing with them in the future. It further provides expressly " that if Stevens should die before the said Dec. 31, 1939 "—that is the date of the prospective retirement—" the company will pay the said sum of £20,000 to his legal personal representatives." In the case of Charleton, there was apparently no service agreement between him and the company, but it is found in the case that there was nothing to prevent him from resigning, but the company felt that while he was in office he would not act in opposition to it. On the other hand, when he was no longer in office, the company felt that there would be a definite danger of his so acting.

In Charleton's case the meeting at which the payment of £10,000 to him was decided upon was on Jan. 26, 1939, at which he stated that he desired to retire on Sept. 30. It was thereupon agreed that a similar arrangement should be entered into with him, substituting £10,000 for the £20,000 in Stevens' case, and that was done by a deed dated July 3, 1939. That also provides that if Charleton should die before Sept. 30, the company will pay £10,000 to his personal representatives. If Stevens and Charleton had both died in Aug., 1939, the directors would have had to pay £30,000 to their respective executors, and I am quite satisfied that it would have been giving away part of the money of the company because there was clearly no consideration whatever for any such undertaking. As they did survive, it may be said that there was some consideration for the £30,000 paid to them, but I am quite clear that it was a capital payment and not an item of the company's expenses to be charged against revenue.

Among these varied cases, the only one in which anything approaching to principle can be discovered is the opinion of VISCOUNT CAVE, L.C., in *British Insulated and Helsby Cables, Ltd.* v. *Atherton* (1), where, as to this question of revenue or capital, he said ([1926] A.C. 205, at p. 213) :

> This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case . . .

In this case the Commissioners have found that it was of a capital nature, and not a proper charge to revenue, and there was clearly ample evidence on which they could so find. The other material passage is a little later in the opinion of VISCOUNT CAVE, L.C., where he says ([1926] A.C. 205, at p. 213) :

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

Applying that principle in this case, there is an additional reason to my mind for thinking that the Commissioners came to the correct conclusion in the facts which they have stated in the case, and that in consequence the judgment of MACNAGHTEN, J., was entirely right.

I agree that the appeal should be dismissed with costs.

TUCKER, L.J. : I agree, and I have nothing to add.

Appeal dismissed with costs.

Solicitors : *Linklaters & Paines* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Applied. DUDLEY AND DISTRICT BENEFIT BLDG. SOC. *v.* EMERSON. [1949] 1 All E.R. 691.

NORMAN *v.* SIMPSON.

[COURT OF APPEAL (Scott, du Parcq and Morton, L.JJ.), November 8, 9, 30, 1945.]

Landlord and Tenant—Covenant not to sub-let—Breach by tenant—Landlord aware of continuing breach—Rent restriction—Sale of premises—Claim for possession against sub-tenant—" Lawfully or unlawfully sub-let "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *ss.* 5 (5), 15 (3) *—Rent and Mortgage Interest Restrictions Act,* 1923 (c. 32), *s.* 7 (1).

In 1937 the owner of a house, by a written agreement, leased it to C., for three years from Mar. 25, 1937, the tenant agreeing not to sub-let without the written consent of the landlord. The house was one to which the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied. On the determination of the tenancy, C. continued in occupation as tenant from year to year with the landlord's consent. In the spring of 1940, C. sub-let the house, furnished, to the appellant at a weekly rent, and in Sept., 1940, the terms of the sub-tenancy were changed to an unfurnished letting, without C. on either occasion obtaining the consent of the landlord. Throughout the material period rents were paid by C. to the landlord who, although aware of the sub-letting without consent, did not comment on it either to C. or to the appellant. On June 12, 1944, the landlord gave C. notice to quit on Mar. 25, 1945, which was accepted.

Subsequently the property was sold to the respondent who refused to accept the rent from the appellant and brought an action in the county court for possession and for mesne profits. The appellant, in his defence, pleaded that the premises were "lawfully sub-let" in that the breach of the agreement against sub-letting had been waived by the original landlord's acceptance of rent from C. with full knowledge of the position. Alternatively, the appellant claimed protection under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3). The county court judge made an order granting the respondent possession and mesne profits. The appellant appealed:—

HELD [DU PARCQ, L.J., *dissenting*]: the question of whether a sub-letting was unlawful or not, within the meaning of sect. 15 (3) of the 1920 Act, depended on the existence of the original landlord's right of re-entry. On the facts here, the original landlord's right of re-entry was lost by reason of the acceptance of rent from C. after knowledge of the breach of the agreement. The premises were, therefore, "lawfully sub-let" to the appellant when C.'s tenancy was terminated.

[**EDITORIAL NOTE.** Under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), a sub-tenant is entitled, on determination of the head-lease, to become the tenant of the head-lessor provided that the premises "have been lawfully sub-let" to him. It is held that premises have been "lawfully sub-let" when the head lessor has no subsisting right of re-entry, and that the time for ascertaining this is immediately before the head-lease came to an end, ignoring the earlier history of the sub-tenancy.

AS TO WHAT AMOUNTS TO WAIVER, see HALSBURY, Hailsham Edn., Vol. 20, pp. 254-257, paras. 287-289; and FOR CASES, see DIGEST, Vol. 31, pp. 497-503, Nos. 6427-6504.]

APPEAL by the defendant from an order of His Honour JUDGE THESIGER, made at Barnstaple County Court, and dated July 24, 1945. The facts are fully set out in the judgment of the majority of the court, delivered by MORTON, L.J.

R. L. Edwards for the appellant.

D. F. Brundrit for the respondent.

MORTON L.J. [delivering the judgment of the majority of the court]: In this case the respondent claims, as against the appellant and his wife, possession of a dwelling-house, known as "The Lodge," situate at Berrynarbor, in the County of Devon, and also mesne profits from Mar. 26, 1945. The respondent alleges that the appellant and his wife are trespassers. The appellant and his wife in their defence say:

> The first defendant [the appellant] has been since Sept. 29, 1940, and still is lawfully in possession of the said premises with his wife (the second defendant) and his three children under a contractual tenancy at the yearly rent of £156. Alternatively, if the said tenancy has been determined (which is not admitted) the defendants are entitled to the protection of the Rent Restriction Acts, 1920-1939.

We need not refer further to the appellant's wife as her claim to remain in possession must stand or fall with the appellant's claim. The county court judge made an order granting the respondent possession and mesne profits, and the appellant appealed.

The facts of the case are as follows. On Mar. 16, 1937 the freehold owner of "The Lodge" entered into a written tenancy agreement with one Conibear as tenant. The tenancy was to be for three years from Mar. 25, 1937, at a yearly rental of £68, and the last three sentences of the document were as follows:

> The tenant agrees not to underlet the premises without the consent of the landlord in writing. The landlord agrees to execute all reasonably necessary external repairs, and the tenant paying the said rent and observing the above conditions shall quietly hold and enjoy the said premises.

On the determination of this tenancy in Mar., 1940, Conibear continued in occupation, with the consent of the owner, as tenant from year to year. In the spring of 1940 the appellant agreed to take the house furnished, as sub-tenant of Conibear, at a rental of £8 8s. a week. Conibear omitted to obtain the written consent of the owner to this sub-letting, and it would appear likely that the appellant knew nothing about this term in Conibear's tenancy agreement. Some two or three months later, the appellant told the agent of the owner about the sub-tenancy and that he was paying a rent of £8 8*s.* a week. On Sept. 29, 1940, the terms of the sub-tenancy were changed. The appellant, having brought his own furniture into the house, took a six-monthly tenancy of the house unfurnished at a rental of £156 a year. No application was made to the owner for a written consent to this sub-letting of the house unfurnished. Having regard to the terms of the Landlord and Tenant Act, 1927, s. 19, it would seem that any application to the owner for a " written consent " would have been a pure formality, as the owner would not have been able to withhold consent to such under-letting to the appellant, who appears to have been a respectable and responsible tenant. However, there is no doubt that in failing even to apply for the written consent, Conibear was guilty of a breach of the contract existing between the owner and himself.

In the summer of 1941, something went wrong with the kitchen boiler at " The Lodge." The agent of the owner visited the house two or three times and the necessary repairs were carried out at the owner's expense. In the course of his visits the agent of the owner saw certain internal decoration work which was in the course of being carried out, or had just been carried out, on the orders of the appellant and at his expense. During one of these visits the appellant suggested to the owner's agent that he might rent the house direct from the owner, and the owner's agent said, " Why do you not buy the house ? " The appellant asked the price and the owner's agent suggested he should see the owner. An interview then took place between the owner and the appellant at which a purchase was discussed, but the parties were unable to agree on a price. The appellant offered to take the house direct from the owner, and, as he says in his evidence :

> I offered to pay the same rent, £78, for six months. I said all my furniture was there as we would like to live there permanently.

However, the owner remarked that Conibear " had the lease " and the matter dropped. This conversation is relied upon as proving the owner's knowledge that a fresh sub-tenancy of the house unfurnished had been granted and that the rent was £156. In 1943 a gale damaged the wall in the garden of " The Lodge," and the owner came and inspected the damage, having first asked the permission of the appellant's wife. The wall was later repaired at the owner's expense. Throughout the whole of this period, and right up to Mar. 25, 1945, the owner accepted from Conibear the rent of £68 a year payable under his tenancy agreement, and did not appear to have made any comment either to Conibear or to the appellant as to the absence of the owner's consent to the under-letting.

On June 12, 1944, the owner gave Conibear notice to quit " The Lodge " on Mar. 25, 1945. That notice was accepted by Conibear. Some time in 1944 the owner agreed to sell the freehold of " The Lodge " to the respondent ; and in Dec., 1944, the property was conveyed to him. The appellant paid his rent of £156 a year to Conibear up to Jan. 31, 1945. He has tendered the rent falling due after that date, and has paid into the county court the sum of £22 2*s.* claimed by the respondent in this action. The appellant's sub-tenancy could not, of course, survive the termination of Conibear's head tenancy, and his claim to remain in possession depends entirely upon the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), which is in the following terms :

> Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.

It is not disputed that " The Lodge " is a dwelling-house to which that Act applies. It would appear that the Legislature has in mind two classes of sub-tenants, namely, sub-tenants to whom the premises have been lawfully sub-let and sub-tenants to whom the premises have been unlawfully sub-let. It is not easy to see exactly what sub-tenants fall within the latter class, but we think the most reasonable explanation of the subsection is that premises are in a state of being " unlawfully sub-let " within the subsection if the head lessor has a subsisting right of re-entry, and are in a state of being " lawfully sub-let " when the head lessor has no such right.

It is still necessary, however, to consider the effect of the words "have been." These words indicate that the county court judge, in considering this matter, has to look back into the past, and the question is: How far back must he look? We think there are two possible constructions of the four words "have been lawfully sub-let" on the footing that our view as to the meaning of the word "lawfully" is correct. Construction (*a*) is that those four words refer only to the original sub-letting, and that if the original sub-letting was such as to give rise to a right of re-entry in the head lessor, the sub-tenant does not come within the sub-section. Construction (*b*) is that the sub-tenant is within the sub-section if the head lessor had no subsisting right of re-entry immediately before the head tenancy came to an end, and that the earlier history of the sub-tenancy is irrelevant. For our part, we accept construction (*b*) and reject construction (*a*). Sect. 15 (3) has remained unamended throughout the subsequent Rent Restriction Acts, and in our view construction (*b*) is not inconsistent with the words used, and is exactly in accordance with the general scheme and intention of the 1920 Act, and of the subsequent Acts.

The provisions in the 1920 Act relating to recovery of possession by landlords are directed to prolonging, beyond the term of their contractual tenancy, the possession of persons lawfully in possession of houses coming within the scope of the Act. This particular sub-section contemplates a case where the head tenant of a house is unable or unwilling to resist his landlord's claim to possession, but where some other person is actually occupying the house, or part of it, and desires to remain in occupation. We should have thought that the relevant question in considering whether that person's possession should be prolonged, is: What was that person's status immediately before the interest of the head tenant was determined? Was he, at that time, a sub-tenant lawfully in possession or was he not? The earlier history of his possession seems to us to be wholly unimportant. We are not inclined to construe the relevant words as relating only to the time at which the sub-letting began, if they will fairly bear some other construction.

It has been argued that construction (*a*) is more in accordance with the literal meaning of the words used. The words "have been," it is said, point to the beginning of the sub-letting. We think, however, that the words "have been" were used instead of the word "are" or "is" because the sub-section is dealing with cases in which the interest of the head tenant "is determined," and a sub-tenancy cannot live beyond the interest of the head tenant. It may well have been thought inappropriate to speak in the present tense of the premises being lawfully sub-let in these circumstances. In this connection it is perhaps of some assistance to compare the words "have been lawfully sub-let," in sect. 5 (5) of the 1920 Act and in the subsection now under consideration with the words "is lawfully sub-let" in the repealed sect. 2 (1) of the 1923 Act and in sect. 7 (1) of the 1923 Act. Counsel for the appellant relied strongly upon the words "in such circumstances" in the last-mentioned sub-section and contended that it supplies a statutory interpretation of the sub-section under consideration, but we think this is putting the matter too high. We are content to say that the explanation which we have given of the use of the words "have been" gains some support from the other statutory provisions to which we have referred, and that the language of the subsection now under consideration does not compel the court to adopt construction (*a*). This being so, we adopt construction (*b*) for the reasons we have already stated.

Turning again to the facts of the case before this court, we are prepared to assume, in favour of the respondent, that the house was "unlawfully sub-let" to the appellant in 1940 in the sense that the sub-letting gave the owner of the house then a right to re-enter. Even so, the appellant is, in our judgment, protected by the section because the owner accepted rent from Conibear with full knowledge of the sub-letting and thereafter the right to re-enter was gone. We have stated the facts very fully, because counsel for the appellant put forward certain further contentions based on the later conduct of the owner, but on the view which we take of the construction of the sub-section it is unnecessary to consider these further contentions.

We would allow the appeal, order that the respondent's claim be dismissed, and order the respondent to pay the appellant's costs here and in the county court.

DU PARCQ, L.J.: The respondent in this case alleged in his particulars of claim that the premises in question were wrongfully occupied by the appellant and his wife as trespassers. Unless they are protected by the Rent Restrictions Acts, they are rightly described as trespassers, because they claim to occupy the premises only as sub-tenants, and the tenancy of their lessor has been duly determined. The only question in this case is whether they are protected by sect. 15 (3) of the 1920 Act. Is the appellant a "sub-tenant to whom the premises . . . have been lawfully sub-let?" A

It cannot be doubted that the sub-letting to the appellant was in its inception unlawful. Conibear, who sub-let the premises, had agreed with the lessor "not to underlet the premises without the consent of the landlord in writing." He broke that agreement, and so sub-let the premises unlawfully. If at some date subsequent to the granting of the sub-tenancy the lessor had given a written consent to it, or if the lessor had agreed to waive his lessee's breach by an agreement made under seal or for good consideration, it may well be that B the sub-letting would have been rendered "lawful" within the meaning of sect. 15 (3). These things did not happen, and in my opinion the sub-letting was and remains unlawful.

It was contended for the appellant that the respondent's predecessor in title had so acted as to estop, or, as counsel for the appellant preferred to say, to "preclude," the respondent from denying that the sub-letting was lawful. I can find nothing in the evidence to support this contention. By the acceptance C of rent the owner, Miss Irwin, acknowledged the continued existence of the tenancy and waived the common law right of forfeiture which the lessee's breach of a condition in the tenancy agreement had, I think, given her, but she did not thereby acknowledge that the sub-letting was lawful. She has never, in my opinion, so acted as to deprive herself of the right to recover damages against the lessee for his breach of contract. Her waiver of forfeiture no doubt D had the result of leaving the appellant and his wife in undisturbed possession. The lessee could not evict them since he could not derogate from his grant or rely on his own unlawful act. The lessor, having waived the forfeiture, could not evict them while they remained in occupation with the leave and licence of the lessee. While the lessee's interest continued, they might thus be said to be lawfully in occupation of the premises. When that interest was determined they became trespassers, since they were unable truly to assert that the premises E had been "lawfully sub-let" to them. There is in my opinion no evidence of any act or omission on the part of the respondent's predecessor in title which can be held, according to any principle of law or equity, to preclude the respondent from denying that the sub-letting to the appellant was lawful.

On these grounds, the respondent was in my opinion entitled to the order made in his favour by the judge, although I am unable to concur in the judge's reasons. I can find no evidence to support his conclusion that the owner, F Miss Irwin, "licensed sub-letting" if by those words he means that she did anything which either was equivalent to giving a consent in writing or rendered a consent in writing unnecessary. I am not satisfied that the judge is right when he says that "what happened afterwards" (that is, after the grant of the sub-lease) "cannot affect the position arrived at," if by that he means that it would not have been possible for the lessor and lessee to render the sub-letting lawful in the ways which I have indicated. Further, I respectfully G dissent from the view which the judge appears to have entertained that no acts or omissions of the respondent's predecessor in title could affect the respondent's position. None the less I am of opinion that the judge came to the right conclusion, and I would dismiss the appeal.

Appeal allowed with costs. Order for possession set aside. Leave to appeal to the House of Lords. H

Solicitors: *Brooks, Davidson & Bartley* (for the appellant); *Coode, Kingdon, Cotton & Ward*, agents for *Crosse, Wyatt, Vellacott & Willey*, Barnstaple (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

UNITED AFRICA CO., LTD. *v.* OWNERS OF M.V. TOLTEN. THE TOLTEN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, L.J., sitting as a judge of the Probate, Divorce and Admiralty Division), November 27, December 3, 1945.]

A *Admiralty—Jurisdiction—Action in rem—Damage by British ship to pier in Nigerian harbour—Admiralty jurisdiction in rem exercisable over British and foreign ships for damage in any waters—Admiralty Court Act,* 1840 (*c.* 65), *s.* 6—*Admiralty Court Act,* 1861 (*c.* 10), *ss.* 7, 35—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (*c.* 49), *s.* 22 (1) (*a*) (iv).

B The U.A.Co. brought an action *in rem* in the High Court against the owners of the British motor vessel Tolten for damage caused to their pier and wharf through the negligent navigation of the Tolten. The shipowners contended that the High Court had no jurisdiction to hear the case since the wharf in question was situated in the harbour of Lagos, Nigeria. On behalf of the U.A.Co., it was contended that the High Court had jurisdiction in the matter because the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (*a*) (iv) gave the High Court Admiralty jurisdiction over " any claim for damage done by a ship " :—

C HELD : (i) the Judicature Acts did not extend the Admiralty jurisdiction of the High Court, but merely transferred to the High Court the jurisdiction formerly exercised by the High Court of Admiralty.

(ii) the Admiralty Court Act, 1861, s. 7, gave the High Court of Admiralty jurisdiction " over any claim for damage done by any ship." Those words must be given the widest possible interpretation and could not be limited to exclude a case of this kind, notwithstanding that the proceedings

D were for damage to immovable property in a foreign country.

[**EDITORIAL NOTE.** The jurisdiction over " damage done by a ship " given to the Admiralty Court by the Admiralty Court Act, 1861, s. 7, and transferred to the High Court by the Judicature Acts is held to override the common law rule that the English courts cannot exercise jurisdiction over cases of trespass to foreign immovables. The point was left open in the *Mary Moxham* (1), but it is here decided that the jurisdiction given is quite general, and that any other view would unduly fetter the court and lead

E in certain circumstances, to absurd results.

AS TO THE JURISDICTION OF THE HIGH COURT OVER CLAIMS FOR DAMAGE DONE BY ANY SHIP, see HALSBURY, Hailsham Edn., Vol. 1, pp. 94-98, paras. 120-126 ; and FOR CASES, see DIGEST, Vol. 1, pp. 139-142, Nos. 467-502.]

Cases referred to :

*(1) *The M. Moxham* (1876), 1 P.D. 107 ; 11 Digest 346, *333* ; 46 L.J.P. 17 ; 34 L.T. 559 ; *revsg.* (1875) 1 P.D. 43.

F *(2) *British South Africa Co.* v. *Companhia de Mocambique,* [1893] A.C. 602 ; 11 Digest 346, *334* ; 63 L.J.Q.B. 70 ; 69 L.T. 604.

*(3) *Bow, McLachlan & Co.* v. *Ship Camosun,* [1909] A.C. 597 ; 40 Digest 380, *116* ; 79 L.J.P.C. 17 ; 101 L.T. 167.

PRELIMINARY ISSUE of law in an action *in rem* against the owners of the British motor vessel Tolten. The action was transferred to the High Court from Liverpool District Registry. The plaintiff's claim was for damage caused

G to their pier and wharf through the negligent navigation of the Tolten. The defendants took the objection that the High Court had no jurisdiction in the matter since the wharf in question was in the harbour of Lagos, Nigeria. The facts are fully set out in the judgment.

Owen Bateson, K.C., for the plaintiffs.

Patrick Devlin, K.C., for the defendants.

H *Cur. adv. vult.*

BUCKNILL, L.J. : In this case the United Africa Co., Ltd., have issued a writ *in rem* against the owners of the motor vessel Tolten, a British ship registered at the port of Newport. The amended indorsement on the writ is for damage caused to the plaintiffs' pier and wharf by the defendants' motor vessel Tolten through the negligence of the defendants, their servants or agents. In the statement of claim the plaintiffs allege, *inter alia,* that they are the owners and occupiers of a wharf known as Bulk Oil Wharf, situated at Apapa, in the harbour of Lagos, Nigeria, and they allege damage to the wharf through the negligent navigation of the Tolten. The defence specifically denies that the plaintiffs are the owners and occupiers of the wharf in question and objects that, on the facts set out in the statement of claim, this court has no jurisdiction to adjudicate thereon. By order of the registrar, the question of jurisdiction has been argued before me as a preliminary point of law.

Counsel were unable to cite any Admiralty action *in rem* which is a direct authority on the point. Counsel for the defendants in support of the objection, relied mainly on *The Mary Moxham* (1), in which the facts were similar to the facts in this case, except that there the pier was in Spain and not in Nigeria. The defence by the owners of the steamship in that case to the action, which was *in rem*, alleged in substance that the court had no jurisdiction ; " that the pier formed part of the land of Spain, and that by the law of Spain the master and mariners were alone answerable for the damage caused by the negligent navigation of the ship." The plaintiffs moved the court to strike out that part of the defence which alleged that the court had no jurisdiction and that by the law of Spain only the master and mariners of the ship were liable for the damage. At the hearing of the objection before Sir Robert Phillimore, it appeared that the Mary Moxham had been arrested in Spain in respect of the damage to the pier and, in order to procure her release, the defendants agreed with the plaintiffs that the liability of the defendants should be determined by proceedings in the English courts ; in face of this agreement, the defendants did not pursue the point that there was no jurisdiction. There was argument by counsel on behalf of the plaintiffs in support of the jurisdiction of the court, and then Sir Robert Phillimore said (1 P.D. 43, at pp. 45, 46) :

> The inclination of my mind, subject to any argument on the point I might have heard from the counsel of the defendants is, that the court has jurisdiction over the case. In these circumstances I shall treat the case not as coming before me by consent, but as one within the ordinary jurisdiction I possess to entertain suits arising out of collisions in foreign waters where no circumstance by which such jurisdiction might be ousted has been brought to my notice.

The court then heard argument as to whether the law of Spain or English law applied on the question of liability of the owners of the ship for the damage to the pier. Sir Robert Phillimore decided that the Spanish law was not applicable to the case and that " the damage . . . must be taken to have been inflicted " by a British ship " within the ebb and flow of the tide upon a pier in the territory of Spain."

The case went to the Court of Appeal, but the question of jurisdiction was not argued there, the only question for appeal being whether the law of Spain applied on the question of the liability of the owners of the ship. James, L.J., however, said (1 P.D. 107, at p. 109) :

> . . . it is a very novel action, and very grave difficulties indeed might have arisen as to the jurisdiction of this court to entertain any action or proceedings whatever with respect to injury done to foreign soil.

Mellish, L.J., said (1 P.D. 107, at p. 112) :

> Whether the rule as to wrongful acts to real or immovable property in a foreign country does not go still further and prevent an action being brought at all is a question which it is not necessary to determine in this case, because, having regard to the consent of the parties and the agreement that has been entered into, no such objection to the jurisdiction could be taken in this case.

The House of Lords in *British South Africa Co.* v. *Companhia de Mocambique* (2) finally decided that the Supreme Court of Judicature has no jurisdiction to entertain an action *in personam* " to recover damages for a trespass to land situate abroad." In the course of the argument counsel who supported the proposition which the House of Lords subsequently affirmed, cited *The Mary Moxham* (1) as a case which showed that actions affecting real property are strictly local in their character and cannot be tried here when they affect foreign countries. Lord Herschell, L.C., in his speech, quoted the passage in the judgment of James, L.J., to which I have already referred, and then immediately went on to say ([1893] A.C. 602, at p. 622) :

> The distinction between matters which are transitory or personal and those which are local in their nature, and the refusal to exercise jurisdiction as regards the latter where they occur outside territorial limits, is not confined to the jurisprudence of this country.

I presume, therefore, that LORD HERSCHELL, L.C., considered that JAMES, L.J. was right when he said that there were very grave difficulties as to the jurisdiction of the court in *The Mary Moxham* (1). This *dictum* of JAMES, L.J., and the contrary *dictum* of SIR ROBERT PHILLIMORE are the only authorities cited to me which directly bear upon the point.

In WILLIAMS AND BRUCE ON ADMIRALTY PRACTICE, 3rd Edn., (1902) it is stated at p. 74 :

> Damage done by a ship to a pier or breakwater has been held to fall within the Admiralty Court Act, 1861, s. 7.

The Mary Moxham (1) is then referred to in a footnote, with the following comment :

> But it seems to be open to doubt whether the court can entertain an action for damage done to a pier in foreign territory except pursuant to the agreement of the parties.

That was written in 1901, after the *British South Africa Co.* case (2) was decided. I think the matter is one of considerable doubt. It is doubtful whether the plaintiffs in the present action could sue the owners of the Tolten *in personam* in England in respect of damage to a pier in their occupation in Nigeria. I do not think that they need prove a legal title to the pier. This is, however, an action *in rem*, and not *in personam*.

Counsel for the plaintiffs argued that the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (*a*) (iv), gave the High Court Admiralty jurisdiction over : " Any claim for damage done by a ship." The Judicature Acts did not extend the jurisdiction of the High Court, but merely transferred to the High Court the jurisdiction formerly exercised by the High Court of Admiralty. LORD GORELL made this clear, in the Privy Council, in *Bow, McLachlan & Co., Ltd.* v. *Ship Camosun* (3). He there said ([1909] A.C. 597, at p. 608) :

> [The Judicature Acts] amalgamated the English courts and transferred to the High Court all the jurisdiction which had been previously exercised by the different courts, so that every judge of the High Court can exercise every kind of jurisdiction possessed by the High Court, but these changes conferred no new Admiralty jurisdiction upon the High Court, and the expression " Admiralty jurisdiction of the High Court " does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new Admiralty jurisdiction. It is true that a judge of the High Court sitting in the Admiralty Division thereof may, as judge of the High Court, exercise any jurisdiction which is now possessed by a judge thereof, but he does so by virtue of the general jurisdiction conferred upon him, and not by virtue of any alteration in his Admiralty jurisdiction.

I must, therefore, look back at the Admiralty Court Acts, 1840 and 1861, to see what jurisdiction the Court of Admiralty had before the Judicature Acts were passed. The Admiralty Court Act, 1861, s. 7, enacted :

> The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

By sect. 35, such jurisdiction :

> . . . may be exercised either by proceedings *in rem* or by proceedings *in personam*.

The words of the statute are quite clear, and quite simple and I think that they must be given the widest possible interpretation. The Act of 1840 dealt [in sect. 6] with damage received by a ship on the high seas or " within the body of a county," but the Act of 1861 does not limit the locality in any way ; it simply states : " The High Court of Admiralty shall have jurisdiction over any claim for damage done by " a ship. That Act has been held to apply to damage done by a ship to a pier in British waters and to damage by collision between ships in foreign waters. To limit the jurisdiction, as suggested by the defendants, seems to lead to this strange result : If the Tolten collided with a ship belonging to the plaintiffs moored alongside the pier and the pier was damaged as a result of the collision, the plaintiffs could sue the Tolten here in respect of damage to their ship, but they could not include in their claim damage done to the pier as a result of the collision.

Unless precluded by an authority binding on this court, I see no reason why a case of this kind should not be included within the plain words of the statute.

So far as any hardship is concerned –if I am entitled to consider hardship—there is no hardship on the defendants if they have to defend the action here. They are resident in this country. On the other hand, if the plaintiffs are not entitled to arrest the ship except in Nigeria, their remedy against the ship, which has left Nigerian waters, has gone. The High Court exercising Admiralty jurisdiction may be considered as an international court in this sense, that it exercises jurisdiction *in rem* over foreign and British ships alike in respect of damage done by such ships, whether the damage has been done in British waters, or on the high seas, or in foreign waters. To limit the plain words of the statute so as to exclude a claim of this kind seems to me to impose a fetter on the jurisdiction of the court to which the court should be slow to submit, and to limit unduly the right of the plaintiffs to arrest the ship which has done the damage.

For these reasons I reject the plea on demurrer.

Judgment for the plaintiffs on the preliminary point, with costs. Leave to appeal granted.

Solicitors: *Lightbounds, Jones & Co.* (for the plaintiffs); *William A. Crump & Son* (for the defendants).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

R. *v.* SELLARS.

[Court of Criminal Appeal (Wrottesley, Stable and Lynskey, JJ.), October 22, 1945.]

Criminal Law—Burden of proof—Rationed goods acquired without surrendering coupons—Discharge of burden of proof if facts of acquisition constitute supply not prohibited by Order—Consumer Rationing (Consolidation) Order, 1944 (*S.R. & O.*, 1944, *No.* 800), *arts.* 3, 4.

Emergency Legislation—Rationing—Rationed goods acquired without coupons—Burden of proof on person charged—Consumer Rationing (Consolidation) Order, 1944 (*S.R. & O.*, 1944, *No.* 800), *arts.* 3, 4.

S. was charged with having acquired rationed goods (*viz.*, children's clothing) without surrendering the appropriate number of coupons, in contravention of the Consumer Rationing (Consolidation) Order, 1944. The clothing in question had been stolen during a weekend. According to the statement of S., the clothing had been offered to her for purchase, but she had had no time for sorting it out and paying for the articles she wanted, when the police arrived. The Consumer Rationing (Consolidation) Order, 1944, art. 4 (repealed and replaced by S.R. & O., 1945, No. 1000) provided that "a person shall not acquire rationed goods from any person without surrendering the appropriate number of coupons in respect thereof provided that it shall be a defence to a person charged with contravening this provision to prove that the supply to him of those goods without the surrender of coupons was not prohibited under the provisions of this Order." The trial judge, when summing up to the jury, stated that art. 4 contained an absolute prohibition of acquiring rationed goods from any person without surrendering the appropriate number of coupons unless the Order in some other part of it stated that coupons were not necessary, and that S. acquired the clothing in accordance with the terms of the Order. S. was convicted of an offence under the Order and bound over for three years. S. appealed against conviction:—

Held: (i) the Consumer Rationing (Consolidation) Order, 1944, art 4, had the effect that a person who acquired rationed goods, if charged with an offence under the Order, must prove that the supply of the goods was not prohibited by the Order. This burden of proof was, however, discharged by the accused if he established a set of facts which on examination was found not to be prohibited by the provisions of the Order.

(ii) the direction to the jury that they had no choice in the matter was wrong. The jury should have had before them the facts alleged with the necessary guidance as to what facts would constitute the accused guilty and what facts would make her not guilty.

(iii) the jury not having received that assistance, the conviction must be quashed.

[**EDITORIAL NOTE.** This case deals with the onus of proof when an accused person is charged with acquiring rationed goods without surrendering coupons. It should be compared with *R.* v. *Putland*, p. 85 *post*. Both cases are a useful guide in cases where an Act or Order places an onus on the defence.

FOR THE CONSUMER RATIONING (CONSOLIDATION) ORDER, 1945 (S.R. & O., 1945, No. 1000), see BUTTERWORTH'S EMERGENCY LEGISLATION [38] 1763.]

APPEAL by the accused from a conviction for an offence under the Consumer Rationing (Consolidation) Order, 1944, art. 4. The accused was tried by the COMMON SERJEANT and a jury at the Central Criminal Court. The facts are sufficiently set out in the judgment of the court delivered by WROTTESLEY, J.

V. J. M. Stephenson for the appellant.

Sebag Shaw for the Crown.

WROTTESLEY, J. [delivering the judgment of the court]: In this case the appellant was convicted at the Central Criminal Court of acquiring rationed goods without surrendering coupons, and she was bound over for three years. She now appeals against conviction. Her ground is that the COMMON SERJEANT was wrong in law in holding that acquisition from a private individual for the private use of the acquirer without the surrender of coupons was a breach of the Consumer Rationing (Consolidation) Order, 1944, Part I, arts. 3 and 4.

The clothing in question was stolen during the Whitsun week-end by thieves who broke into a store at 78-81 Goswell Road. On Whit Thuesday the police visited the flat where Ada Breen, one of the accused persons, lived, and in her room they found a lot of the clothing. It was, I think, women's clothing of all kinds. They then went to another flat, No. 20, in the same building but on a different floor and saw the appellant and asked her about this property. She said: "Don't tell me it is stolen. I have some clothing here for my children, what the girl Breen gave me," and she produced an overcoat and told them they would find the rest in the drawers, adding that she had not yet paid for them. A little later she made a statement to the effect that Margaret Breen had offered her the things that morning, assuring her that they were "straight," and that she could pick what she wanted for her children. She said she had taken the bundle but had not had time to make her choice before the police arrived, and she had not paid for them. Counsel for the appellant submitted that the Order did not apply, and that is the point which has really been argued here to-day.

This Order now is no longer in force, having been replaced by another one [Consumer Rationing (Consolidation) Order, 1945 (S.R. & O., 1945, No. 1000)] It deals with "supply of rationed goods by traders," and art 1 says:

> Subject to the following provisions of this Part of this Order, no trader shall supply any rationed goods to any person unless the appropriate number of coupons has been surrendered to the trader in respect thereof.

"Trader" is defined in the definition article, art. 56, as follows:

> . . . a person carrying on in the United Kingdom the business of supplying any rationed goods, whether or not he carries out any process in the manufacture of them, or a business in the course of which he uses rationed goods in the production of goods which are not rationed goods.

Art. 2, and I am only dealing with the more important and relevant sections, deals first of all with the case:

> (1) Where any rationed goods are sold at a public auction on behalf of a person who is not a trader, the auctioneer shall not permit the supply of those goods unless the appropriate number of coupons has been surrendered to him.

There is a similar provision with regard to sale at a bazaar or sale of work. Then art. 2 (3) is:

> Where a person has acquired or manufactured rationed goods for the purpose of selling them to other persons, he shall not supply them unless the appropriate number of coupons has been surrendered to him.

That covers the case of somebody who buys material, works it up into a dress and sells the dress. Then comes art. 4, which is the important one for the purposes of this case and which is quite general. It says:

> A person shall not acquire rationed goods from any person without surrendering the appropriate number of coupons in respect thereof; provided that it shall be a defence to a person charged with contravening this provision to prove that the supply to him of those goods without the surrender of coupons was not prohibited under the provisions of this Order.

It is clear to us, first of all, that, by virtue of this article, a person who does acquire rationed goods, if charged with an offence against this Order, must, to be found not guilty, prove that the supply was not prohibited by this Order. The burden of proof is shifted intentionally by the Order on to the person accused, but we are all agreed that that onus is discharged by proving a set of facts which on examination is found not to be prohibited by any of the provisions of the Order. It may well be that the appellant cannot do that without establishing that the sale was by a person who is not a trader, but we are not concerned with that. We are agreed that that is the proper approach to this matter, a proposition which the prosecution contest. We hold the view strongly that the proper approach to the question is to prove a set of facts and from them to establish, if possible, that that set of facts is not prohibited. It is not necessary to go further than that.

Two passages in the summing-up of the COMMON SERJEANT to the jury on this matter, are complained of. He said, dealing with this charge, after reading art. 4:

> There are certain provisions of the Order which say that coupons are not necessary. I need not go into them at any length, but it is really that I may deal with the point . . . raised by [counsel for the defence] . . . when she said that in the circumstances of this case it could not be said that these goods were "acquired." Art. 4, as I have pointed out, contains an absolute prohibition of acquiring rationed goods from any person without surrendering the appropriate number of coupons unless the Order in some other part of it states that coupons are not necessary.

That is not the effect of art. 4, and counsel for the prosecution, quite fairly, told us that the distinction between what the COMMON SERJEANT said at this point in his summing-up and the real meaning of art. 4, is not to be reconciled, and therefore it is clear that in that respect the summing-up did not give the true meaning of this Order.

The other passage complained of contains these words of the COMMON SERJEANT:

> Then as regards Mrs. Sellars the same thing applies. Consider her story. If you consider it a reasonable one, and one consistent with innocence, acquit her of receiving, but I cannot see at the moment any answer to the question of acquiring. In my view she did acquire these goods in accordance with the terms of that Order and I am bound so to direct you.

It is clear that there again the COMMON SERJEANT directed the jury that they had no choice in this matter. In truth and in fact the jury should have had before them the facts alleged with the necessary guidance as to what facts would make, on the one hand, the appellant guilty of a breach of the Order and what would, on the other hand, make her not guilty. The jury did not receive that assistance, and the conviction must be quashed. The order of probation falls with the conviction.

Appeal allowed. Conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellants); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

R. v. THOMAS PUTLAND AND GLADYS ANNIE SORRELL.

[COURT OF CRIMINAL APPEAL (Humphreys, Hilbery and Henn-Collins, JJ.), November 26, 27, 1945.]

Criminal Law—Evidence—Rationed goods acquired without coupons—Onus of proof—Duty of prosecution to establish prima facie case—Consumer Rationing (Consolidation) Order, 1944 (*S.R. & O.*, 1944, *No.* 800), *arts.* 1, 2 (3), 4.

Emergency Legislation—Rationing—Rationed goods acquired without coupons—Onus of proof—Duty of prosecution to establish prima facie case—Consumer Rationing (Consolidation) Order, 1944 (*S.R. & O.*, 1944, *No.* 800), *arts.* 1, 2 (3), 4.

G.S. and T.P. were charged with having conspired to acquire, and having acquired rationed goods (*viz.*, silk stockings) without surrendering the appropriate number of coupons, in contravention of the Consumer Rationing (Consolidation) Order, 1944. It was submitted on their behalf that there was no case to go to the jury because there was no evidence in regard to the non-surrender of coupons. In his summing-up, the trial judge directed the jury that, in a case of this kind, a defendant alone might know whether coupons had been surrendered or not, and, therefore, if the prosecution had proved the whole case to the satisfaction of the jury, it was not necessary to prove that no coupons had been given in order to establish a case requiring an answer from a defendant. On the facts of the case (including the evidence given by G.S. and T.P. themselves) the jury found them guilty of the offences, and they were convicted. On appeal, it was contended that the Order in question did not put the onus of proof on a defendant and the judge had, therefore, misdirected the jury in law in regard to the onus of proof. The prosecution contended that the onus of proving that he had surrendered the appropriate coupons was on the defendant because that was, very often, a fact peculiarly within his knowledge :—

HELD : (i) where a person was charged with an offence against the Consumer Rationing (Consolidation) Order, 1944, the prosecution had to establish to the satisfaction of the jury a *prima facie* case for the defendant to answer. Until a *prima facie* case had been established against him, the onus of proving that he had surrendered the appropriate coupons was not on the defendant.

R. v. *Oliver* (1) *distinguished.*

(ii) there had been no misdirection in law according to the facts of the case in the judge's direction to the jury. A summing-up was not intended to be a full statement of the law upon the particular crime that was charged, but a direction to the jury as to the law to be applied by them to the facts of the particular case.

(iii) upon the facts of the case, there was sufficient evidence for a jury to find that no coupons had been surrendered.

[**EDITORIAL NOTE.** This case deals with the onus of proof on a charge of dealing in rationed goods without surrender of coupons. It should be compared with *R.* v. *Sellars*, p. 83, *ante*.

AS TO FACTS PECULIARLY WITHIN THE KNOWLEDGE OF ONE PARTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 545, 546, para. 615 ; and FOR CASES, see DIGEST, Vol. 22, pp. 40, 41, Nos. 171-177.

FOR THE CONSUMER RATIONING (CONSOLIDATION) ORDER, 1944, see BUTTERWORTH'S EMERGENCY LEGISLATION [38] 1761.]

Case referred to :

*(1) *R.* v. *Oliver*, [1943] 2 All E.R. 800 ; [1944] K.B. 68 ; 113 L.J.K.B. 119 ; 170 L.T. 110.

APPEALS against convictions on charges of contravening the Consumer (Rationing) Consolidation Order, 1944. The grounds of appeal alleged (i) that the judge misdirected the jury as to the onus of proof ; (ii) that there was no case proper to be left to a jury. The report deals only with the questions of law raised by the appeals and not with the evidence of the appellants. The facts are fully set out in the judgment of the court given by HUMPHREYS, J.

G. O. Slade, K.C., and *Percy Lamb* for the appellants.

R. E. Seaton for the Crown.

HUMPHREYS, J. [delivering the judgment of the court]: The Consumer Rationing (Consolidation) Order, 1944, was made by the Board of Trade under the Defence (General) Regulations, 1939, regs. 55 and 55AA, to deal with the surrender of coupons in respect of the supply of rationed goods. Art. 1 of the Order made it an offence for any trader to supply rationed goods without the appropriate number of coupons being surrendered. Art. 2 (3) provides:

> Where a person has acquired or manufactured rationed goods for the purpose of selling them to other persons, he shall not supply them unless the appropriate number of coupons has been surrendered to him.

Art. 4 of the Order provides:

> A person shall not acquire rationed goods from any person without surrendering the appropriate number of coupons . . .

To that there is a proviso which is immaterial in this case because it affords a possible defence to an accused person, putting the onus of proof upon that person [that the supply to him of those goods without the surrender of coupons was not prohibited under the provisions of the Order]. No one has suggested that the defence in this case have proved, or attempted to prove, at any stage of the proceedings, that the proviso would apply to this case.

Those being the relevant articles of the Order, the first count of the indictment in this case charged three persons, Marchant and the two appellants, Mrs. Sorrell and Putland, with a conspiracy to acquire rationed goods without the appropriate number of coupons being surrendered. The second count charged all three of them with actually acquiring named rationed goods, *i.e.*, 314 pairs of silk stockings, without surrendering the appropriate number of coupons. The third count charged all those three persons with conspiring together to supply rationed goods which had been acquired for the purpose of selling to other persons. They were all convicted on counts 1 and 2. Marchant and Mrs. Sorrell were convicted on count 3. Putland was acquitted by the jury on count 3, a not unimportant matter to keep in mind because it shows how carefully the jury discriminated in this case between the parts played by the three then defendants. Marchant at one time appealed or desired to appeal, against his conviction, but he abandoned that appeal and only appealed against his sentence and has been dealt with. The other two are the appellants in this case, and they have each been given leave to appeal against their convictions on the ground that questions of law worthy of consideration were proposed to be argued.

The first and most important point, from the public point of view, which has been raised in this case is that there was misdirection in law by the deputy chairman who tried the case in regard to that very important matter, the onus of proof. Two occasions are relied upon, the first being when a submission was being made that there was no evidence to go to the jury. There being a submission that there was no evidence from start to finish about the surrender or the non-surrender, of coupons, the question of onus of proof was discussed. The deputy chairman observed that on some occasions the onus is shifted to the defendant to some extent. The matter being argued by counsel for the defendants, who said that there was nothing in the Regulations which puts the onus on the defendant, the deputy chairman said:

> No, there is nothing in the Regulations, but I think in law there is.

Later, when he came to sum up to the jury the deputy chairman said:

> It has been urged by defending counsel that there is no evidence about the non-surrender of coupons. Well, there is no direct evidence, but in a case like this if you find that the defendants have acquired the goods, they must know better than anybody else, they may be the only persons who know, whether they have given the proper amount of coupons or not, and it is quite sufficient for the crime that they have acquired the goods, the defendants being left, if they desire, to prove that they did give the proper number of coupons. Of course, on the whole case the prosecution have to prove the case to your satisfaction, but it would not be necessary for the prosecution to prove that no coupons had been given in order to establish a case which required some answer from the defence.

That is alleged to be a misdirection upon that matter and a misdirection in law.

We were referred in regard to that matter to *R.* v. *Oliver* (1) which is binding upon us so far as it is relevant to the present case. The Order which was being considered in that case was the Sugar (Control) Order, 1940, which made it an offence for any wholesaler by way of trade to supply any sugar; it is an absolute prohibition, subject to this, that he may do so "in accordance with the terms of a licence, permit or other authority granted by . . . the Minister." So that no person may do the act—no person may deal in sugar at all—unless he has a licence. The court held, upon the terms of that Order, that the onus was on the defendant to prove that he had a licence, that being a fact peculiarly within his own knowledge, and the prosecution was therefore under no necessity of giving *prima facie* evidence of the non-existence of a licence. There is, in our opinion, a very broad distinction which must be observed between that case and the present. In that case the prohibition against doing the thing was absolute, and it was for the defendant, if he wanted to show that he might do it lawfully, to provide some excuse such as a licence or other authority from the Minister.

In this case, the offence (I am now dealing more particularly with the first two counts of this indictment) which is created is not in dealing in rationed goods, either by way of supply or by way of acquiring; that remains lawful. There is no reason why anybody should not deal in rationed goods if they like, but what is provided is that, if a person does deal in rationed goods in a particular way, he must do something else, *i.e.*, he must surrender the appropriate number of coupons. That seems to us to be a slightly different matter. The view we take of the onus of proof in such a case is this: we are not prepared to hold that the prosecution is bound to prove by evidence that in fact there was no surrender of coupons, because in many cases that would be quite impossible. But we do think that the prosecution, in making a charge against persons of having contravened this Order, must give some *prima facie* evidence to the jury upon which the jury would be entitled as reasonable people to find as a fact that there was no surrender of coupons. When the prosecution have done that, there is, in our opinion, not a change in the onus of proof, but there is a case against the defendants upon which the jury may convict them, unless they can upset the *prima facie* case which has been made against them. We are very far from saying that that means that the defendant must prove in the first instance anything at all. It was argued as to how absurd it would be if the law were that any person who is found in possession of rationed goods, which he obviously and admittedly has acquired by buying, had to prove that, on buying those articles, he had surrendered coupons. Every day cases might arise in which the servants or officials of the Board of Trade might say to a perfectly respectable person: "You are wearing a shirt which is quite new" (or some other rationed goods which are quite new) "you must satisfy me that when you bought that you surrendered coupons." The answer might be—the article in question being, say, a handkerchief or a tie—"I bought it three weeks ago somewhere or other; I cannot tell you where. I found myself without a handkerchief, I went into a shop and I gave a coupon; I cannot tell you where the shop was, I do not know, and even if I did know the shop, it would not help you because it was a cash transaction; the shopkeeper has not my name, does not know me, and I do not suppose for a moment he recollects the transaction." It would be absurd to say that such a person must be convicted because he could not prove that he had in fact surrendered a coupon. In our view, there is no necessity for a defendant in the first instance to give evidence that he has surrendered coupons—he being a person who has been proved to have acquired rationed goods—unless and until there is some case made against him, some *prima facie* case, so that an answer is called for. Then it is for him; he can either sit down under it, or he can give evidence, make statements, do what he likes in the matter by way of satisfying the tribunal of fact that the transaction was in truth a proper one because there was a surrender of coupons.

Every case must be decided upon its own facts. Therefore, when we look at the direction given to the jury in this case by the deputy chairman, we shall say that it was, or was not, a misdirection in law according to the facts of the case to which he was addressing his mind. A summing-up is never intended to be a full statement of the law upon the subject of a particular crime which is charged in the indictment. It is a direction to the jury as to the law to be applied by them to the facts of the case as they find them, and no more. Perhaps I ought to add that it is always necessary to do what the deputy chairman did in this case, *i.e.*, to warn the jury that upon the whole matter the onus is still upon the prosecution to satisfy them that the crime charged in the indictment has been committed by the defendants, otherwise they must acquit.

The second point which has been raised is that there was no evidence that the defendants acquired or agreed to acquire these rationed goods without coupons. Upon that matter, counsel for the Crown has drawn our attention to one fact which is so important that it could be said to be the principal fact in this case ; *i.e.*, the goods in question were silk stockings. The number of pairs of silk stockings was 314. Evidence was given that the number of coupons that would have to be surrendered for those 314 pairs of silk stockings was 942 coupons. When one has evidence given like that, it becomes slightly ridiculous to talk about the surrender of coupons by private persons. The jury would know—they must be taken to have known—that nobody in England under this rationing system ever, at any time, gets 900 coupons (or 300 supposing that each supplied his quota) ; and the idea that coupons could have been surrendered to that number was completely ridiculous. That is the best possible evidence that coupons were not surrendered—the best possible *prima facie* evidence, at all events, that they could not have been. When one looks at the evidence in the case, as the deputy chairman was bound to do, when he was summing-up to the jury, it consisted not only of proof by the prosecution that 942 coupons were apparently being dealt with, but also of the evidence of the two defendants (now the two appellants) : each of them had purported to give an account of their doings for the whole day—where they went, who they saw, what they did—and from beginning to end they had never suggested that a single coupon was handed over by anybody to anybody else. In our view, the deputy chairman was perfectly justified in making the observation he did when he said :

> The truth is that the surrender of coupons does not come into this case at all.

Nobody has ever suggested that that is the defence to this case ; the defence that is set up is : " We never acquired the goods and we never agreed to acquire the goods." If they did acquire them, they acquired them, in our view, without the surrender of coupons.

Appeal of Gladys Annie Sorrell dismissed. Appeal of Thomas Putland allowed and conviction quashed on other grounds.

Solicitors : *Oswald Hickson, Collier & Co.*, agents for *Bracher, Son & Miskin*, Maidstone (for the appellants) ; *Solicitors for Metropolitan Police* (for the Crown).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

Re PRINGLE, BAKER *v.* MATHESON AND OTHERS.

[Chancery Division (Cohen, J.), November 27, December 6, 1945.]

Wills—Construction—Gift of whole estate to C.—Codicil providing that " in the event of the simultaneous death " of C. and the testatrix " the interests of my moneys to be divided between " Mrs. M. and E., " after the deaths of these two named the capital to go to my nephew "—Testatrix, C. and E. killed instantaneously by the same bomb—Whether gift in will revoked by codicil—" Simultaneous death "—" After the deaths of these two named "—Gift of capital to take effect only after death of survivor of Mrs. M. and E.—E.'s half share payable to Mrs. M. during the remainder of Mrs. M.'s life—Law of Property Act, 1925 (c. 20), *s.* 184.

By her will dated Jan. 6, 1939, the testatrix gave all her property to her sister C. On Jan. 21, 1941, when enemy air raids were at their height, the testatrix made a codicil to her will stating : " In the event of the simultaneous death of " C. " and myself, I hereby desire and bequeath the interests of my moneys to be divided between my two sisters," Mrs. M. and E., " after the deaths of these two named the capital to go to my nephew " R.W.E. The testatrix and her sisters C. and E. were all three killed on Feb. 7, 1943, when the house in which they were living suffered a direct hit from an enemy bomb. On the evidence, the deaths must have been instantaneous. The testatrix was aged 68, C. was 63, and E. was 60. The questions to be determined were (i) whether, in the event which had happened, the gift in the will was revoked by the codicil ; (ii) if it was revoked, to whom the half share of the income of the estate which had been payable to E. was payable during the remainder of Mrs. M.'s life. With regard to the first question, it was contended by a sister who was not a beneficiary that the phrase "simultaneous death" could not be defined and the codicil was, therefore, void for uncertainty. With regard to the second question it was agreed that, in accordance with the presumption laid down by the Law of Property Act, 1925, s. 184, it must be assumed that E. survived the testatrix. It was contended by E.'s personal representatives that, on the true construction of the will, they were entitled to E.'s half share of the estate until Mrs. M.'s death. For the nephew it was contended that the interests of each of the sisters was only a life interest and the phrase "after the deaths of these two named the capital to go to my nephew" meant that after the respective death of each of the sisters the capital of their respective shares was to go to him. On behalf of Mrs. M., it was also contended that each of the sisters had only a life interest, but it was further contended that the gift of capital to the nephew took effect only after the death of the survivor of the two sisters :—

HELD : (i) upon the true construction of the codicil, the words "simultaneous death" meant death in such circumstances that the ordinary man would infer that death was simultaneous. The event contemplated by the testatrix had occurred and the gift in the will was revoked by the codicil.

Dictum of LORD PORTER *in Hickman* v. *Peacey* (1) ([1945] 2 All E.R. 215, at p. 231), *applied.*

(ii) by the gift in the codicil, the testatrix intended to give to each of her sisters, E. and Mrs. M., only a life interest in her estate.

Bignold v. *Giles* (4) *distinguished.*

(iii) by the phrase "after the deaths of these two named" the testatrix meant "after the death of the survivor" of the two sisters named. The gift of the capital of their respective shares, therefore, took effect only after the death of the survivor of E. and Mrs. M.

Re Hobson (5) *and Re Ragdale* (6) *applied.*

(iv) during the remainder of her life Mrs. M. was entitled to E.'s half share of the income of the estate.

Re Ragdale (6) *applied.*

[**EDITORIAL NOTE**. The facts in this case are similar to those in *Hickman* v. *Peacey* (1), where, however, the Law of Property Act, 1925, s. 184, was under construction. Here the question is the interpretation to be put upon the phrase "simultaneous death" when used by a testatrix. Applying the principles in *Perrin* v. *Morgan* (3) COHEN, J., looks at the surrounding circumstances, and holds that simultaneity of death exists for the purposes of the codicil where there is a common calamity causing instantaneous death in which it cannot be shown that any lapse of time has occurred between one death and another.

AS TO COMMORIENTES, see HALSBURY, Hailsham Edn., Vol. 14, p. 212, para. 354 ; and FOR CASES, see DIGEST, Vol. 23, pp. 88, 89, Nos. 790-801.]

Cases referred to :

*(1) *Hickman* v. *Peacey*, [1945] 2 All E.R. 215 ; [1945] A.C. 304 ; 114 L.J.Ch. 225 ; 173 L.T. 89.

(2) *Edinburgh Street Tramways Co.* v. *Edinburgh Corpn.* [1894] A.C. 456 ; 43 Digest 354, *113* ; 63 L.J.Q.B. 769 ; 71 L.T. 301.

*(3) *Perrin* v. *Morgan*, [1943] 1 All E.R. 187 ; [1943] A.C. 399 ; 112 L.J.Ch. 81 ; 168 L.T. 177.

*(4) *Bignold* v. *Giles* (1859), 4 Drew. 343 ; 39 Digest 135, *296* ; 28 L.J.Ch. 358 ; 32 L.T.O.S. 308.

*(5) *Re Hobson, Barwick* v. *Holt*, [1912] 1 Ch. 626 ; 44 Digest 566, *3839* ; 106 L.T. 507.

*(6) *Re Ragdale, Public Trustee* v. *Tuffill*, [1934] Ch. 352 ; Digest Supp. ; 103 L.J.Ch. 181 ; 150 L.T. 459.

ADJOURNED SUMMONS to determine certain questions arising under the will of Anna Elizabeth Pringle. The facts and the relevant clauses of the will and codicil are fully set out in the judgment.

Humphrey H. King for the plaintiff, Mrs. Baker.

J. V. Nesbitt for the defendant Mrs. Matheson.

M. O'C. Stranders for Emily's personal representatives.

Hon. Denys Buckley for the defendant Mrs. Bell.

C. E. Shebbeare for the defendant Robert William Elder.

Cur. adv. vult.

COHEN, J.: The testatrix was one of seven sisters. Four were married and are still living; they are the plaintiff and the defendants, Mrs. Matheson, Mrs. Bell and Mrs. Elder. On Feb. 7, 1943, the three unmarried sisters were all in a house, 20, Lushington Road, Eastbourne, when an enemy bomb fell on the house and all three sisters were killed. The facts as to the deaths, so far as known, are set out in an affidavit of a rescue party supervisor in the service of the borough of Eastbourne:

> My party was summoned at 15.17 hours and arrived at the said premises at 15.22 hours. From enquiries which I made I ascertained that the bomb fell at 14.56 hours. The house had suffered a direct hit and had completely collapsed on its own site. We found three bodies on the top of the debris all close together. Two were dismembered and unrecognisable but in the case of the third body, although dismembered, the face was recognisable.

The ages of the three sisters were as follows: the testatrix was 68, her sister Christina was 63 and her sister Emily was 60. It is in those circumstances that the testamentary dispositions of the testatrix have to be considered. Her will, which was dated Jan. 6, 1939, was in the following terms:

> This is the last will and testament of me Anna Elizabeth Pringle of 17a Southfields Road Eastbourne in the county of Sussex spinster Whereby I revoke all former wills and testamentary dispositions made by me and give the whole of my property of every kind to my sister Christina Jane Pringle, whom I appoint as my sole executor knowing she will faithfully carry out any wishes I have made to her.

On the same day she wrote a memorandum addressed to her sister Christina containing directions as to the ultimate disposition of her property which corresponded to the codicil to which I shall refer later. This was not a testamentary disposition and there is no evidence that it was communicated to her sister and I do not think it assists in the decision of the point before me.

On Jan. 21, 1941, in the midst of the blitz, the testatrix made the following codicil:

> This is a codicil to the will of me Anna Elizabeth Pringle of 20 Lushington Road Eastbourne Sussex the said will bearing date Jan. 6, 1939. In the event of the simultaneous death of the aforesaid, Christina Jane Pringle and myself, I hereby desire and bequeath the interests of my moneys to be divided between my two sisters Mary Agnes Matheson and Emily Gertrude Pringle, after the deaths of these two named the capital to go to my nephew Robert William Elder.

I am informed by the defendant Mrs. Elder, who appeared in person but has not sworn an affidavit, that the testatrix had made it quite plain to her husband, Mr. Elder, when giving instructions for the codicil, that this codicil was intended to provide for the events which happened. But I think this statement, even if in evidence, would not be admissible and, even if admissible, it could not relieve me of the task of construing the words the testatrix has used which are not in terms confined to the consequence of enemy action.

The first question raised by the summons is as follows:

> Whether upon the true construction of the said codicil and in the event (which happened) of the deaths at approximately the same time of the testatrix and her sister Christina Jane Pringle in the said codicil named, the disposition of the estate of the said testatrix contained in her said will is revoked by the said codicil wholly or to the extent to which the said estate is effectively disposed of by the said codicil.

The first point to be noted is that, on this question, I am not primarily concerned with the meaning of the Law of Property Act, 1925, s. 184. That section is in the following terms:

> In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court) for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

Its meaning was considered by the House of Lords in *Hickman* v. *Peacey* (1), where it was held, on facts very similar to those of the present case, that the presumption prescribed by the section applied. The basis of the decision of the majority in the House of Lords was that the question to be answered, in deciding whether the section applied, was not whether there was simultaneous death or not, but whether there was uncertainty as to which of two or more persons survived the other or others. This appears clearly from the opinion expressed in the judgments of Lord Macmillan and Lord Porter that the existence of a reasonable element of doubt was enough to create uncertainty, although a jury on the evidence might be able to arrive at a conclusion. Lord Macmillan said ([1945] 2 All E.R. 215, at p. 223) :

> It is easy to involve oneself in logical and metaphysical subtleties, and perhaps fallacies, in handling such a topic as this. It is, of course, true that time is infinitely divisible and also that it is theoretically possible that the deaths of two persons may be absolutely coincident in time. As Lord President Robertson said in *Edinburgh Street Tramways Co.* v. *Magistrates of Edinburgh* (2), at p. 704 : " This is . . . a profound and impressive truth . . . but there are times and places for everything, and I should hardly have thought a Tramway Act exactly the occasion which Parliament would choose for teaching business men metaphysics unawares." I prefer, therefore, to judge the language of the present enactment by a more commonplace standard. I think that it poses a practical question—Can you say for certain which of these two dead persons died first ? If you cannot say for certain, then you must presume the older to have died first. It is immaterial that the reason for your inability to say for certain which died first is either because you think they both died simultaneously or because you think they died consecutively but you do not know in what sequence. I note with interest that ([1944] 1 All E.R., at p. 85) Lord Greene, M.R., himself in the course of the argument in the Court of Appeal " suggested that the section upon its true construction might cover the case of simultaneous deaths." The reasons which he gives for rejecting his suggestion do not, with all respect, convince me, despite their verbal logical cogency. I would only add a few words regarding the term " uncertain " which occurs in the enactment and which was so much canvassed in the course of the argument. The basis of belief may range from mere conjecture through all degrees of probability to absolute demonstration—possibility, probability, certainty. In seeking to arrive at a conclusion in fact in ordinary human affairs the law rejects mere possibility as an insufficient basis of proof but on the other hand it does not exact absolute or mathematical proof. It is content to proceed upon probability if it is sufficient and the test of sufficient probability is that the direct evidence with all legitimate inferences is such as ought to satisfy the mind of a person of reasonable intelligence. But the result of a decision on a question of fact by a judge or a jury is not certainty. It is finality, not certainty. Your Lordships in considering a verdict of a jury on a question of fact have often declared that it is not to be disturbed because there was evidence on which a reasonable person could so find but that it is not to be taken that your Lordships would have reached the same conclusion. Can it be said that in such circumstances the fact found by the jury has been ascertained with certainty ? It has been determined with finality in law but not with certainty in fact. In my opinion the legislature in employing the word " uncertain " in the section which the House has to construe was not thinking of the kind of certainty with which the law has to be content but was using the word in its ordinary acceptation as denoting a reasonable element of doubt.

Lord Porter said ([1945] 2 All E.R. 215, at pp. 230-232) :

> For the appellants it was contended firstly that though simultaneity of death was theoretically possible and perhaps even possible in fact yet its existence could never be proved and, therefore, in all cases where it could not be shown that one survived the other there was always such uncertainty as the section requires. Secondly, that in the present case it was in fact uncertain which of the four persons concerned survived. There were, it was said, only two alternatives ; either it could be shown who was the survivor or it could not, and if it could not the sequence of death was uncertain. On the part of the respondents it was maintained that the facts established instantaneous and contemporaneous death in the case of each of the four persons, and, therefore, there was no uncertainty : they all died together. Speaking for myself, I should be inclined to read the section, even without the previous history, as presenting only two alternatives, *viz.* : (i) an ability to show the order of death, or (ii) uncertainty. Like Lord Cranworth, L.C., I am not sure that the occurrence of two deaths at exactly the same point of time is possible, and still less am I inclined to accept the allegation that it can ever be proved. But quite apart from theoretical questions of this kind, I think the section itself is so framed as to exclude the possibility of simultaneous death from ever being recognised as a certainty and to include it amongst the uncertainties. It does not speak of uncertainty as to whether the persons concerned died at the same time, but seeks to determine which survived the other. It seems to be concerned with survivorship or no survivorship, and not to be concerned with some *tertium quid* which is neither the one nor the other . . . Before leaving the case I should desire to say something as to the amount of uncertainty required in order to establish that, in a case such as this, sect. 184 applies. It is undoubted law that in

civil cases absolute proof of the fact to be determined is not required: it is enough if from facts admitted or proved a reasonable inference can be drawn . . . But in the present case, under the section, what has to be proved is not whether there was simultaneous death or not, but the certainty of simultaneous death or rather uncertainty as to who survived whom. I can imagine a court, whether judge or jury, being asked on a balance of probabilities: "Do you draw the inference that A and B died at the same moment of time?" and replying, "Yes!"; but on the inquirer putting the further question: "But are you certain?" I can imagine the answer being "No!"

In construing the will now before me I must decide what the testatrix means by the phrase "simultaneous death" Mr. Stranders and Mr. Buckley in their able argument referred me to the dictionary meaning. I take the dictionary meaning of "simultaneous" from the OXFORD ENGLISH DICTIONARY as being:

> Existing, happening, occurring, operating, etc., at the same time; coincident in time.

Counsel say that that is the plain meaning of the words the testatrix has used and there is no ambiguity which would justify me in looking at the surrounding circumstances to see if the words are not used in some secondary sense. But are they so plain? I think not. In *Hickman* v. *Peacey* (1) LORD WRIGHT uses language which suggests that it is not so plain ([1945] 2 All E.R. 215, at p. 225):

> Suppose the hypothetical plain man were cross-examined as to what he meant when he said that the five persons died at the same time, and were asked whether he meant within the same minute or the same second, or what? It may be he would reply that he was applying the smallest measurement of time of which he could take cognisance. This may not be very exact, but it is as exact as expressions like "the same moment," or "the twinkling of an eye" or "instantaneous" or "simultaneous" are in ordinary thought. Different language would be necessary to specify differences in measurement imperceptible to ordinary sense which might be recorded by scientific instruments of almost incredible delicacy.

The relevant principles of construction are laid down in *Perrin* v. *Morgan* (3) by LORD ROMER ([1943] 1 All E.R. 187, at p. 197):

> My Lords, I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. In order to understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said; that he was, in fact, one of those persons of whom KNIGHT BRUCE, L.J., said that they spoke as if the office of language were to conceal their thoughts. In many of the cases to be found in the books the court is reported to have said that the construction it has put upon a will has probably defeated the testator's intention. If this means, as it ought to mean, that the court entertains the strong suspicion to which I have just referred no sort of objection can be taken to it. But, if it means that the court has felt itself prevented by some rule of construction from giving effect to what the language of the will read in the light of the surrounding circumstances convinces it was the real intention of the testator, it has misconstrued the will.

I think, therefore, I am justified in looking at the surrounding circumstances to see what the testatrix meant by the words she has used. Having regard to the date of the codicil, it is clear to my mind that the testatrix's mind was directed to covering the very event which in fact occurred. But she did not in terms say so, and, Mr. Buckley says, once you learn the dictionary meaning you cannot define the event contemplated, and the codicil is void for uncertainty. I think the answer is that you can define the event in the language suggested in *Hickman* v. *Peacey* (1) by LORD PORTER ([1945] 2 All E.R. 215, at p. 231):

> Counsel for the respondents came, I think, nearest it when he said there would be simultaneity of death in a case where there was a common calamity causing instantaneous death in which it could not be shown that any lapse of time had occurred between one death and another . . .

It is true that LORD PORTER set that argument up as a ninepin which he proceeded metaphysically to knock down, but I have no reason to believe that the testatrix was a metaphysician. I think that the language used by LORD PORTER accurately described what the testatrix had in mind and that the language she used is capable of this construction. If that be so, there can be no doubt but that the event contemplated by the testatrix occurred: the bomb was a common calamity and it caused the instantaneous death of all three sisters.

The conclusion I have reached may be stated somewhat differently as follows. The mind of the testatrix was directed not to the establishment of an absolutely scientific truth but to a correct conclusion in point of law. If, therefore, she meant by "simultaneous death" death at the same moment of time, she meant, not death in such circumstances that a metaphysician would hold that simultaneous death had been proved, but death in such circumstances that the ordinary man would infer that death was simultaneous. If that be so, I think the observations of LORD PORTER ([1945] 2 All E.R. 215, at p. 231), apply to the facts of the present case:

> If, however, the possibility of proving simultaneous death was contemplated by the section or was practicable, I should be inclined to say that the facts in the present case go as far, or nearly as far, as they could to show simultaneous death.

For these reasons I am of opinion that the event contemplated by the codicil has occurred.

Declaration that the codicil revoked the will wholly or to the extent to which the estate was effectively disposed of by the said codicil.

COHEN, J.: The next question raised by this summons is this: on the basis of my decision that the will of the testatrix has been wholly or in part revoked by the codicil, and in the event which happened of the death of Emily Gertrude Pringle, named in the codicil, at approximately the same time as the death of the testatrix, whether, on the true construction of the codicil, the one half share in the income of the estate of the testatrix by that codicil made payable to Emily is, during the remainder of the life of the defendant Mrs. Mary Agnes Matheson, (*a*) payable to the defendant Robert William Elder, or (*b*) undisposed of, or (*c*) disposed of by the will of the testatrix, or (*d*) payable to the defendant, Mary Agnes Matheson, or (*e*) payable to Emily's legal personal representatives.

It was common ground between the parties that, for the purpose of deciding this question, I must assume, in accordance with the presumption laid down in the Law of Property Act, 1925, s. 184, that Emily survived the testatrix, even although by only a small fraction of time. That being so, I have now to consider on that basis the effect of the direction in the codicil:

> I hereby desire and bequeath the interests of my moneys to be divided between my two sisters Mary Agnes Matheson and Emily Gertrude Pringle, after the deaths of these two named the capital to go to my nephew Robert William Elder.

Counsel for those who desired to support an intestacy admitted—rightly, I think—that, whatever other construction is possible, it is impossible on the terms of that codicil to treat the testatrix's estate, or any portion of it, as undisposed of by her will. That leaves me with three alternatives. The first alternative, supported by the defendant Robert William Elder, is that those interests were only life interests, and that "after the deaths of these two named the capital to go to my nephew Robert William Elder" means that after the respective deaths of each of them the capital of their respective shares is to go to the defendant Robert William Elder. That, he says, is the correct view in accordance with the principle stated in JARMAN ON WILLS, 7th Edn., p. 1776, in these terms:

> But the court will not construe the will as postponing the distribution of every part until the death of the surviving tenant for life, unless an intention so to do is clearly indicated; although the gift in remainder is in terms of the whole fund, and appears therefore to have a simultaneous distribution in view, yet, if a tenancy in common is more consistent with the general context, it will be established, especially in favour of children, in spite of the apparently antagonistic terms.

The second claim is by Emily's legal personal representatives. Counsel on their behalf says that there is nothing to indicate that the gift to the two sisters is only for their respective lives, and that, if it were not for the direction as to what was to happen after the death of the two named persons, it would clearly be an unlimited gift of income to them as tenants in common, carrying therefore, the right to capital. The effect of the additional words, he says, is merely to cut down their interest: their absolute interest comes to an end on the death of the survivor, but in the meantime the personal representatives are entitled to one half of the income. In support of that proposition he cited the decision of KINDERSLEY, V.-C., in *Bignold* v. *Giles* (4).

The third contention, which was advanced by counsel for Mrs. Matheson, is that, on the true construction of this will, the testatrix gave to each of her sisters only a life interest, and that the gift of capital was only to operate after the death of the survivor of them: therefore, he says, in accordance with the principle stated by PARKER, J., in *Re Hobson* (5), there is either an implied joint tenancy—in which event Mrs. Matheson takes as surviving joint tenant the income of the whole fund until her death -or, alternatively, there is an accruer clause under which the gift goes over to Mrs. Matheson. The principle is stated in these terms by PARKER, J., ([1912] 1 Ch. 626, at p. 631):

> In my opinion it is quite clear on the authorities that where there is a gift equally between A, B and C during their respective lives and after the death of the survivor of them the whole property is given over, the court has implied an intention on the part of the testator that the survivors or survivor of A, B and C shall after the death of one or more of them be entitled to the whole income down to the period of distribution . . .

He then gives two alternative ways of arriving at the ultimate conclusion.

I must dispose first of the contention advanced by Mr. Stranders. I am dealing here with a home-made will and I cannot think that the testatrix, when she directed the interests of her moneys to be divided between two sisters, whom she named, and after the death of the two of them gave the capital to her nephew, intended to give anything but a life interest. It seems entirely contrary to any probability and to place a strained meaning on the language used. I can distinguish *Bignold* v. *Giles* (4) on the ground that in that case the testator, when he had left a life interest, or an annuity, had in terms said so, and, therefore, it was much more difficult to cut down language which was on the face of it absolute to a mere life interest. KINDERSLEY, V.-C., said towards the end of his judgment (4 Drew. 343, at p. 348):

> . . . the testator, when he means to give life annuities, has expressed them to be for life, from which it may be collected, and the argument is not without weight, that when he does not so express himself, he does not intend to limit the duration.

Here I have no doubt, on the true construction of the will, that the testatrix did intend to give only a life interest.

The question then arises which of the other two constructions I should adopt. Should I take the view that "after the deaths of these two named the capital to go to my nephew Robert William Elder" means "after the death of the survivor of them the capital goes to Robert William Elder"? Or does the phrase mean that after the respective deaths of each of them the capital of their respective shares shall go to the nephew Robert William Elder? On the whole, though not without some doubt, I have come to the conclusion that the argument advanced by counsel for Mrs. Matheson is correct, and that the testatrix intended to dispose of the whole of the capital only after the death of the survivor of the two ladies. It seems to me that that fits in with the general scheme under which one generation, sisters, take, and on the death of the last survivor of the two named persons, (*i.e.*, after the death of the survivor of that generation) it goes over, not to their children, but to another name. As I said, it is a matter of construction in each case. It seems to me on the whole that, if I read "after the deaths of these two named" as meaning after the death of the last survivor of them, it is a construction of the will which does least violence to its language and one which, I think, is in accordance with decisions such as that of FARWELL, J., in *Re Ragdale* (6). I think that, once I get to the stage of holding that the gifts to the sisters were only life interests, *Re Ragdale* (5) is an authority which justifies the decision to which I have come.

I will declare accordingly.

Declaration that the half share in the income of the estate of the testatrix payable under the codicil to Emily was, during the remainder of Mrs. Matheson's life, payable to Mrs. Matheson. Costs of all parties to be taxed as between solicitor and client and paid out of the estate.

Solicitors: *G. F. Hudson, Matthews & Co.* (for the plaintiff and the defendants other than Mrs. Bell); *R. S. Jackson & Bowles* (for the defendant Mrs. Bell).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

ALFRED EARL HODGSON *v.* BRITISH ARC WELDING CO., LTD. AND B. & N. GREEN & SILLEY WEIR, LTD.

[KING'S BENCH DIVISION (Hilbery, J.), November 13, 1945.]

Factories and Workshops—Dock—Ship under repair—Defective staging—Accident to workman employed by sub-contractors engaged for the electric arc welding—Contractors in occupation of ship—Staging provided by contractors—Sub-contractors not liable—Breach of statutory duty by contractors—Shipbuilding Regulations, 1931 (*S.R. & O.*, 1931, *No.* 133), *reg.* 11 (*b*).

Master and Servant—Liability of master at common law—Ship under repair—Defective staging—Accident to workman employed by sub-contractors engaged for the electric arc welding—Staging provided by contractors—Sub-contractors for specialised work not responsible for staging erected by contractors.

A workman was employed as an electric arc welder by B.A.W. Co., which had sub-contracted for the electric arc welding of a ship under repair. The shipwrights, who were the contractors for the repairs, were in occupation of the dock and the ship and they provided the scaffoldings and stagings necessary for the repairs. While working in the hold of the ship the workman found that he had to stand on a plank which could not be securely fixed owing to its being warped. Owing to the defective plank, the workman met with an accident and sustained personal injuries. He brought an action for damages against his employers, B.A.W. Co., for breach of the common law duty owed by a master to his servant and against the shipwrights, as occupiers of the ship in which he was working, for breach of the statutory duty imposed on them by the Shipbuilding Regulations, 1931, reg. 11 (*b*), or, alternatively, for breach of their common law duty to him:—

HELD: (i) in the circumstances of the case, there was no breach of common law duty by the employers; since they were merely sub-contractors, engaged to do specialised work, they were not responsible for the scaffolding which was provided by the shipwrights.

(ii) by providing a plank which was warped and which could not be "maintained in such condition as to ensure the safety of all persons employed," the shipwrights were liable to the workman for breach of the statutory duty imposed on them by the Shipbuilding Regulations, 1931, reg. 11 (*b*).

(iii) in the circumstances, it was not necessary to determine whether the shipwrights had committed a breach of their common law duty to the workman; because, as the danger was apparent to him before he used the plank, the shipwrights could not be liable at common law.

[**EDITORIAL NOTE.** The main point of interest in this case is the decision that the common law duty owed by a master to insure the safety of his servant does not apply in the case of a sub-contractor, where the defective scaffolding is provided and erected by the contractor. The sub-contractor in such circumstances relies upon the expert knowledge of the contractor, and he is not liable to his servant for injury resulting from the negligence of the contractor.

AS TO LIABILITY OF OCCUPIER OF DOCKS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 619-621, para. 1174, and Supplement; and FOR CASES, see DIGEST, Vol. 24, pp. 915-919, Nos. 104-138, and Supplement.]

Case referred to:

(1) *Smith* v. *Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. 242; Digest Supp.; 109 L.J.K.B. 134; 163 L.T. 9.

ACTION for damages for negligence. The action was brought by a workman against his employers, sub-contractors for repairs to a ship, for breach of the common law duty owed by a master to his servant, and against the contractors who were in occupation of the ship for breach of the statutory duty imposed on them by the Shipbuilding Regulations, 1931, reg. 11 (*b*), or, alternatively, for breach of their common law duty to him. The facts are fully set out in the judgment.

S. R. Edgedale for the plaintiff.

R. Marven Everett for the first defendants, the sub-contractors.

E. Ryder Richardson for the second defendants, the contractors.

HILBERY, J.: In this case the plaintiff, who is an electric arc welder employed by the first defendants, went on Apr. 14, at 2 p.m. to work for his employers in the hold of S.S. Sampep, then lying in a dock which was in the occupation of the second defendants. The second defendants were in occupation both of the dock and of the ship. They were the contractors for repairs to the ship, the first defendants sub-contracting for the electric arc welding. The second defendants were shipwrights and as shipwrights, in the ordinary course of the doing of such work, were the people to provide, and they did provide, the scaffoldings and stagings in the ship necessary for the doing of all the repairs for which they were contracting or sub-contracting.

The plaintiff went to No. 5 hold to do the work which he was directed to do, and he found there a staging which had been erected by the second defendants. The staging was formed by resting a plank, on which the plaintiff was to stand and work, on a cargo batten in the side of the ship, the other end of the plank resting on a trestle. The plaintiff says he noticed that the particular plank on which he was to work was a warped plank with a twist in it, and the end which should have rested on the horizontal member of the trestle had been wedged to prevent it from tipping up and down. In his view it was not a safe plank. In the course of working at the other end of the plank from that where it rested on the trestle, he had occasion to require a little extra length of flex. He was working with an electric arc welder with a very long trailer flex. Wanting some slack, he found that the flex had got caught round the end of the plank which was at the trestle end. He did what seems to have been a perfectly sensible thing to do: he walked down to the end of the plank and freed it. It is said that that was an unwise, and even a negligent, thing to do, inasmuch as the plaintiff knew that the plank was wedged, and that he ought to have got off the plank, walked along and then got back, as it was only 2ft. 6ins. from the deck. I cannot see anything negligent or unwise in the plaintiff doing what he did do. I think it was a normal thing for a man to do—to walk along the plank, release the flex, and then walk back along the plank. I do not think that any ordinary or reasonable workman would have thought of getting down off the plank and taking some extra precaution because the plank was wedged. Although the plank was wedged, the plaintiff did not, at that stage, apprehend that the wedge was coming adrift and that the plank was going to tilt. As he went back, the plank did tilt. He lost his balance and fell off the plank, hitting his back rather a severe blow. It would appear that he must have hit it in the region of the pelvis. He continued to work that afternoon, but the next day, when he went to work, he felt that he could not go on because of the pain. He knocked off his work and went down to the Tilbury Hospital. The doctor there advised him to see his own doctor or to attend his own local hospital, as the Tilbury Hospital was then an emergency hospital.

He acted as he was advised and went into his local hospital where he received infra-red ray treatment for seven or eight weeks. He went back to his work on about June 20, 1944. He went back to the same sort of work, welding, but he did not have to do any climbing or pulling cable about. He did that work for some time and it is clear that, from then until Apr., 1945, he was earning substantially the same wage that he earned before. Thereafter, he began to feel worse; he says that he now gets pain in the back after doing only a certain amount of work. That is the case upon which the plaintiff asks for damages.

The action now comes to trial against both these defendants. As regards the first defendants, the plaintiff alleges that they are in breach of a common law duty owed by a master to his servant. As against the second defendants, he alleges that this accident was due to a breach of the Shipbuilding Regulations, 1931, imposed upon the second defendants as the occupiers of the dock and the ship where he was at work when the accident happened, the Regulations being one of the sets of regulations made relating to dangerous trades. Alternatively, as against the second defendants, he says that they were guilty of a breach of their common law duty to him, *i.e.*, of the duty owed by occupiers of premises to those going upon the premises on a matter of business common to the person going upon the premises and the occupiers.

On the evidence, I cannot find that any case is made out against the first defendants, the plaintiff's employers. The work in question was to be done by his employers in premises over which they had no control whatsoever. They were not occupiers of the premises; they were only a firm of contractors employed to do certain work in a ship which was then in the hands of the shipwrights for repairs, and they contracted to do that work for the shipwrights. The evidence is that, in those circumstances, the shipwrights provide the scaffoldings and stagings in the ship required for the work which has to be done in the way of repairs. They are skilled persons in the erection of such things. It is a sensible system, because scaffoldings and stagings inside a ship are not like straightforward scaffoldings on a building; there are all sorts of peculiarities of ship construction to deal with. In accordance with the usual custom, the first defendants' workmen, including the plaintiff, found a stage and scaffolding provided by the second defendants, and there was no reason to suppose that it would not be a reasonably safe scaffolding.

I think it is putting the duty of an employer in those circumstances too high to say that an electric arc welding firm, or any other sub-contractor doing a specialised type of work, is under a duty separately to inspect every piece of scaffolding in order to see that what the shipwright has done has been done with proper care and skill. They are not competent, or qualified, to criticise what the shipwright does in the way of erecting a scaffolding. The shipwright is an expert in the matter, whereas the sub-contractors probably know nothing about it. It would be ridiculous to say that the employer in those circumstances was responsible to his workmen, because he (the employer) who knows nothing about the erection of scaffoldings, and how to make them reasonably safe, did not inspect with the eye of ignorance the work which was being done with the eye of knowledge and skill. I do not think that there was any breach of duty by the first defendants which led to this accident—*i.e.*, breach of any duty owed in law. They were not the occupiers of this ship and dock, or of the ship, or the dock. They did not owe the duty which the ordinary occupier of premises owes to somebody coming upon the premises on a matter of business common to that person and to the occupier. They were not under the statutory obligations and regulations, because they were not the occupiers. As far as they are concerned, there must be judgment for them.

So far as the second defendants are concerned, it seems plain on the evidence before me that this plank was not a suitable or safe plank to provide in a scaffolding or staging which was constructed as that one was. A twisted and warped plank might be the only safe plank to fit into a particular opening which was so shaped that it would not take a plank which was true, but would take one which was warped; but that was not this case. This warped and twisted plank was being laid on what was apparently a straight-edge and, since, in those circumstances, it could tip, someone put a wedge underneath it to prevent it tipping. But I have not heard that the wedge, or the plank, was secured in any way, nor that any step was taken to prevent that wedge from coming out; and the wedge did come out. I am satisfied that the real explanation of the matter is that this work was being done at a time when timber in this country was very difficult to obtain, and, owing to the urgency with which work had to be done in ships, a chance was taken which would not be taken in ordinary circumstances. A piece of bad dangerous planking was used, which, in the ordinary course, would not have been used. The result was that the plaintiff fell.

The question then arises whether there was a breach of the duty owed in law by the second defendants to the plaintiff at common law or a breach of the statutory regulations, or both. As I read the Shipbuilding Regulations, 1931, reg. 11 (*b*), I think there was a breach of the statutory regulations which, as was pointed out in *Smith* v. *Cammell Laird & Co.* (1), imposed an absolute obligation. That there was a breach of the statutory duty is, I think, clear. The Shipbuilding Regulations, 1931, reg. 11 (*b*) provides:

> All staging shall (i) be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed.

As I have said, this plank was twisted, warped and unsafe, and it was not, and it could not be, maintained in such a condition as to ensure the safety of all persons employed. In my view, the plaintiff succeeds against the second defendants for breach of the statutory duty.

I need not, therefore, decide whether the plaintiff has also established a claim based upon the common law duty. I very much doubt whether he has, because this danger from which he suffered was apparent to him before he went upon the plank or used it; so it was not a danger of which the occupier knew, or ought to have known, but of which the visitor did not know, though exercising reasonable care for his own safety. The plaintiff did know of it; he recognised the danger; and, in those circumstances, I do not think that he could succeed on the claim of common law duty, but he does succeed on the breach of the statutory duty. I think the plaintiff has established the right to damages to the extent of £235. There must be judgment for the plaintiff against the second defendants for £235, and judgment for the first defendant against the plaintiff.

Judgment for the plaintiff against the second defendants for £235 with costs. Judgment for the first defendants, the taxed costs of the first defendants to be paid direct by the second defendants.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the first defendants); *Hewitt, Woollacott & Chown* (for the second defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

YOUNG *v.* BRISTOL AEROPLANE CO., LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Russell of Killowen, Lord Macmillan, Lord Porter and Lord Simonds), July 24, 25, 26, 27, November 29, 1945.]

Workmen's Compensation—Right to sue for breach of statutory duty—Alternative remedies—Election between remedies—Receipt of compensation—Knowledge of workman—"Option"—When option exercised—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29 (1).

The appellant, a workman in the respondents' factory, sustained injuries in the course of his employment owing to the failure of the respondents to fence a machine. He lost three fingers and was unable to return to work for 6 months. Shortly after the accident the respondents offered him, and he accepted, a weekly sum of money and he signed receipts for weekly payments made under the Workmen's Compensation Act, 1925. These sums were paid to him throughout the period of his unemployment. The appellant then brought an action against the respondents claiming damages for breach of their statutory duty. It was found as a fact that, although the appellant could not be said to have exercised his option under the Workmen's Compensation Act, 1925, s. 29 (1), since he did not know of his right to elect, nevertheless he had received the payments made to him by the respondents as compensation under the Act. The question for the determination of the court was whether the appellant, knowing that such payments to him were made by the respondents under the Workmen's Compensation Act, 1925, was debarred by virtue of sect. 29 (1) from taking proceedings independently of the Act for the recovery of damages from the respondents:—

HELD: (i) the Workmen's Compensation Act, 1925, s. 29 (1) was not to be regarded as substituted for the civil liability of the employer to the workman who, although given an option under the section as to which liability he might enforce against his employer, could not pursue together the two remedies by claiming compensation under the Act and damages independently of the Act. The option, however, was not equivalent to equitable election, since that would make the exercise of it by the workman dependent not upon what he had done but upon what he knew.

(ii) where, however, the workman accepted some payments under the Act, in ignorance of the option, the alternative remedy available to him was not lost. But if he persisted in receiving weekly compensation after knowing of the alternative course, he was debarred from changing the nature of his claim.

(iii) on the facts here, the appellant, after he became fully informed of his rights, continued to receive weekly payments from the respondents and had, therefore, exercised his option for compensation under the Act.

Decision of the Court of Appeal ([1944] 2 All E.R. 293) *affirmed.*

[**EDITORIAL NOTE**. It is abundantly clear in this case that the workman continued to receive compensation under the Act with knowledge of the choice of remedies given him by the Workmen's Compensation Act, 1925, s. 29, and the House of Lords accordingly upholds the decision of the Court of Appeal in favour of the employers. There is, however, considerable difference of opinion as to the true construction of sect. 29, which may be reduced to this position. *Perkins* v. *Hugh Stevenson* (1) and *Selwood* v. *Townley Fire Co.* (2) are based upon the view that a workman who has accepted compensation as such cannot sue for damages even though he did not know he had an alternative remedy, the latter part of sect. 29 operating in favour of the employer independently of the first part. The contrary view, represented by the reasoning of the Lord Ordinary in *Brown* v. *William Hamilton & Co.* (3), is that the final part of the section is merely exegetical. Much of the difficulty appears to arise from confusing the statutory "option" with the equitable right of election. Grave difficulties arise if a workman is required to have such a knowledge of all the material facts as would be necessary in the case of the equitable doctrine. The matter may be summed up in the words of Lord Simonds, at p. 113 *post*, that "it is what the appellant did, not what he knew or thought, that matters."

As to Alternative Remedies, see HALSBURY, Hailsham Edn., Vol. 34, pp. 961-966, paras. 1318-1325; and for Cases, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071. See also Willis's Workmen's Compensation, 36th Edn., pp. 522-549.]

Cases referred to:

*(1) *Perkins* v. *Stevenson (Hugh) & Sons, Ltd.*, [1939] 3 All E.R. 697; [1940] 1 K.B. 56; Digest Supp.; 109 L.J.K.B. 1; 161 L.T. 149; 32 B.W.C.C. 181.

*(2) *Selwood* v. *Towneley Coal & Fireclay Co., Ltd.*, [1939] 4 All E.R. 34; [1940] 1 K.B. 180; Digest Supp.; 109 L.J.K.B. 8; 161 L.T. 323; 32 B.W.C.C. 238.

*(3) *Brown* v. *William Hamilton & Co., Ltd.*, [1944] S.L.T. 282; [1943] Session Notes 82.

*(4) *Unsworth* v. *Elder Dempster Lines, Ltd.*, [1940] 1 All E.R. 362; [1940] 1 K.B. 658; Digest Supp.; 109 L.J.K.B. 305; 162 L.T. 163; 33 B.W.C.C. 1.

*(5) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1; Digest Supp. 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463.

*(6) *Coe* v. *London & North Eastern Ry., Co.*, [1943] 2 All E.R. 61; [1943] 1 K.B. 531; 112 L.J.K.B. 497; 168 L.T. 382.

*(7) *Lissenden* v. *Bosch (C.A.V.), Ltd.*, [1940] 1 All E.R. 425; [1940] A.C. 412; Digest Supp.; 109 L.J.K.B. 350; 162 L.T. 195; 33 B.W.C.C. 21.

*(8) *Bennett* v. *Whitehead (L. & W.), Ltd.*, [1926] 2 K.B. 380; 34 Digest 492, *4068*; 135 L.T. 329; 19 B.W.C.C. 133.

*(9) *Cribb* v. *Kynoch, Ltd. (No. 2)*, [1908] 2 K.B. 551; 34 Digest 492, *4071*; 77 L.J.K.B. 1001; 99 L.T. 216; 1 B.W.C.C. 43.

*(10) *Burton* v. *Chapel Coal Co., Ltd.*, [1909] S.C. 430; 34 Digest 491, *k*; 46 Sc.L.R. 375; [1909] 7 S.L.T. 111; 2 B.W.C.C. 120.

*(11) *Blain* v. *Greenock Foundry Co.* (1903), 5 F. (Ct. of Sess.) 893.

*(12) *McDonald* v. *James Dunlop & Co.* (1905), 7 F. (Ct. of Sess.) 533.

*(13) *Rouse* v. *Dixon*, [1904] 2 K.B. 628; 34 Digest 491, *4066*; 73 L.J.K.B. 662; 91 L.T. 436; 6 W.C.C. 44.

*(14) *Edwards* v. *Godfrey*, [1899] 2 Q.B. 333; 34 Digest 492, *4072*; 68 L.J.Q.B. 666; 80 L.T. 672; 1 W.C.C. 32.

*(15) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; 1 Digest 579, *2195*; 48 L.J.Q.B. 705; 41 L.T. 418.

*(16) *Mackay* v. *Rosie*, [1908] S.C. 174; 1 B.W.C.C. 52.

*(17) *Birch* v. *Pease & Partners, Ltd.*, [1941] 1 K.B. 615; 165 L.T. 146; 34 B.W.C.C. 37; *sub nom. Pease & Partners, Ltd.* v. *Birch*, [1941] 1 All E.R. 343.

*(18) *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon (or Waddell)*, [1931] A.C. 575; Digest Supp.; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. 181.

*(19) *Codling* v. *Mowlem (J.) & Co., Ltd.*, [1914] 3 K.B. 1055; 34 Digest 491, *4067*; 83 L.J.K.B. 1727; 111 L.T. 1086; 7 B.W.C.C. 786; *affg.* S.C. [1914] 2 K.B. 61.

Appeal by the plaintiff, a workman, from a decision of the full Court of Appeal (Lord Greene, M.R., Scott, MacKinnon, Luxmoore, L.JJ., Lord Goddard and du Parcq, L.JJ.), dated July 28, 1944, reported ([1944] 2 All E.R. 293), affirming a decision of the commissioner of assize, given at Lancaster on Nov. 30, 1943, dismissing the action brought by the workman against his employers for damages for breach of their statutory duty. The facts are fully set out in the opinions of Viscount Simon, Lord Russell of Killowen and Lord Porter.

Gilbert J. Paull, K.C., and *Henry Burton* for the appellant.

F. A. Sellers, K.C., and *W. Matabele Davies* for the respondents.

The House took time to consider its opinion.

Viscount Simon: My Lords, this is the appeal of the plaintiff, in an action brought for damages at common law against his employers, the respondents, for failure to fence dangerous machinery. The appeal is from a unanimous decision of the Court of Appeal which was specially constituted to hear the plaintiff's appeal from the judgment given against him by the commissioner at the Manchester Assizes. Besides Lord Greene, M.R., who delivered the considered judgment of the whole court, Scott, MacKinnon, Luxmoore, Goddard and du Parcq, L.JJ., were parties to the decision. One of the conclusions reached in the judgment of Lord Greene, M.R., is that if the Court of Appeal, when sitting in one of its Divisions, has in a previous case pronounced on a point of law which necessarily covers a later case coming before the court, the previous decision must be followed (unless, of course, it was given *per incuriam*, or unless the House of Lords has in the meantime decided that the law is otherwise), and that this application of the rules governing the use of precedents binds the full Court of Appeal no less than a division of the court as usually constituted. Thus, the previous decisions of the Court of Appeal in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) and *Selwood* v. *Townley Coal and Fireclay Co.* (2), upon the correctness of which the respondents rely, but which the appellant challenges, could not be overruled in that court; and since these decisions were held to apply to the present case in a sense adverse to the appellant, his appeal was necessarily dismissed.

The present appeal, therefore, is in substance a submission that the decisions in *Perkins's* case (1) and *Selwood's* case (2) are wrong, or, at any rate, that they are not conclusive against the appellant's claim. The question involves the interpretation and application of the Workmen's Compensation Act, 1925, s. 29 (1)—a section which is in the same form as sect. 1 (2) (*b*) of the 1896 Act, and one which has given rise to many difficulties and to a multitude of decisions. Sect. 29 (1) runs as follows:

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

Before proceeding further, it is necessary to set out the essential facts in the present case. On Apr. 3, 1942, the appellant lost three fingers of his left hand by amputation while operating a guillotine sheet-metal cutter in the respondents' factory. It is not in dispute that this accident arose out of and in the course of his employment in such circumstances as to create a liability in the respondents to pay compensation for his injury under sect. 1 of the 1925 Act. On Apr. 30, 1942, the appellant attended at the respondents' works and received from one Howarth, whose duty it was to attend, on the respondents' behalf, to payments under the Workmen's Compensation Act, the sum of £6 15*s*., which amount is equal to the compensation under the Act due to the appellant for the first four weeks. Thereafter, the appellant attended at the works and was paid by Howarth, week after week, the sum of £1 15*s*. until the following October. On each occasion there was put before him a pay-sheet which plainly showed that these were payments under the Workmen's Compensation Act, and how they were calculated. On each occasion the appellant signed the pay-sheet "for payment received." The commissioner of assize found that the appellant read the form and understood it, and accepted these payments knowing them to be made as compensation under the Act, though he did not in the first instance "make a claim for compensation 'as such'."

In the course of making and receiving these weekly payments, namely, on July 24, 1942 (and apparently after the respondents had been prosecuted and convicted for failing to fence the machinery which had injured the appellant) the appellant's solicitor wrote on his behalf claiming "compensation under the Workmen's Compensation Act and, alternatively, claiming damages." The respondents replied admitting liability under the Act only, and pointed out that the appellant "has been in receipt of compensation since his cessation of work following the injuries." Notwithstanding this correspondence in July, the appellant continued to draw his weekly compensation and the commissioner found (*a*) that the appellant between the time of the accident and July "did not know that he had a right under sect. 29 (1) of the Workmen's Compensation Act to elect as between two alternative remedies," and (*b*) inferentially, that he "*did* know after July 24, but nevertheless went on drawing his compensation money." Consequently, the commissioner, following *Perkins's* case (1), felt constrained to hold that the option to sue independently of the Act had gone.

In *Perkins's* case (1), the injured workman had actually applied to his employers for compensation under the Act and was paid weekly sums accordingly for about a year, after which no further compensation was due as he had recovered from his injuries. About two months after the accident, however, his solicitor had written referring to his alternative claim apart from the Act and attempted unsuccessfully to secure that the weekly payments should be regarded as being made without prejudice to the alternative claim. The Court of Appeal held that this alternative claim was barred, because from the date of the solicitor's letter the workman must be regarded as having material for exercising his "option" and as having exercised it; the employer had already been made liable under the Act and had paid in full all that the Act prescribed and could not therefore, be also liable independently of the Act. It is true that in the course of his judgment SIR WILFRID GREENE, M.R., expressed the view ([1939] 3 All E.R. 697, at p. 703) that:

> . . . where the employer, in response to a claim under the Act, has made a payment of compensation under the Act, that payment discharges once and for ever, in whole or *pro tanto*, the statutory liability under the Act . . .

FINLAY, L.J., appears to agree with him. But this view is not essential to the decision, and SIR WILFRID GREENE, M.R., goes on to point out that in that case the workman has in fact exercised his option. The actual decision can be supported by reason of that circumstance, apart from the fact that the workman had claimed and received compensation without knowledge that another remedy was available to him if he chose to adopt it.

In *Selwood's* case (2), the workman had made no application for compensation but he had received a number of weekly sums from his employers which were, as he knew, payments under the Act. Later, and while still gravely incapacitated, he refused, on the advice of his solicitor, to accept any more weekly payments and subsequently brought an action at common law against his employers for damages for personal injuries. The Court of Appeal held that the principle of *Perkins's* case (1) applied: he could not succeed in his action, according to the Court of Appeal, because, if he did, his employers would be paying both under the Act and independently of the Act. One difficulty I feel about this latter decision is that it involves the conclusion that if an injured workman receives one single weekly payment, knowing it is tendered as compensation under the Act, he loses all chance of suing successfully at common law. On this view, he takes the first payment, even though he has never asked for it, at his peril. The employers have paid for one week "under this Act" and are liable to pay it, and, therefore, it is suggested, they cannot thenceforth be liable to any proceedings by the workman "independently of this Act." It is to be observed that in *Selwood's* case (2) there is no trace of a suggestion that the workman had effectively exercised an "option": the decision turned on nothing else than that one or more weekly payments had been offered and accepted.

Having regard to the general scheme of the Act and to its obvious purpose of preserving remedies apart from the Act if the workman chose to avail himself of the alternative, I cannot accept this view. *Perkins's* case (1), on its actual facts, seems to me to be correctly decided: there the workman, by persisting in receiving weekly compensation as long as his injury lasted, although he long before had appreciated that the law offered him an alternative remedy, must be regarded as having effectively exercised "his option." But, with all respect to the members of the Court of Appeal in *Selwood's* case (2), which was decided three months later, I do not agree that this decision necessarily followed from the principle laid down in *Perkins's* case (1), and I think that the decision in *Selwood's* case (2) was wrong. The LORD ORDINARY (PATRICK) in *Brown* v. *William Hamilton & Co.* (3) develops the view ([1944] S.L.T. 282, at p. 286), which I would uphold, with much clearness and cogency. I think that the Scotch authorities quoted by Lord Patrick are right in treating the final part of sect. 29 (" but the employer . . .") as exegetical of the preceding part (" but in that case the workman may, at his option . . .") and not as further restricting by an added condition the workman's right of option. As the Lord Ordinary (Patrick) points out, and as was also laid down by Lord Goddard in the Court of Appeal in *Unsworth* v. *Elder Dempster* (4), no difficulty in adopting this construction arises from the rule that the employer is not to be bound to pay twice over. If, before the workman can be regarded as having really exercised his option, he receives one or more weekly payments under the Act, and he then opts to issue a writ and recovers damages, the damages in the action would be reduced by the amounts already received. This view secures what Sir Wilfrid Greene, M.R., in *Perkins's* case (1), described as the effect of the final words ([1939] 3 All E.R. 697, at p. 703), namely, that " the employer is not to be made to pay twice over to the same person." I cannot agree that the deduction from damages of a sum already paid in respect of the same injury is contrary to any " principle of law " (*ibid.*, at p. 704). On the contrary, I would adopt the statement of the Lord Ordinary (Patrick), ([1944] S.L.T. 282, at p. 286) that :

> When the workman sues at common law, if the sum awarded in the name of damages exceeds the sums already paid to him in the name of workmen's compensation, these sums will form a good set-off or will have to be taken into account in diminution of damages.

In the present case, I agree that the appeal must be dismissed on the ground that the appellant, who knew of his " option " in July, nevertheless continued to draw weekly compensation until the following October, and must consequently have deliberately and consciously chosen to claim compensation under the Act, instead of proceeding independently of the Act.

As the House has heard a full discussion of the difficulties of construction arising under sect. 29, I venture to add the following observations as representing my view of the general effect of the clause :

(1) The statutory provisions for workmen's compensation are not to be understood as substituted for remedies against his employer previously available to the workman injured by the personal negligence or wilful act of the employer or of those for whom the employer is responsible. One of the remedies so preserved is a right of action based upon breach of a statutory duty : see *Lochgelly Iron Co.* v. *McMullan* (5), especially *per* Lord Atkin ([1934] A.C. 1, at p. 9). The previous remedies remain available as an alternative for the cases which they cover.

(2) But the two remedies are not to be pursued together. For a workman to issue a writ for damages independently of the Act and also to " claim " compensation under the Act is forbidden. This prohibition of double process applies to the initiation and carrying on of proceedings whether either or both of them would ultimately succeed or not. It is presumably inserted for the protection of the employer, so that he shall not be vexed with both demands concurrently. The protection so given him could in proper cases be secured by stay or injunction.

(3) There thus being an option between two kinds of proceedings, who is to have the right to exercise the option ? The employer cannot insist on being called on to pay by one process rather than by the other. It is the workman who opts. It is " his " option. This option is not equivalent to equitable election and I deprecate the use of the latter word as a substitute for the word in the section. If " election," in the full sense, were meant, it would be necessary for the workman to know all that was material to determine his choice. Scott, L.J., is perfectly logical, in *Coe* v. *London and North Eastern Ry. Co.* (6), in saying ([1943] 2 All E.R. 61, at p. 64), that if " option " means " election " there can be no effective exercise of option " without full knowledge of all material facts affecting his choice." But this, in my opinion, is not the meaning of " option " in this connection. " Election " has two meanings, as Viscount Maugham pointed out in *Lissenden* v. *C.A.V. Bosch, Ltd.* (7), when he said ([1940] 1 All E.R. 425, at p. 429) :

> . . . the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he

will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether, in a case of wrongful conversion, he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice. The history of the common law rules, the principles which apply to them, and the effect of the election are all very different from those which prevail where the equitable principle is in question. See also LORD ATKIN's speech ([1940] 1 All E.R. 425, at p. 436).

Here we are dealing with a statutory " option ", in its setting in the section, and I am willing to adopt the view, which has constantly been expressed and enforced, that the workman does not lose his alternative remedy merely because he accepts some payments under the Act, when the option is unknown to him. But if the circumstances amount to this, that he persists in taking weekly compensation after knowing of the alternative course, he is debarred from changing the nature of his claim. This view, in my opinion, is confirmed by the exegetical character of the prohibition against double liability.

In conclusion, I would venture to express the hope that, if there is to be new statutory enactment on the subject of alternative remedies when workmen meet with industrial accident, the legislation will be so framed as to get rid of the doubts and difficulties which have led to so much controversy, and have given rise to such fine distinctions, in the interpretation and application of sect. 29.

My Lords, I move that the appeal be dismissed, with costs.

LORD RUSSELL OF KILLOWEN [read by LORD PORTER]: My Lords, the question debated on this appeal, while it admits of easy statement, is difficult of solution. The question is whether the appellant workman having accepted from his employers (the respondents) payments of compensation under the Workmen's Compensation Act, 1925, knowing them to be payments under that Act, is debarred by reason of sect. 29 (1) of that Act from taking proceedings independently of that Act for the recovery of damages from his employers. Sect. 29 (1) of the Act runs thus:

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

The relevant dates are these: The accident occurred on Apr. 3, 1942; the appellant received payment of the appropriate compensation (*viz.*, £1 15*s.* a week) until he returned to work on Oct. 2, 1942; on Feb. 5, 1943, he issued the writ in the present litigation, claiming damages for negligence and breach of statutory duty. The only defence upon which the respondents now rely is sect. 29 (1) of the Act.

The commissioner who tried the action at the Manchester Assizes, found the following facts: (i) that on and after Apr. 30, 1942, the appellant accepted the weekly payments knowing them to be made as compensation under the Act; (ii) that the appellant when he began to receive those payments did not know " that he had a right under sect. 29 (1) of the Workmen's Compensation Act to elect as between two alternative remedies "; and (iii) that in or about July, 1942, he did become aware of that right. The commissioner, on the finding first above-mentioned, felt bound to dismiss the action in view of two authorities in the Court of Appeal, *viz.*, *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) and *Selwood* v. *Townley Coal & Fireclay Co.* (2), which may, I think, be accurately described as having decided that a workman who has knowingly accepted as such payments of compensation under the Act, is precluded from recovering compensation independently of the Act.

My Lords, let me say at once, that in my opinion the present appeal must fail whatever view be taken as to the correctness of the decisions of the Court of Appeal, or the true interpretation of sect. 29 (1). The appellant here knew in July, 1942, of the choice given to him by the subsection, and with that knowledge chose to continue in receipt of compensation under the Act until he returned to work. Having thus, in exercise of the option given to him by the subsection, enforced to the full one liability of the employer, he cannot enforce any other; in other words, having in exercise of his option, enforced to the full the employer's liability to pay compensation under the Act, he cannot take proceedings to make the employer pay compensation independently of the Act. He has deliberately selected and exhausted one of the two rights which the subsection offers for his choice.

In view, however, of the course taken by the debate before your Lordships, I may be permitted to state my views upon the true construction of the subsection. It contains four provisions to the following effect:

(1) The civil liability of the employer is not affected by the Act when the injury was caused by the personal negligence or wilful act therein described.

(2) If the injury was so caused the workman is given a choice as to which liability he will seek to enforce.

(3) The employer is not to have to pay compensation to the workman both independently of the Act and under its provisions.

(4) No action may be brought against the employer in respect of an injury to a workman by accident arising out of or in the course of his employment, unless the injury was caused by the personal negligence or wilful default as aforesaid.

The subsection only applies when the injury was caused by the personal negligence or wilful default described in the opening words, but when it applies, it operates for the benefit of both the workman and the employer. On the one hand the first provision preserves to the workman the civil liability of the employer, and the second provision gives him a choice between enforcing that liability and enforcing the liability imposed on the employer by the Act. On the other hand, the third provision protects the employer from being obliged to meet both liabilities. The fourth provision may for the present purpose be disregarded. The second and third provisions are the ones which create the difficulty.

The Court of Appeal has treated the third provision as an enactment in favour of the employer which operates independently of the first and second provisions, and which in some way detracts from or qualifies the express saving in favour of the workman of the civil liability of the employer. It has construed the subsection as meaning that once some compensation for injury to a workman has been paid under the Act, and has been accepted by him as such, the employer is freed from all liability to pay compensation independently of the Act. My Lords, I find myself unable so to construe the third provision. It is a construction which, in my opinion, should only be adopted if none other is open, because it destroys to a great extent the primary object of the subsection, *viz.*, the preservation in favour of the workman of the employer's civil liability. So long as in the long run an employer is not made to pay more than his total liability under the particular head of liability which the workman, knowing of his choice, chooses to enforce, the protection given to the employer by the third provision will be secured to him. He will not have paid two sets of compensation, but only the compensation payable under his liability independently of or under the Act as the case may be.

For myself I would construe the subsection as follows: The object of the subsection is to keep the civil liability of the employer alive, and it gives the workman a choice as to what liability he will enforce against the employer. But to make a choice the workman must be aware of his right to choose, and of the alternatives open to his choice. In the case of a workman who, owing to ignorance in these respects, has been unable to exercise his option under the subsection, but who has been paid and has accepted compensation under the Act, even to the full amount, I cannot see how he can be prevented, on discovering his right to choose, from recovering compensation independently of the Act, if he be not barred by lapse of time.

On the other hand, if a workman, who knows of his right to choose and of the alternatives open to his choice, has enforced his claim to compensation independently of or under the Act, he cannot thereafter seek to enforce any other liability of the employer. By the words "has enforced his claim," I mean that he has obtained a judgment for damages at common law or compensation under the Employers Liability Act, 1880, or that he has obtained an award or an agreement for recording under sect. 23 of the 1925 Act, determining the employer's liability under the Act. When the workman has so made his choice of the liability which he desires to enforce, and has so enforced it, the subsection has been worked out, and the chapter is closed. But unless and until he has so enforced the liability of his choice, I find nothing in the subsection to prevent him from changing his mind, abandoning any pending proceedings in reference to one liability, and commencing proceedings to enforce the other liability.

In coming to this conclusion I find myself in substantial agreement with the views expressed by the LORD ORDINARY (PATRICK) in *Brown* v. *William Hamilton & Co., Ltd.* (3), although I do not think that the rights of the workman under the subsection are (as is indicated or suggested in many authorities) to be judged in the light of the strict rules applicable to the equitable doctrine of election. As I have said, the primary object of the section is to preserve the civil liability of the employer, making it plain on the one hand that it is the workman who may choose which liability shall be enforced against the employer, and on the other hand that the employer cannot be made to pay more than the measure of his liability independently of, or under, the Act as the case may be. The LORD ORDINARY (PATRICK) has pointed out the harsh results and the difficulties which would ensue if a workman is to be held to be deprived of his rights against the employer which are independent of the Act, by the mere acceptance as such of compensation paid under the Act. I need not repeat them, but they appear to me very real; and while no suggestion is or could be made against the employers in the present case, it is obvious that instances might arise in which, upon the construction of the subsection adopted by the Court of Appeal, very grave injustice might be inflicted on a workman by his employer.

As already indicated, however, this appeal must, in my opinion, fail.

LORD MACMILLAN [read by LORD SIMONDS]: My Lords, on the facts of the present case I have no doubt that the decision of the Court of Appeal was right in law. But as certain views on the proper interpretation of the Workmen's Compensation Act, 1925, s. 29, are implied in that decision and as the opportunity has been taken of bringing under review the many and varying judicial expositions of this much-debated enactment, I agree with your Lordships that the House ought to pronounce on the matter generally.

The remedy of compensation which the Act provides for accidents to workmen arising out of and in the course of their employment is expressly declared to be exclusive of all other remedies except in the single case of the accident having been caused by the employer's personal negligence or wilful act. In that case, but in that case only, the injured workman is given an option; he may either claim compensation under the Act or take proceedings independently of the Act under the pre-existing law. One thing at least is clear on the terms of the enactment: the injured workman is not entitled to make claims against his employer simultaneously for compensation under the Act and for damages independently of the Act. The remedies are mutually exclusive.

The option given to the workman is no doubt important and valuable, but it should not be overlooked that the Legislature in fixing the scale of statutory compensation must be taken to have regarded it as affording in the normal case fair and adequate compensation for the injury sustained, which physically is the same whether the accident was due to the employer's personal negligence or not. The reluctance manifested in some of the cases to hold that the workman has exercised his option in favour of the statutory compensation and the ingenuity exhibited in avoiding such a decision would seem to suggest that this consideration has not always been borne in mind.

The main controversy has centred round the question of what in law is to be held as committing the workman irrevocably to one or other of the two courses open to him when he has sustained an accident arising out of and in the course of his employment which has been caused by his employer's personal negligence or wilful act, the only case in which the statute gives him an option.

The problem has in my opinion been confused by the importation of the refinements of the equitable doctrine of election. It has been said that in giving the workman an option between two courses the statute has put him to his "election"; an "election" to be valid and irrevocable can only be made where there is on the part of the workman knowledge of the alternatives and full information as to the advantages and disadvantages of deciding to adopt the one or the other. Consequently the workman cannot be held to have exercised his option and to have committed himself irrevocably to the one or the other remedy unless he was possessed of such knowledge and information. The result of this argument is to make the determination of the question whether the workman has irrevocably exercised his option dependent not upon what he has done but upon what he knew. In my view this is an erroneous approach to the matter. Carried to its logical conclusion the argument would entitle a workman who for years had received compensation under the Act from his employer, either by agreement or under an award, to turn round and institute proceedings for damages independently of the Act on the plea that he did not know, when he claimed and accepted or was awarded compensation under the Act, that he had any right to redress outside the Act. If he could prove that this was so, then he must be held never to have exercised his statutory option, never to have made an "election." Similarly, on this argument, if the workman had intimated a claim of damages outside the Act and obtained from his employer, with or without proceedings in court, a sum in full satisfaction of his claim, he could nevertheless throw over the settlement and have recourse to a claim for compensation under the Act if he could show that he had not been aware of his rights under the Act when he made the settlement. Such an interpretation of the enactment would, in my opinion, be clearly contrary both to its letter and to its spirit. In one case the Act permits a *locus poenitentae.* If the workman exercises his option by bringing an action to recover damages independently of the Act and fails in that action, he may move the court to assess and award him compensation under the Act, if otherwise entitled to it, subject to deduction of the costs caused to his employer by his unsuccessful action. There is no parallel provision in the case of an unsuccessful claim under the Act. The inference is clear that the workman cannot try his luck first under the Act and then, if unsuccessful, independently of the Act or *vice versa,* apart from the single special concession which I have just mentioned.

It would be a singular situation if the employer could have no assurance that finality had been reached in settling a claim either under or independently of the Act unless he had taken steps to satisfy himself of the state of the workman's mind and that the workman had made a fully informed "election" between the alternative courses open to him. It would be grotesque to suggest that the employer to whom a claim under the Act has been made must ask the workman if he has considered the possibility of bringing an action against him for personal negligence or wilful fault, lest otherwise any settlement of the claim under the Act might have no finality because there had been no "election" on the part of the workman. The workman, like any other citizen, must be presumed to know the rights which the statute has given him, and must be judged according to what he does in the exercise of these rights and not according to the extent of his knowledge of them. I quote and adopt the words of SCRUTTON, L.J., in *Bennett* v. *L. & W. Whitehead, Ltd.* (8) ([1926] 2 K.B. 380, at p. 405) :

> If by statute you have an option to do A or B, but not both, and you have done A, it does not seem to me relevant to say "I have done A, but I have not elected to do it."

If one of the alternatives is adopted the other is excluded, no matter what failure there has been to appreciate the respective merits of the one or the other.

But this, unfortunately, is far from ending the matter. It still remains to consider what steps taken by the workman must be held in law to be evidence of an irrevocable exercise of his statutory option. This has proved a highly controversial point, as the diversity of judicial opinions shows. It is best elucidated by discussing the possible cases. I begin with the easiest case, on which there appears to be general agreement. If the workmen's claim either under or outside the Act is contested and he institutes proceedings which are carried through to their conclusion and result in an award of compensation under the Act or in a judgment for damages outside the Act, all are apparently now agreed that finality has been reached. The workman cannot be heard to say that in proceeding in the one way or the other he was unaware of his rights and had never truly exercised his option.

But what if the workman fails in the proceedings which he has taken ? Is he entitled then to resort to the alternative proceedings which he might have taken but did not take? The answer in my opinion is in the negative. I quote and adopt the words of COZENS-HARDY, M.R., in *Cribb* v. *Kynoch, Ltd.* (*No.* 2) ([1908] 2 K.B. 551, at p. 555) :

> . . . I think that the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail, and then proceed by common law action, and also cannot proceed by common law action and, having failed in that action, then proceed under the Act . . .

subject, of course, to the special right accorded under subsect. (2) of sect. 29. The workman by persisting to a conclusion in the proceedings which he has taken has irrevocably committed himself. He cannot be heard to say that he has exercised his option only conditionally on success. This view was emphatically approved in Scotland by a court of seven judges in *Burton* v. *Chapel Coal Co., Ltd.* (10). But in that case a qualification was admitted, based on the Scottish decisions in *Blain* v. *Greenock Foundry Co.* (11) and *McDonald* v. *James Dunlop & Co.* (12), and the English case of *Rouse* v. *Dixon* (13). If the reason of the workman's failure to recover compensation in proceedings under the Act was that his case did not fall within the Act, then, it was said, he was not barred from proceeding outside the Act. The ground for this view, as stated in *Burton's* case (10) by LORD LOW ([1909] S.C. 430, at p. 441), is that the enactments were :

> . . . intended to meet the case of a workman who has, in fact, an option between a claim under the Act and a claim independently of the Act, and, therefore, have no application to the case of a workman who does not fall within the purview of the Act and has no title to claim compensation under it.

I do not accept this qualification. In contested claims for compensation the employer's most frequent answer, apart from questions of quantum, is that the claim does not fall within the Act because the accident did not arise out of or in the course of the employment. If the employer succeeds in this plea he is nevertheless, if the qualification is well-founded, to be exposed to entirely new proceedings outside the Act. This is, in my opinion, contrary to the true interpretation of the Act. I agree with SCRUTTON, L.J., that if the workman's case fails it makes no " difference whether the applicant fails because he is not, or fails although he is, a ' workman ' or ' dependant ' within the Act " (*Bennett's* case (8) ([1926] 2 K.B. 380, at p. 403)). If the workman takes proceedings under the Act and carries them to a conclusion, then he has exhausted his rights, notwithstanding that the conclusion may be that his case does not fall within the Act, for example, because the accident did not arise out of or in the course of his employment. He cannot be heard to say that he has exercised his option only conditionally on his case being held to fall within the Act. The proceedings are under the Act none the less that the result of the proceedings may be that the workman's case is held not to come within it " . . . Proceedings carried to a final determination are conclusive evidence of a final election " (*per* BANKES, L.J., in *Bennett's* case (8), *ibid.*, at p. 391).

Next, what if the workman, having instituted proceedings either under or outside the Act, withdraws from them before a decision is reached? As the law stands, under the authority of *Bennett's* case (8), notwithstanding the vigorous dissent by SCRUTTON, L.J., the workman is not held to have irrevocably committed himself by the initiation of proceedings from which he has resiled. BANKES, L.J., who was in the majority, seems nevertheless to have thought that it was a question of circumstances and that a workman might in some circumstances be held to have irrevocably committed himself by taking proceedings not persisted in to a conclusion. This leaves the law in an unsatisfactory state. It has been suggested that there are two and only two rival constructions of sect. 29 : (i) that it protects the employer from being proceeded against more than once ; (ii) that it protects him only from being made to pay more than once. But this clean-cut choice of interpretations has not been accepted or logically applied. The mere intimation of a claim for compensation, although a step in proceedings, has not been held to be an irrevocable exercise of the workman's option. The hardship of so holding has moved the courts not to do so, though on a strict and literal reading of the section it looks very much as if this was intended, and SCRUTTON, L.J., so thought. Suppose a workman makes a claim on his employer under the Act—it may be quite informal and need not even be in writing—and the employer declines to admit it, pointing out that he has an irrefutable answer to it, the validity of which the workman at once recognises. Is the workman by having made this abortive claim finally precluded from resorting to an action of damages for which he may have an excellent *prima facie* case? Similarly if the workman has issued a writ in an action of damages and on seeing the defence at once recognises that he has no case, must he go on with the action to its inevitable conclusion against him in order to obtain a "determination" that the injury is one for which the employer is not liable and so enable himself to obtain compensation under subsect. (2) of sect. 29 less the cost of the action? While I have thus indicated the sort of considerations involved I am not disposed in the present case, in which the point does not arise, to express a concluded opinion upon it. It may never have to be decided by this House, in view of the general revision of the law of workmen's compensation which the Government has announced that it has in contemplation.

I pass now to consider the position where there have been no proceedings either by way of arbitration under the Act or by way of action independently of the Act. If the injured workman intimates a claim against his employer on the ground of the employer's personal negligence or wilful act and the employer admits liability and settles with the workman by payment of an agreed sum, in such a case I think there can be no question that the workman must be held to have exercised his option irrevocably. If on the other hand the workman intimates a claim under the Act and the employer admits liability and proceeds to make to the workman the payments due under the Act, I equally see no reason why the workman should not be held to have exercised his option irrevocably. The Act contemplates that in the normal case claims will be settled by agreement without resort to proceedings, and the vast majority of cases are so settled. I cannot see any good reason for holding that finality is reached where as a result of proceedings in a contested case there has been a determination of the matter in favour of or against the workman, but that where a contest has been avoided by agreement the workman should be entitled to maintain that he has never exercised his option. An agreement can under the Act be rendered as enforceable as an award after proceedings. It is, of course, essential that there be a real agreement between the parties for the payment and acceptance of compensation under the Act. But where there is sufficient evidence of such an agreement I do not think that it is open to the workman to challenge it on the ground that he has never exercised his option because he did not know that he might have brought an action against his employer for damages or had not information to enable him to weigh the comparative advantages of claiming under the Act and claiming independently of the Act. An agreement under the Act need not be in writing. It may be oral or inferred from the facts and circumstances. It does not seem to me to make any difference whether the agreement results from a claim by the workman admitted by the employer or from an offer by the employer accepted by the workman or from the conduct of the parties. What is essential is that the agreement should be an agreement under the Act; that is to say, that the parties should understand that they are transacting about the right to compensation which the Act confers. And, of course, it must be a real agreement; it must not be vitiated by mutual error, fraud, undue influence or any of the other grounds on which the validity of an agreement may be assailed. *A fortiori* if there has been not only agreement under the Act but payments under the Act on the faith of the agreement, the evidence of the workman having finally exercised his option is conclusive. Further, the acceptance by the workman of payments expressly made under the Act and accepted by him as such is sufficient evidence of the agreement of the parties and of the workman having irrevocably committed himself.

In the present case the appellant workman did not take advice as to the course he should adopt, although the respondent's representative was so fair as to inquire of him whether he intended to take advice before committing himself, and he was not proved to have known that he had any rights independently of the Act. But week after week he accepted payments made to him expressly under the Act and received by him as such. That being so, I agree with LORD GREENE, M.R., that the case is covered by the decisions of the Court of Appeal in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1), and *Selwood* v. *Townley Coal & Fireclay Co.* (2), in which it was held that:

> . . . a workman who has been paid compensation under the Act, which he has know-

ingly accepted as such compensation, is thereby precluded from recovering damages from his employers at common law.

I am of opinion that these cases were decided rightly and in consonance with a sound interpretation of the Act. Consequently, while I appreciate I cannot accept the views expressed by the LORD ORDINARY (PATRICK) in *Brown* v. *William Hamilton & Co., Ltd.* (3), to which the attention of the House was specially drawn on behalf of the appellant.

A The appeal should, in my opinion, be dismissed and the judgment of the Court of Appeal be affirmed.

LORD PORTER: My Lords, this case raises again a question which has many times been before the courts of this country. The facts are short. On Apr. 3, 1942, the appellant met with an accident arising out of and in the course of his employment. About three weeks after the accident he saw, at the B respondents' works, one Howarth, assistant to their commercial manager. Howarth's duty was to deal with payments under the Workmen's Compensation Act, and he saw about fifteen to twenty men on days specially appointed for that purpose. He told the appellant that no authority had yet come from the respondents' insurance company to make any payment, and asked the appellant whether, in view of the seriousness of his injury, he would seek advice, and probably mentioned his trade union. The appellant next visited Howarth C on Apr. 30, and on that occasion Howarth passed over the pay-sheet for the appellant to read, and explained that though only 24 days' compensation was then due, he proposed to pay up to the end of the fourth week. The appellant read and understood the form, which plainly showed that it dealt with weekly payments under the Workmen's Compensation Acts. He then filled in the form and signed the appropriate receipt. Thereafter the appellant continued to draw compensation and to accept payments of workmen's compensation D knowing it to be such until he returned to work on Oct. 2.

Meanwhile, on July 24, his solicitor wrote to the respondents stating that he desired to claim compensation under the Workmen's Compensation Act and alternatively damages. To this letter the respondents' insurance company replied on Aug. 19 that liability was only admitted under the Act, and that the appellant had been in receipt of compensation under it since his cessation of E work following his injuries. After some further communications between the parties a writ was issued on Feb. 5, 1943, claiming damages for negligence and breach of statutory duty. Meanwhile the appellant continued to receive and to accept compensation under the Act, and no notice was given or assertion made that the receipt was without prejudice to the bringing of a claim for damages.

The final finding of the commissioner is as follows. I quote his words:

> F I am satisfied . . . that the plaintiff did not make a claim for compensation as such . . . The plaintiff, as I find, received the payments made to him as compensation under the Workmen's Compensation Act and the payments were paid to him as such. I also find that at the time this workman received his first payment on Apr. 30, 1942, and until such time as he consulted his solicitor . . . he did not know that he had a right under sect. 29 (1), of the Workmen's Compensation Act to elect as between two alternative remedies. It follows that the workman, not knowing of the existence G of his right to elect, could not be said to have exercised the option given to him by the subsection.

In the action the substantial defences were that the appellant was guilty of contributory negligence and that in any event, having claimed and received compensation under the Workmen's Compensation Act, he was debarred from recovering damages. The judge negatived the former of these two defences, but, whilst making the findings set out above, felt himself bound by authority H to hold that the latter must succeed. This defence is the creature of statute and depends upon the construction to be placed on the Workmen's Compensation Act, 1925, s. 29 (1), which is in the following terms:

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both

> independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

The wording is not very artistic, but the aim is, I think, clear enough, *viz.*, to leave the workman his choice of two remedies whilst preventing the employer from having to pay both damages and compensation.

Apart from authority, I should have thought it reasonably plain that whereas the workman can choose which of his two types of remedy he would pursue, he cannot recover both damages and compensation, and at some time or other he must reach the position when he is bound to the one and debarred from the other. Your Lordships have to determine when and by what means that position is reached. The appellant maintained that the choice continues until the workman can be said to have exercised the option which the Act gives him. The true construction of the subsection was, he said, to be found by reading the second part as exegetical or explanatory of the first, *i.e.*, by interpreting it as meaning that the workman might at his option pursue either remedy, provided that by doing so he did not ultimately impose a liability upon his employer to pay both damages and compensation. In his contention, that point would not be reached unless either a judgment had been obtained in his favour in a claim for damages or an award made in his favour or an agreement for compensation registered. In support of this agreement he cited the observation of KENNEDY, J., in *Rouse* v. *Dixon* (13) ([1904] 2 K.B. 621 at p. 634):

> It is not impossible to construe sect. 1 (2) [the corresponding section in the 1897 Act] as meaning that the option may be exercised unless and until a claim has proceeded to a decision . . .

The respondent, on the other hand, urged that the two parts of the subsection were to be read separately; that the choice made by the workman was irrevocable if he received workmen's compensation as such, and in any case that, as the Court of Appeal has held, the acceptance of either damages or compensation as such was a bar to recovery under the alternative remedy.

Even though the respondent's argument be, as I think it is, unsound, yet in the present case I can have no doubt but that, after his solicitor's letter of Aug. 4, the appellant knew that he could claim damages and with this knowledge continued to accept compensation. Up till then in my view he might have withdrawn his claim under the Act, but after that time he was confined to the remedy of which he continued to take advantage. Conversely, if he had brought an action knowing what he did and failed, he could not thereafter have applied for workmen's compensation were it not for the terms of sect. 29 (2), which expressly make provision for this contingency: see *Edwards* v. *Godfrey* (14), and *Cribb* v. *Kynoch* (9). The general principle is founded on LORD BLACKBURN'S *dictum* in *Kendall* v. *Hamilton* (15) ([1879] 4 App. Cas. 504, at p. 542): ". . . There cannot be an election without knowledge of the right to elect." It finds support in *Rouse* v. *Dixon* (13), *Bennett* v. *Whitehead* (8), and *Unsworth* v. *Elder Dempster* (4), and is not inconsistent with *Burton* v. *Chapel Coal Co.* (10), where it was decided that a workman cannot sue for damages after failure to recover under the Act in a case where he has brought his action with full knowledge of the alternative remedy. Moreover, *Mackay* v. *Rosie* (16), and *Birch* v. *Pease & Partners* (17), are not antagonistic in deciding that acts may be evidence of choice. Whether the workman has chosen is a matter of fact, but the effect of his knowledge or ignorance that he has alternative remedies is a matter of law.

In so far as *Perkins* v. *Hugh Stevenson* (1), and *Selwood* v. *Townley Fire Co.* (2) depart from these principles and decide that the mere acceptance of compensation as such, but in ignorance of the existence of an alternative remedy, is a fatal bar to a claim for damages, I think they are wrong. I prefer the reasoning of the LORD ORDINARY (PATRICK) in *Brown* v. *William Hamilton & Co.* (3), where he reviews the Scotch cases and refuses to follow the two last-mentioned English cases. I should be content to follow his conclusion and reasoning, but as the matter has been fully argued I think I ought to give the grounds for my preference.

In the English cases, as I understand them, the Court of Appeal construed sect. 29 (1) as divisible into two parts. Under the first they acknowledged the existence of the workman's option, at any rate unless and until he accepted compensation under the Act as such, but under the second they held that a workman who had claimed and received compensation or had accepted compensation as such had precluded himself from suing for damages even though he did not know that he had an alternative remedy ; it was enough that he knew he was receiving workman's compensation as such. The Court of Appeal, as I understand them, in so holding, relied solely upon the second half of the subsection and thought it unnecessary to have regard to the earlier part which gave the workman a choice. The mere payment and receipt of compensation was said to free the employer from the alternative liability, inasmuch as to expose him to such a claim would be to render him liable to pay twice over.

So long as it was thought that, if compensation was paid, there was no method of recovering what had been so paid or of setting it off against any damages afterwards awarded, there was force in this argument (see *Perkins's* case (1) and *Selwood's* case (2)), but once it was acknowledged, as it was in *Unsworth* v. *Elder Dempster* (4), that this view was mistaken and that any compensation previously paid could be deducted from damages when awarded, the argument loses its efficacy. In a case where this course is adopted the employer does not pay twice nor has his liability to pay been finally determined.

In my view, unless the dispute has reached the stage at which the employer is at least compellable to pay, either by judgment in an action or by award or registered agreement under the Act, he cannot be said to be liable to pay within the wording of the subsection. Even a failure at law or the dismissal of a claim for compensation would not be enough ; there must be some binding decision under which the employer is liable to pay. The provisions of this part of the subsection are a defence against a legal liability to pay twice, not a method of ascertaining whether the workman has or has not made an irrevocable choice.

But a choice has to be made under the first part of the subsection and must at some time become irrevocable. When does this occur ? I can find no answer, except that it comes when the workman is fully aware of the alternatives and deliberately makes his choice between them. He must not only know that he has claimed, or is offered or is receiving workman's compensation as such, he must also know that he has an alternative remedy.

The opinion I have been expressing is, I think, in accordance with the view of your Lordships' House, as expressed in *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Waddell* (18). In *Codling* v. *John Mowlem & Co., Ltd.* (19) ATKIN, J., as he then was, had said ([1914] 2 K.B. 61, at p. 69), that the provisions referred to in the latter part of the section give to the employer the right, independent of the exercise by anyone of the option, not to pay twice over, and further that this would be the result although payment under the statute was made without the knowledge and consent of the plaintiff who was seeking to enforce common law rights. LORD BUCKMASTER did not agree, and VISCOUNT DUNEDIN said ([1931] A.C. 575, at p. 584) :

> What I think the section means to say, and what involves no absurdity, is that no individual is to get two payments, one at common law and the other under the Act.

If the workman, knowing of the alternative, makes his choice, I should regard the option as exercised. But if he had not this knowledge, a claim for damages which either was not brought to a conclusion, or if brought to a conclusion failed, need not be a final election. Even judgment in favour of the workman would not of itself necessarily be a final choice, but it would bar a claim under the Act because the employer, being thereby liable to pay independently of the Act, could not be made liable to pay under it ; the wording of the second half of the subsection would protect him.

For the same reason an award or registered agreement under the Act would likewise protect the employer. But short of such a conclusion I do not see why the workman should not withdraw from one claim and proceed in the other, always provided he has not deliberately chosen the one or the other with full knowledge that the alternative is open to him.

In the present case I think the appellant did make such a choice, and I would for that, but for that reason alone, dismiss the appeal.

LORD SIMONDS : My Lords, I concur in the motion that this appeal, the facts of which I need not rehearse, should be dismissed and will add only some observations upon the meaning and effect of the Workmen's Compensation

Act, 1925, s. 29, which, having caused so much controversy in the English, Scotch and Irish Courts, is now, I hope, to be replaced by a provision more easily intelligible. The section in question is, I suppose, introduced for the benefit of both the employer and the workman. The Workmen's Compensation Acts provided a new remedy for an injured workman but they could not be read so as to take away from him an existing right at common law in the absence of a provision to that effect. Yet it was clearly unfair to the employer that in respect of the same act or omission he should be doubly liable : therefore some provision against that event had to be made. It was made by sect. 29 of the 1925 Act as similar provision had been made by the earlier Acts : the question for your Lordships' consideration is, what does the section mean ?

My Lords, there are, I think, two separate questions involved. The first is, what is meant by saying that the workman may at his option do one of two things ? Having done one of those two things is he debarred from doing the other of them, only if (as some would say) he knew that he had a choice, or (as others would say) he both knew that he had a choice and was aware of all the facts relevant to the making of the particular choice ? Or having done one of those two things, is he, whatever his state of mind may have been, altogether debarred from doing the other of them upon the footing that his act proclaims his choice ? The second question is, what act or acts amount to claiming compensation under the Act or taking proceedings independently of it, as the case may be, so that after such acts the workman is debarred from his other remedy ? That is a question that arises whatever answer may be given to the first question.

Upon the first question I respectfully concur in what has been said by LORD MACMILLAN, whose opinion I have had the advantage of reading. I agree in thinking that much confusion has arisen from importing into the consideration of this section the niceties of the equitable doctrine of election. I do not understand how a workman, being given the statutory choice between what I will, for brevity, call claim and action, can make his claim and later say : " I will now bring my action, for when I made my claim I was unaware that I could bring an action." It is not clear to me whether the contention that he can do so is based solely on the words " at his option " which are found in the section. I do not think that it is logical that it should. For without those words the section gives the choice : " the workman may . . . claim compensation . . . or take proceedings . . . ," and if where there is a choice, an act, however unequivocal, is not decisive unless the actor is aware of his rights, the words " at his option " add nothing.

In *Bennett* v. *L. & W. Whitehead, Ltd.* (8) SCRUTTON, L.J., said ([1926] 2 K.B. 380, at p. 404) :

> I do not think you can escape the statutory prohibition against doing a thing by saying that, though you have done it, you have not elected to do it.

This expresses my own view with admirable terseness. If the statute says that a man may do one of two things, that involves that he may not do both. If he does one of them he cannot escape by saying : " I did not choose or elect to do it." He has done it. *Res ipsa locuta est.* If it is said that this gives no meaning to the words " at his option," I should be inclined to agree, but in any event they are superfluous since he, who has the choice, has also the option. The value of the words, as it appears to me, lies in this, that they make doubly clear, what was already clear enough, that it is for the workman not the employer to say which remedy shall be pursued. But that does not mean that, when the workman has pursued one remedy, he can deny that it was his choice.

My Lords, in coming to this conclusion upon what I conceive to be the first question, I am assisted by a consideration of the difficulties, overwhelming as they appear to me to be, if the alternative view is accepted, *viz.*, that, whatever a workman may have done, he is not debarred from his alternative remedy unless he has made a conscious choice between the two remedies. It is significant that, as I pointed out earlier in this opinion, it is not agreed amongst those who adopt this view, what degree of knowledge is sufficient to make the choice effective. On the one hand it is said that there must be knowledge that there is a right to choose : no more apparently is needed. On the other hand it is said —and I will take the latest statement of this kind from the judgment in *Coe* v. *L. & N.E. Ry. Co.* (6), of SCOTT, L.J. ([1943] 2 All E.R. 61, at p. 64) : " that option is beyond doubt a legal right of election ; and no election can be exercised by the elector without full knowledge of all material facts affecting his choice." In this view there must be knowledge not only of the possibility of choice in general but of all the material facts affecting the particular choice. If indeed it is relevant to ascertain the state of the workman's mind, when he makes his claim or brings his action, the latter view appears to me more consistent and logical, for it is of little use to the workman to know in general that he has a choice unless he knows also all the facts which should guide him in making it. The theory postulates that the workman is instructed before he acts. I see no justification for stopping half-way and saying that it is sufficient for him to know that he has a choice and that it does not matter how much or how little he knows of the facts relevant to that choice.

But, my Lords, if the view so expressed by SCOTT, L.J., is the right one, the practical difficulties are grave indeed. There are no doubt regions of the law in which it is necessary to enquire into the state of a man's mind. But the inquiry must always be a difficult one, not lightly to be undertaken. Here "all material facts affecting his choice" must include the very facts which can perhaps only be ascertained upon a judicial determination of his claim or action, and, even when they have been ascertained, there may be nice questions as to their bearing upon such problems as the doctrines of contributory negligence or *volenti non fit injuria* introduce. It would appear that the workman can make no fully instructed choice until he has been taught by failure or success in the claim or action that he has made or brought, and that it is only after that that any act on his part is final or irrevocable. If so, it is strange that it should have been thought necessary in a certain event and subject to certain conditions to preserve to him his alternative remedy, *viz.*, to permit him, if he brings his action and fails in it, to ask the court to assess and award him compensation under the Act.

My Lords, I would say, expanding what I venture to think was in the mind of SCRUTTON, L.J., in *Bennett* v. *Whitehead* (*L. & W., Ltd.*) (8), that this is but an example of the fundamental proposition that a man intends the natural consequences of his acts. He is judged by what he does, not by what he thinks. Given alternative rights against his employer he exercises one of them: the employer for whose benefit has been introduced the limitation of alternative remedy, is bound neither to enlighten him nor to enquire into his state of mind. He is entitled to assume that that which the workman has done, he has intended to do, that he has "at his option" made his claim or brought his action, as the case may be. I think, with deference to those who think or have thought otherwise, that LORD BLACKBURN'S *dictum* in *Kendall* v. *Hamilton* (15) ([1879] 4 A.C. 504, at p. 542), that there cannot be an election without knowledge of the right to elect (a *dictum* uttered in a widely different context) does not assist your Lordships in the construction of this section.

Answering the first question that I have posed by saying that it is what the appellant did, not what he knew or thought, that matters, I turn to the second question and ask whether he so acted that he was debarred from taking proceedings independently of the Act. Upon this question I understand that no doubt is entertained by your Lordships that, however much the simple words, "claim compensation under this Act," where they occur in this section, may be expanded or refined, however liberally the section may be construed in favour of the workman, the present appellant so acted and, if it be material, continued so to act with knowledge of his rights, as to debar him from his alternative remedy of action. Under those circumstances, fully concurring in the conclusion, I do not think it necessary to consider the widely divergent views that have been held upon this subject. But I would safeguard myself in any future consideration of the matter, if it should come again before this House, by saying that I am far from satisfied that a somewhat strained and unnatural meaning has not been placed upon simple words. It is clear, I think, what the words "take proceedings independently of this Act" mean. That is one remedy open to the workman. The other remedy is to "claim compensation under this Act." If it becomes material, I should wish to consider how far it is legitimate to construe these plain words as importing anything more than a demand for compensation as of right, which I understand to be the natural and primary meaning of "claim." Nor should I, unless constrained by authority, be prepared without further consideration to accept the view that it is only against an ultimate double liability that the section protects the employer. That it has that result is certainly true, but as at present advised I do not see why it does not further protect him from proceedings independently of the Act if a claim for compensation under the Act has been already made. That is what the section seems in clear language to say. It may be thought desirable to give a greater latitude to the workman in the pursuit of his alternative remedies. That is a matter for the Legislature. I am for my part unable by judicial interpretation of the section in its present form to achieve that result.

The appeal should, in my opinion, be dismissed.

Appeal dismissed with costs.

Solicitors: *W. H. Thompson* (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *John Taylor & Co.*, Manchester (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

LANGSTONE *v.* HAYES.

[Court of Appeal (Scott, MacKinnon and Tucker, L.JJ.), October 26, November 14, 1945.]

Husband and Wife—Separation deed—Covenant by husband to pay annuity to wife—Term during which annuity payable not stated—Death of husband—Whether husband's estate liable for payments—Law of Property Act, 1925 (*c.* 20), *s.* 80 (1).

By a separation deed which recited that the parties had agreed to live separately and apart, the husband covenanted to pay the wife "for her separate use and for the maintenance and support of herself a clear annuity of £104 payable by weekly payments of £2 each until determined as provided by cl. 3 (ii) hereof." Cl. 3 (ii) provided that the annuity should cease to be payable if the husband and wife resumed cohabitation or if the wife did not remain chaste. The husband and wife covenanted not to molest each other and the wife covenanted to support and maintain herself and to keep the husband indemnified against all debts and liabilities incurred by her; if she failed to do so, the husband was entitled to deduct out of subsequent payments of the annuity whatever amounts he had paid by reason of her breach. On the husband's death, his executor discontinued the weekly payments. The wife brought an action against the executor and contended that under the Law of Property Act, 1925, s. 80 (1), the covenant by the husband to pay the annuity bound his estate. On behalf of the executor, it was contended that sect. 80 (1) did not apply because there was a contrary intention expressed in the deed and the subsection did not in itself have the effect of binding a covenantor's estate by an obligation which was intended to cease on his death:—

Held: (i) upon the true construction of the deed, the covenant to pay the annuity was not intended to continue after the husband's death.

(ii) since there was a contrary intention expressed in the deed, the Law of Property Act, 1925, s. 80 (1) did not apply. The effect of that subsection was not to create a liability on the personal estate of a covenantor but to extend a pre-existing liability of that estate to the real estate.

Kirk v. *Eustace* (1) *distinguished.*

(iii) there was no general rule of law that a covenant in a separation deed was intended to bind the estate of the covenantor; whether such an obligation was intended depended on the terms of the particular contract. In the present case, the obligation to pay the annuity did not pass to the executor, since the husband's covenant could not be construed as intended to continue after his death.

[**EDITORIAL NOTE.** There is no general rule that the covenants in a separation deed are to be construed as binding the estate of the covenantor. It is a question of construing the provisions of each deed, and even the inclusion of such a phrase as "during the life" of the wife is not conclusive, as is shown by *Kirk* v. *Eustace* (1). Here the provisions of the deed appear to assume that the husband is still alive, and there is, therefore, a contrary intention within the Law of Property Act, 1925, s. 80.

AS TO DURATION OF ANNUITIES UNDER SEPARATION DEEDS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 723, 724, para. 1178, and Supplement; and FOR CASES, see DIGEST, Vol. 27, pp. 231-233, Nos. 2028-2043, and Supplement.]

Cases referred to:

*(1) *Kirk* v. *Eustace*, [1937] 2 All E.R. 715; [1937] A.C. 491; Digest Supp.; 106 L.J.K.B. 617; 157 L.T. 171; *revsg.*, [1936] 3 All E.R. 520.

(2) *Nicol* v. *Nicol* (1886), 31 Ch.D. 524; 27 Digest 245, *2158*; 55 L.J.Ch. 437; 54 L.T. 470.

APPEAL by the plaintiff from a decision of His Honour JUDGE DALE given at Birmingham County Court, on June 25, 1945, in which he held that, upon a proper construction of a separation deed made between Cecil Joseph Langstone and his wife, Bertha Langstone, an annuity of £104 payable by the husband to the wife ceased to be payable on the husband's death. The action by the wife against the husband's executor for payment of the annuity was commenced by specially indorsed writ in the district registry and remitted for trial to the county court. The facts are fully set out in the judgment of the Court of Appeal delivered by SCOTT, L.J.

H. D. Baskerville for the appellant.

G. L. Dawson for the respondent.

Cur. adv. vult.

SCOTT, L.J. [delivering the judgment of the court]: This appeal from His Honour JUDGE DALE in a remitted action depends entirely on the question whether his interpretation of a deed of separation dated June 10, 1926, was correct. The claim in the action was by the plaintiff (to whom we will refer as the wife) for £106 for arrears of an annuity of £104 a year payable weekly, alleged to be due to the plaintiff from the defendant, as executor of the will of Cecil Joseph Langstone deceased, her late husband. Of this sum £14 had already accrued due at the date of the death, being the amount due for seven weeks, in respect of seven weekly payments of £2 each for the period which had elapsed from the time of the last previous payment by the husband to the date of his death, which occurred on Apr. 2, 1944. This sum was paid into court with the admission of liability. The dispute was as to the liability for the balance of weekly payments claimed to have fallen due from the executor after the death. The main issue tried by the county court judge was whether, on its true construction, the covenant by the husband bound his personal representatives, or was limited to the joint lives of the spouses. There was in the county court also a separate question about income tax, but that was not raised before us.

Counsel for the wife, both below and before us, relied upon the decision of the House of Lords in *Kirk* v. *Eustace* (1); or alternatively, if that decision did not conclude the appeal in his favour, he submitted that his contention gave the proper meaning to the covenant and he further relied upon certain observations of LORD ATKIN, and possibly of LORD RUSSELL OF KILLOWEN, in that case. In our view, neither argument avails the wife. Unless the deed or written contract under consideration is a matter of common form—at least, in respect of the particular provision which falls to be considered—it is dangerous to seek to apply to it the judicial interpretation of another document unless that other document is so similar in its terms as to be almost identical: a principle applied to a separation deed by BOWEN, L.J., (31 Ch.D. 524, at p. 529), in *Nicol* v. *Nicol* (2). In *Kirk* v. *Eustace* (1) the deed of separation said expressly that the husband's obligation to pay was to endure "during the life" of the wife. The majority of the Court of Appeal in that case (of which I was one, EVE, J., differing) thought that even that clear expression of intention ought to give way to other indications in the deed of an intention that it was only to operate during the joint lives of the spouses. The instant deed, as the county court judge has pointed out, differs in an important respect from the deed in *Kirk* v. *Eustace* (1): *viz.*, by the complete omission from the deed of the phrase "during the life of the wife." There were apparently no children of the marriage.

The following provisions are contained in the deed:

1 (i) . . . the wife may at all future times live apart from the husband and free from his control . . . (iii) [to be read with the proviso to cl. 3 (ii)] . . . the husband will pay to the wife . . . for her separate use and for the maintenance and support

> of herself a clear annuity of £104 . . . payable by equal weekly payments of £2 each . . . until determined as provided by cl. 3 (ii) hereof . . . 3 (ii) If at any future time the spouses shall with their mutual consent again cohabit as man and wife or the wife shall not remain chaste the annuity (or allowance) shall thereupon determine . . . and [the deed] shall become void . . .

I can see nothing in these provisions to extend the husband's covenant beyond the term of their joint lives: everything presumes the continuance of his life during performance of the covenant to pay. This view of the agreement is supported by other terms in the deed. Cl. 1 (iv) is the covenant by the husband not to molest, and so on; it is obviously limited to his life. Cl. 2 contains the wife's covenants. By cl. 2 (i) she promises to support and maintain herself —a meaningless term if addressed to the time when his death will have deprived her of her common law right to be maintained by him. Cl. 2 (ii) is her covenant not to molest " at any future time "—obviously she could not do so after he is dead. The same applies to cl. 2 (iii), to keep the husband indemnified against liabilities put on him by her contrary to the deed: to this there is a proviso, in cl. 3 (i), that, if she breaks her promises in cl. 2 (i) (or (iii)), the husband may deduct the amount of the liability so imposed by her on him in breach of the deed and may repay himself out of subsequent payments of the annuity. By cl. 2 (iv) the wife covenants not to take legal proceedings against him for misconduct committed before the date of the deed. Every one of these provisions seems to us in terms to assume that the husband is still alive and, therefore, to apply only to the period of their joint lives; thus distinguishing this deed of separation, on a radical point of its terms, from *Kirk* v. *Eustace* (1).

The respondent before us, however, relied on two other grounds to support his contrary submission. The first was in answer to a contention that the Law of Property Act, 1925, s. 80 (i), in terms imposed such an obligation on the husband. That subsection says:

> A covenant . . . under seal made after Dec. 31, 1881 [when the Conveyancing Act, 1881, s. 59, which it superseded, came into operation] binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant . . .

The answer to that contention is two-fold: (i) that a contrary intention is expressed in this deed; (ii)—and this we add subject to what is said below in regard to the language of the noble Lords in *Kirk* v. *Eustace* (1)—that the effect of that section is not to create a liability on the personal estate, but to extend a pre-existing liability of that estate to the real estate. That this is the meaning of the subsection is borne out, we think, by the terms of the Conveyancing Act, 1881, s. 59, the object of which was to extend to heirs an obligation not previously binding on them, but only on the personal estate.

The last argument for the respondent was that, even if the decision in *Kirk* v. *Eustace* (1) did not help him, there were expressions of opinion by one, if not two, of the noble Lords which, though not necessary to the decision and therefore not actually binding on this court, gave support to his interpretation of the deed in the present case and ought, in due respect to the House of Lords, to be followed by us. LORD ATKIN said ([1937] 2 All E.R. 715, at pp. 717, 718):

> . . . while it is true that the covenant was not expressly made by the covenantor for his executors and administrators, [he then quoted the Law of Property Act, 1925, s. 80 (1), and continued :] therefore, this contract, which is under seal, is to be read as if it were made by the husband for his executors and administrators, unless the contrary intention is found expressed in the covenant. So far, the matter seems to me to be beyond question, and the wife has the right expressed in the deed.

Later, LORD ATKIN repeated ([1937] 2 All E.R. 715, at p. 719):

> . . . the statute quite plainly imposes an obligation which binds his estate, unless the contrary intention is expressed. I find no contrary intention expressed in the deed. If I had to consider the intention of the parties at all, I should have come to the conclusion that the intention was that the obligation was to last after the death of the husband; but it is unnecessary to decide that.

LORD RUSSELL OF KILLOWEN (as well as the other noble Lords) based his decision we think, on the words of that deed " during the life " of the wife; and we cannot see in his decision any reference to any other ground of decision.

We are not sure whether it was suggested in argument that in a deed of separation there is a rule of law that covenants are to be construed as intended to bind the estate of the covenantor, but, if it was, we know of no such general rule. There is no question here of the scope or limitation of the maxim *actio personalis moritur cum persona.* There was no cause of action (except for the £14) which had arisen before the death: the only question is whether the promise to pay continued in force after the death so as to give rise at the end of each week to a new cause of action against the executor if he did not recognise the A covenant as binding on him. The question whether such a contractual obligation passes to the executor must, in our view, depend on the terms of the contract which is supposed to pass it on. In the case of a promise of an essentially personal kind, such as to paint a picture, obviously it does not pass: but the reason it does not pass is because the contract, truly interpreted, did not intend it to pass. In other words, the passing or lapsing of the promise on the death of the promisor must depend on the terms and nature of the contract, construed, B like every other contract, in the light of the surrounding circumstances. In the present case, we can see no reason for construing the husband's covenant as intended to continue after his death.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Ward, Bowie & Co.*, agents for *Duggan, Elton & James*, Birmingham C (for the appellant); *Caporn & Campbell*, agents for *A. C. Hayes & Sheppard*, Birmingham (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re COMPTON, POWELL *v.* COMPTON AND OTHERS.

[CHANCERY DIVISION (Romer, J.), November 6, 1945.]

D *Perpetuities—Will—Gift for education of children of named families—"Children" to be "the lawful descendants" of three named individuals—Money to be invested by trustees "under a trust for ever to be called" after testatrix and her mother —Trust void for perpetuity.*

By her will the testatrix provided that certain money was to be held by her trustees "and invested in trustee stocks under a trust for ever to be called" after the testatrix and her mother "for the education of E Compton and Powell and Montagu children as scholarships for the time thought best by the trustees," such scholarships to be held "at the pleasure of the trustees." She then added: "Compton children are the lawful descendants of H. C. Compton Powell children are the lawful descendants of Weyland Powell and Montagu children the lawful descendants of William Earl of Sandwich. The trustees are always to be one Compton and one F Powell at the least." The question to be determined was whether the trust was void for perpetuity, or was valid for any and what period. It was contended (i) that the words in the will, if properly construed, did not indicate an intention to create a perpetual trust; (ii) that, even if the gift were not confined to persons ascertained at the death of the testatrix, it would not be void for perpetuity because, under the provisions of the trust, the trustees could, at their discretion, use up and exhaust the corpus G of the fund, and, therefore, the principle followed in *Re Taylor* (1) applied; (iii) that, even if the testatrix had attempted to set up a perpetual trust, the court could hold that the gift was valid for a reasonable period of time:—

HELD: (i) in view of (*a*) the terms in which the trust was constituted (*viz.*, "under a trust for ever to be called") and (*b*) the definition clause at the end of the disposition, ("Compton children are the lawful descendants" of the three persons named therein) the testatrix intended to set up H for an indefinite period a trust to benefit in a specific way the lawful descendants of the three named persons.

(ii) the principle followed in cases where the corpus of a trust fund could without infringing the terms of the gift, be dealt with in the discretion of the trustees, did not apply, because the real object of the testatrix was to set up a perpetual investment fund to be retained by the trustees and used by them in a particular manner; the trustees merely had a discretion as to which persons among the specified class were to have scholarships, and for how long.

Re Taylor (1) *distinguished.*

(iii) since there were no words in the will limiting the operation of the trust to a period permitted by law, the will did not contain the essential elements required to enable the court to hold that the gift was valid for a limited period.

Re Hooper (2) *and Pirbright* v. *Salwey* (3) *distinguished.*

(iv) upon the true construction of the will, the trust was void for perpetuity.

[**EDITORIAL NOTE.** The gift in issue in this case was decided in earlier proceedings (see [1945] 1 All E.R. 198), to lack the public character necessary to make it a charitable trust. It is now held to be void as a perpetuity, being for an indefinite period. The possibility that the trustees might have recourse to the corpus is not sufficient to save it from failure, since the real object of the testator was to set up a permanent fund. It cannot be held valid for a limited period, since no phrase equivalent to " so far as they legally can do so " (as in *Re Hooper* (2)), or " so long as the law for the time being permits " (as in *Pirbright* v. *Salwey* (3)) appears in the will.

AS TO GIFTS VOID FOR PERPETUITY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 220-222, paras. 275, 276 ; and FOR CASES, see DIGEST, Vol. 44, pp. 766-768, Nos. 6248-6265.]

Cases referred to :

*(1) *Re Taylor, Midland Bank Executor and Trustee Co., Ltd.* v. *Smith,* [1940] 2 All E.R. 637 ; [1940] Ch. 481 ; 109 L.J.Ch. 188 ; 163 L.T. 51.

*(2) *Re Hooper, Parker* v. *Ward,* [1932] 1 Ch. 38 ; Digest Supp. ; 101 L.J.Ch. 61 ; 146 L.T. 208.

*(3) *Pirbright* v. *Salwey,* [1896] W.N. 86 ; 8 Digest 261, *230.*

ADJOURNED SUMMONS to determine whether a trust set up under the will of the testatrix was void for perpetuity or uncertainty, or was valid for any and what period. The facts and the relevant provisions of the will are fully set out in the judgment.

N. C. Armitage for the trustee.

J. Neville Gray, K.C., and *B. G. Burnett-Hall* for the next of kin.

C. E. Harman, K.C., and *H. E. Salt* for one of the Montagu children.

ROMER, J. : This summons raises a question under the will of the late Alice Theophila Compton, who died on Nov. 14, 1941. Her will, which is dated May 29, 1906, is obviously a home-drawn document and is ungrammatical and, to some extent, ill-spelt. In the first place, she bequeathed, in effect, what she had inherited from her mother to the plaintiff, Edward Weyland Martin Powell. Then she dealt with money which was not brought into the family by her mother, and directed as follows :

> The money which was not brought into the family by my mother is to be held by my trustees and invested in trustee stocks under a trust for ever to be called the Mary Catherine Compton and her daughter Alice Theophila Compton Trust for the education of Compton and Powell and Montagu children but Compton and Powell children are to have the preference as scholarships for the time thought best by the trustees not over the age of 26 years. It is not to be used as a pension or income for anyone and is to be held as scholarships at the pleasure of the trustees. It is to be used to fit the children to be servants of God serving the nation not as students for research of any kind. No person shall be allowed as a family who is not born in wedlock and who is not of sound mind and body. Compton children are the lawful descendants of H. C. Compton of Manor House Minstead Powell chidn (*sic*) are the lawful descendants of Weyland Powell of Foxhan Park Lyndhurst and Montagu children the lawful descendants of William Earl of Sandwich father of the Earl of Sandwich hereinbefore mentioned. The trustees are always to be one Compton and one Powell at the least and are never to be less than four.

The fund, which is the subject of that disposition, is a considerable one, amounting in value to something over £100,000. The summons asks whether the trust is a valid charitable trust, or is void for perpetuity or uncertainty, or is valid for any and what period. The question as to whether it was a valid charitable trust came before COHEN, J., some little time ago. He took the view that it was a valid charitable trust, but the Court of Appeal took a different view and held that it was not a valid charitable trust. The matter now comes before me to decide whether it is void for perpetuity or uncertainty, or is valid for any and what period. The Court of Appeal assumed, for the purposes of the discussion and for the purposes of its decision, that this gift was intended to go on for an indefinite period of time, without expressing any view one way or the other as to whether that was so or not. The first question that I have to decide is : Who are the objects of the trust ? Are they the children of the Compton and Powell and Montagu families who should be living at the time of the testatrix's death, or are they persons who, from time to time, for an indefinite period, may be able to say of themselves that they are the lawful descendants of H. C. Compton, Weyland Powell or the Earl of Sandwich ? If the gift is confined to those persons who were children, in the strict sense, of those three families at the date of the testatrix's death, or to a class which is confined to persons who were living at the testatrix's death, then it is reasonably clear that the gift would be perfectly valid and would not fail by reason of perpetuity or uncertainty or anything else. If, on the other hand, it was intended that the objects of the gift should embrace people who might from time to time be able to say of themselves that they were the lawful descendants of thees three persons, then—at first sight—it would seem that the perpetuity rule had been infringed.

It seems to me that the testatrix did have in mind the class of persons who might from time to time be able to describe themselves as the lawful descendants of these three families because that is what she says in the definition clause :

> Compton children are the lawful descendants of H. C. Compton of Manor House Minstead Powell chidn (*sic*) are the lawful descendants of Weyland Powell [and similarly with regard to the Montagu children].

I read that as meaning " by ' Compton children ' I mean the lawful descendants," and so on. So read, the effect would be that the money is to be invested under a trust for ever to be called the Mary Catherine Compton and her daughter Alice Theophila Compton Trust, for the education of the Compton and Powell and Montagu descendants as thereinafter defined. Having regard to the definition clause which she puts in later on, it is not possible, in my opinion, to hold that she had in mind only those persons who were children of these families at the time of her death. Therefore, I start off on the footing that she had in mind all those persons who might at any time thereafter be described as the lawful descendants of these three people. It seems to me that that is also very strongly corroborated by the terms in which the trust is constituted. It is :

> . . . to be held by my trustees and invested . . . under a trust for ever to be called the Mary Catherine Compton and her daughter Alice Theophila Compton Trust.

In my view, that means that the trust, the objects of which are set out directly afterwards, is to be continued for an indefinite period of time ; and whether you read it as " to be held by my trustees and invested in trustee stocks under a trust for ever " or " under a trust for ever to be called the Mary Catherine Compton and her daughter Alice Theophila Compton Trust " one arrives at the same result, that the testatrix is indicating an intention to set up a trust for purposes which may last for an indefinite period of time. I am mindful of the fact that later on the phrase " the trustees are always to be one Compton and one Powell at the least " is used. It was suggested that that is a common form phrase in wills and merely means " for as long as the trust subsists," and does not indicate an intention to create a perpetual trust. But, even so, it seems reasonably plain that the idea or conception which the testatrix had in mind was to set up, for an indefinite period, a trust to benefit, in a specific way, the lawful descendants of those three respective persons, those lawful descendants being described, for the sake of brevity, in the early part of the disposition as " children."

If the effect of the gift is that the trustees are to hold this fund in that way, it would appear, at first sight, that the rule against perpetuity is infringed—under certain rules (which are well known, and which are referred to in JARMAN ON WILLS, at pp. 278, 279 and 304). dealing with powers and discretionary trusts which are created for a period which may exceed that allowed by the rule against remoteness. But it is said that, even if the gift is not confined to persons who were ascertainable at the testatrix's death—and I have held that it is not—nevertheless, by reason of the provisions under which the scholarships are set up, the rule against perpetuities is not infringed because the trustees could, if they liked, have distributed, and, indeed, might conceivably be driven to distribute, the corpus, or use it and exhaust it ; and that being so, the rule, which has been observed over and over again, (*i.e.*, that, if the donee of a gift can, without infringing the terms of the gift, spend the money as he chooses, no question of perpetuity can arise), would apply. *Re Taylor* (1) was referred to as one of the most recent cases on the subject.

I do not, however, think that the principle of these cases has any application here. It seems to me that the real object of the testatrix was to set up a perpetual investment fund which was to be retained by the trustees and used, at their discretion, for the purpose of providing scholarships (as distinct from providing income) for the benefit of the persons who qualified. This idea of the testatrix as expressed by the language she has used, necessarily involves the notion of an indefinite and possibly perpetual trust, and, although one naturally would give effect, so far as one legitimately can, to the express wishes of a testator or testatrix, if, in fact, one finds that she has expressed her bounty in terms which run counter to established principles and rules of law, no effect can be given to them and they must fail. It seems to me that the testatrix, in attempting, as she has done, to set up a perpetual trust for the benefit of persons who are not charitable objects, has done what she cannot do, and the gift must fail.

Assuming that to be the case, it is then said that there is no reason why the gift should not be held to be perfectly valid for a limited period of time, and a term of 21 years is suggested as being a reasonable period and one which the law could sanction and which should be approved in the present case. I was referred to *Re Hooper* (2), before MAUGHAM, J., in which the headnote reads:

> A testator bequeathed to his executors and trustees money out of the income of which to provide, "so far as they legally can do so and in any manner that they may in their discretion arrange," for the care and upkeep of certain graves, a vault, certain monuments, a tablet and a window. On a summons to determine whether the bequest was valid in whole or in part: *Held*, that (the rule against perpetuities not applying to the trust for the upkeep of the tablet and the window) the trust for the upkeep of the graves, the vault and the monuments was valid for 21 years from the testator's death.

MAUGHAM, J., founded himself, in arriving at that conclusion, on a previous decision of STIRLING, J., in *Pirbright* v. *Salwey* (3). In *Pirbright* v. *Salwey* (3) the trustees were directed to employ income for a particular purpose, *viz.*, in keeping up a certain inclosure in a churchyard and decorating the same with flowers "so long as the law for the time being permits"; and there STIRLING, J., held that the gift was valid for at least a period of 21 years from the testator's death. In *Re Hooper* (2) the words qualifying the period of time during which the money had to be expended were "so far as they" (*i.e.*, the trustees) "legally can do so." MAUGHAM, J., held ([1932] 1 Ch. 38, at pp. 40, 41), that the phrase "so long as the law for the time being permits" was in effect the same as the language in the gift before him, *viz.*, "so far as they legally can do so"; so he followed *Pirbright* v. *Salwey* (3), and held that the trust for the upkeep of the graves, the vault and the monuments was valid for 21 years from the testator's death. There is nothing here which, in my opinion, amounts to a direction similar to that which resulted in the decision in those two cases. There are no words here such as "so long as may be legally necessary," or to that effect. It is merely a trust which is to go on, not for so long as the law may permit, but so long as there may be from time to time lawful descendants of H. C. Compton, Weyland Powell or the Earl of Sandwich. The essential elements, which enabled the judges in *Re Hooper* (2) and *Pirbright* v. *Salwey* (3) to arrive at the decisions which they expressed, are absent from the present case, and there is nothing of their nature to be found which can take their place, and which could provide the ground for coming to the same conclusion.

Therefore, I must arrive at the conclusion that the children whom the testatrix had in mind were not confined to persons living at the date of her death, but would embrace all persons who, from time to time, could say of themselves that they were the lawful descendants of those three named persons. As I come to the conclusion that the fund which is to be set aside for the benefit of those persons has to be retained and invested by the trustees for ever, and held under a particular name, the income being disposed of by the trustees in scholarships in the manner which is indicated, and as I have no language in the will before me which enables me to limit the operation of the trust to 21 years, or any other definite and legitimate period of time, I have no course open to me but to say, and I so declare, that the gift is void for perpetuity.

Declaration accordingly.

Solicitors: *Lovell, Son & Pitfield,* agents for *Nantes, Maunsell & Howard,* Bridport (for the trustee); *Farrer & Co.* (for the next of kin); *Royds, Rawstorne & Co.* (for one of the Montagu children).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

MACINTYRE *v.* MACINTYRE AND MOPPETT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), October 30, 31, November 1, 1945.]

Divorce—Evidence—Cross-examination—Husband's petition—Prayer for discretion inserted erroneously—Application to amend petition—Affidavit sworn by husband denying adultery—Wife's petition alleging different adultery without reference to adultery denied in affidavit—Husband's evidence confined only to matters in affidavit—Cross-examination restricted to charge specifically denied—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), *s.* 198.

The husband filed a petition on Oct. 2, 1944, in which he alleged that his wife had committed adultery and in his prayer he asked for the exercise of the court's discretion. On Dec. 28, 1944, he swore an affidavit asking for leave to amend his petition by deleting the prayer for discretion which, he stated, had been inserted owing to a misunderstanding between him and his solicitors. The misunderstanding arose because the husband had alleged that he had had an adulterous association at Aleppo in order that his wife might divorce him. In para. 4 of the affidavit he made the following statement: "I did not, however, commit adultery on that occasion or any other occasion." In Sept., 1945, the wife filed a petition for divorce, alleging that the husband had committed adultery with a woman whose Christian name only was known, but the petition contained no reference to the alleged incident at Aleppo. The husband's evidence was restricted to a denial that adultery had been committed at Aleppo. The question for the determination of the court was whether the husband could be cross-examined as to the adultery now alleged in the wife's petition:—

HELD: the husband could not be cross-examined as to the alleged adultery in the wife's petition because at the time when he swore the affidavit that question had not been raised. To hold that the affidavit allowed the husband to be cross-examined as to the whole of his conduct during his married life would infringe the principle of the common law rule that no one could be required by evidence to criminate himself or herself.

Cavendish v. *Cavendish* (1) *applied. Morton* v. *Morton* (3) *followed.*

[**EDITORIAL NOTE.** BOWEN, L.J., pointed out in *Cavendish* v. *Cavendish* (1) that the doctrine that "no one is bound to criminate himself," although dating back to the days of ecclesiastical censure, still applies with full force to a charge as grave as that of adultery. It is accordingly held that the prohibition in s. 198 of the Judicature Act, 1925, against questions tending to show that a party has been guilty of adultery, unless he has already given evidence in disproof of such adultery, is to be strictly construed, and in the circumstances here in issue made such questions inadmissible.

AS TO PROTECTION OF PERSONS ACCUSED OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 735, 736, para. 1138; and FOR CASES, see DIGEST, Vol. 27, pp. 430-432, Nos. 4383-4403.]

Cases referred to:

*(1) *Cavendish* v. *Cavendish,* [1926] P. 10; 27 Digest 425, *4313.*
*(2) *Redfern* v. *Redfern,* [1891] P. 139; 27 Digest 263, *2317*; 60 L.J.P. 9; 64 L.T. 68.
*(3) *Morton* v. *Morton, Daly and McNaught,* [1937] 2 All E.R. 470; [1937] P. 151; Digest Supp.; 106 L.J.P. 100; 156 L.T. 46.

CONSOLIDATED PETITIONS for dissolution brought (i) by the husband, charging the wife with adultery; (ii) by the wife, charging the husband with desertion and with adultery. The husband sought leave to amend his petition by deleting the prayer asking for the exercise of the court's discretion and stated in his affidavit: "I have not in fact committed adultery and the discretion was only asked for owing to a misunderstanding between me and my solicitors." The misunderstanding arose out of the fact that the husband had faked an adultery at Aleppo because he wanted his wife to divorce him. Para. 4 of the affidavit also stated : " I did not, however, commit adultery on that occasion or any other occasion." The wife, in her petition, alleged that the husband had frequently committed adultery with a woman whose surname was unknown but whose Christian name was known, without making any reference to the adultery at Aleppo. The only matter calling for report was the limit set to the cross-examination of the husband after he had restricted his evidence to a denial of the adultery at Aleppo.

J. Scott Henderson, K.C., and *R. T. Barnard* for the husband.

Gilbert H. Beyfus, K.C., and *C. A. Marshall-Reynolds* for the wife.

H. D. Baskerville for the co-respondent.

Bucknill, J. : This point is an interesting one, and arises under very peculiar circumstances ; and it is one of great importance to the parties, having regard to the possible course that the case may take.

The material facts are these. On Oct. 2, 1944, the husband filed a petition in which he alleged that his wife had committed adultery, and in his prayer he asked for the exercise of the discretion of the court. On Dec. 28, 1944, he swore an affidavit asking leave to amend his petition by deleting the prayer for discretion, and in his affidavit he says :

> I have not in fact committed adultery and the discretion was only asked for owing to a misunderstanding between me and my solicitors . . .

Then he sets out what the misunderstanding was. I do not think I need really refer to it, but the gist of it was that he faked an adultery in Aleppo because he wanted his wife to divorce him ; and in para. 4 he states this :

> I did not, however, commit adultery on that occasion or any other occasion.

I think the affidavit was framed for the purpose of dealing only with this particular faked adultery at Aleppo, although it is certainly couched in the widest possible terms.

In Sept., 1945, the wife filed a petition in which she alleges that he has frequently committed adultery with a woman whose surname is unknown but whose Christian name is Kathleen, and says nothing about this adultery at Aleppo. The husband gave evidence tending to show that he had not committed adultery at Aleppo, and said nothing more about his own conduct. In cross-examination counsel for the wife asserted his right to cross-examine the witness as to his conduct with Kathleen, and the question I have to decide is whether those questions are admissible, or whether the husband is entitled to refuse to answer them. The question depends upon the interpretation to be placed on the Judicature Act of 1925, s. 198, which is in the following terms :

> The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings [and husband and wife are parties] but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

It is said by counsel for the wife that the husband has already given evidence in the same proceedings in disproof of the alleged adultery because of the affidavit which I have referred to. On the other hand counsel for the husband has argued that the affidavit is not evidence in the same proceedings, and in any case it is not in disproof of the alleged adultery.

It is material to consider for a moment what the object of the rule is, and I find that set out by Lord Merrivale, P., in *Cavendish* v. *Cavendish* (1), where he refers to *Redfern* v. *Redfern* (2), in which Bowen, L.J., says ([1891] P. 139, at p. 147) :

> It is one of the inveterate principles of English law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. In these days, when the thunders of the Church have become less formidable, the rule, so far as it relates to ecclesiastical censure, seems to wear an archaic form ; but adultery is a charge of such gravity as to render it not unnatural that we should find the doctrine still applicable to it—that " no one is bound to criminate himself." Based upon the traditions of a law belonging to an earlier age, and a fear of ecclesiastical monitions that is now technical and obsolete, the privilege in such a case has never been abrogated. The principle has been recognised

as governing similar subject-matter by common law and equity alike . . . The ecclesiastical courts have dealt with the question in a like manner.

It is quite true that *Cavendish* v. *Cavendish* (1) had to do with a question of discovery, but the same principle seems to me to apply here.

There is one other case I must refer to because it throws light on the meaning of the words "alleged adultery," and that is *Morton* v. *Morton* (3), where SIR BOYD MERRIMAN, P., says ([1937] 2 All E.R. 470, at pp. 473, 474) :

> . . . sect. 198 of the 1925 Act . . . means that unless and until the husband or wife, as the case may be, has denied the adultery with regard to which the cross-examination is to be directed there is no right to cross-examine with regard to that particular adultery.

He goes on to deal with the facts of that particular case, and says ([1937] 2 All E.R. 470, at p. 474) :

> If the party has given evidence denying adultery in general, then, of course, cross-examination may be directed to that general denial . . .

I think in this case that the husband has not given evidence in disproof of the alleged adultery, because at the time when he swore the affidavit no question as to his conduct with Kathleen had been raised or alleged, and the general terms of his affidavit are to be confined to his conduct with the girl at Aleppo. To hold that that affidavit entitles his wife to cross-examine him as to the whole of his conduct during his married life seems to me to infringe the principle of the rule, and, therefore, I rule that the questions are inadmissible.

Husband's petition dismissed with costs, wife granted a decree nisi on the ground of desertion and co-respondent dismissed from the suit and awarded his costs.

Solicitors : *Blundell, Baker & Co.* (for the husband) ; *Howard, Kennedy, Genese & Co.* (for the wife and the co-respondent).

[*Reported by* R. HENDRY WHITE ESQ., *Barrister-at-Law.*]

OCEAN STEAMSHIP CO., LTD. *v.* LIVERPOOL AND LONDON WAR RISKS ASSOCIATION, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), October 23, 24, 25, November 16, 1945.]

Insurance—Marine insurance—War risks—Warlike operations—Ship carrying urgently needed war material including deck cargo—Damage caused by effect of heavy seas on deck cargo and aggravated by reason of speed of ship—Damage resulting from additional risks incurred by reason of warlike operation—Damage consequence of warlike operation.

The Priam, which was requisitioned by the Government, was insured by war risks insurers against the consequences of warlike operations. On Dec. 2, 1942, she sailed from Liverpool for Alexandria, *via* the Cape, with a very heavy cargo of war material urgently needed by the Army in Egypt. So much had to be taken that part of the cargo had to be carried on deck. But for the urgent military necessity, the master would have refused to carry deck cargo on a voyage across the Atlantic at that time of the year. Between Dec. 7 and 12, the ship encountered very heavy weather. The deck cargo, which had been securely lashed to the hatch covers, became loose and caused part of the hatch covers to be stripped away, with the result that the holds were flooded. In spite of the heavy seas and the damage suffered, the ship continued at the maximum speed possible because of the urgent need for the cargo. She thereby suffered still further damage. In an action against the war risks insurers, it was contended by the shipowners (i) that the damage caused by the weather to the ship while she was engaged on a warlike operation was a consequence of the operation ; (ii) that the nature of the operation created additional risks and perils which were the effective cause of the damage :—

HELD : (i) damage resulting from heavy weather while a ship was engaged on a warlike operation was not a consequence of that operation.

(ii) the damage to the ship was the result of the additional perils incurred by her owing to the nature of the operation. The damage was, therefore, the consequence of the warlike operation and the war risks insurers were liable on the policy.

Hindustan S.S. Co. v. *The Admiralty* (4) *and Reischer* v. *Borwick* (5) *applied.*

[**EDITORIAL NOTE.** It was laid down in the *Yorkshire Dale* case (2) that a casualty befalling a vessel engaged upon a warlike operation is not a consequence of that operation when it is the result of some external event in which the damaged vessel was not an active participant. This applies particularly to heavy weather, and Atkinson, J., accordingly holds that this, *per se*, would not make the loss one due to warlike operation. It seems, however, that there may be more than one proximate cause of a loss and since the heavy weather encountered on the voyage in question would not have caused injury but for the exceptional carriage of deck cargo and the necessity for speed, both being incidental to the warlike operation undertaken, the case is held to come within the decision of the House of Lords in the *Yorkshire Dale* (2), that " the totality of the facts must be looked at."

As to War Risks, see HALSBURY, Hailsham Edn., Vol. 18, pp. 314-318, paras. 439-442, and Supplement ; and for Cases, see DIGEST, Vol. 29, pp. 226-230, Nos. 1836-1861, and Supplement.]

Cases referred to :

*(1) *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518 ; 29 Digest 203, *1624* ; 57 L.J.Q.B. 24 ; 57 L.T. 726.

*(2) *Yorkshire Dale S.S. Co., Ltd.* v. *Minister of War Transport. The Coxwold*, [1942] 2 All E.R. 6 ; [1942] A.C. 691 ; 111 L.J.K.B. 512 ; 167 L.T. 349 ; *revsg.*, [1941] 3 All E.R. 214.

*(3) *Clan Line Steamers, Ltd.* v. *Board of Trade, The Clan Matheson*, [1929] A.C. 514 ; Digest Supp. ; 98 L.J.K.B. 408 ; 141 L.T. 275.

*(4) *Hindustan S.S. Co.* v. *The Admiralty*, [1921] 8 Lloyd L.R. 230 ; Digest Supp.

*(5) *Reischer* v. *Borwick*, [1894] 2 Q.B. 548 ; 29 Digest 206, *1650* ; 63 L.J.Q.B. 753 ; 71 L.T. 238.

Action by shipowners to recover on a war risks insurance policy. The facts are fully stated in the judgment.

Owen L. Bateson, K.C., and *A. J. Hodgson* for the shipowners.

F. A. Sellers, K.C., and *Patrick Devlin, K.C.*, for the insurers.

Cur. adv. vult.

Atkinson, J. : The question in this case is whether certain damage suffered by the motor vessel Priam was the consequence of a warlike operation. The ship was insured by the defendants from June 30, 1942, to Dec. 29, 1942, against King's enemy risks. The expression " King's enemy risks " was defined in cl. 1 in this way :

> This insurance is only to cover the risks (in this policy referred to as " King's enemy risks ") of capture . . . [and] of the consequences of hostilities or warlike operations by or against the King's enemies.

Cl. 7 (*b*) runs :

> If the ship is requisitioned by or on behalf of His Majesty [and this ship was] this policy so long as the requisitioning remains effective shall have effect subject to the following modifications . . . (3) " War risks " means the risks of war which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause " warranted free of capture . . . also from the consequences of hostilities or warlike operations."

On Dec. 2 the ship sailed from Liverpool for Alexandria with a cargo of which 78.5 per cent. consisted of war stores. It is conceded that the voyage was a warlike operation. Between Dec. 7 and 12 she encountered very heavy weather and sustained damage and thereby expense to the extent of £1,632 10*s*. 10*d*. The plaintiffs claim that damage resulting from heavy weather while a ship is engaged on a warlike operation is a consequence of that operation or, at any rate, that under the special circumstances of this case it was such a consequence,

The facts are as follows. The Priam is a motor vessel of 10,829 gross tonnage, 486ft. long with 66ft. beam. She was practically a new ship in 1942, capable of 17 knots. The draught forward was 29ft. 4ins., and aft, 30ft. 9ins. She was under requisition by the Minister of War Transport and was ordered to proceed, in Dec., 1942, from Liverpool to Alexandria. She was to sail independently and her route was dictated, north of Ireland then slightly north of west until she reached latitude 58° and longitude 35° west, and then she was to proceed south passing to the west of the Azores direct to the Cape. She was to zigzag continuously. A glance at the map will show what an indirect course she was to take. But for the war, the route would have been east of Ireland and by the Mediterranean. The Battle of Alamein having just been fought the cargo was of great military importance. It consisted of aeroplanes, tanks, guns, etc., things which were urgently needed, and time was of the utmost importance. So much cargo had to be taken that the master was asked to carry cargo on deck. But for the fact that the cargo was of vital military importance, he would have refused; on principle, he disapproved of all deck cargo on a voyage across the Atlantic at that time of the year. He said that he had never before been asked to carry deck cargo under such conditions, and I am satisfied that, but for the requirements of the operation, he would not have carried deck cargo. The cargo carried on the forward well deck included two cases containing aeroplane bodies, weighing, the one, 3 tons 10 cwts., and the other, 2 tons 15 cwts., and a tank bridge layer weighing over 21 tons. The two cases were firmly lashed in position on the hatch covers of No. 2 hold and the tank was firmly lashed in position on the starboard side of the vessel immediately opposite to the said hatch covers. The Priam sailed on Dec. 4, put into the Clyde to renew a cast iron T piece on the starboard main engine, left the Clyde on Dec. 5, and for two days all went well. Then followed a period of exceptionally heavy weather. There was a succession of gales from Dec. 7 until Dec. 13. A new gun platform had been mounted on the forecastle head. On the night of Dec. 7 the wind reached gale force; at 11 a.m. on Dec. 8, the cases of aeroplanes began to see-saw across the tarpaulins owing to their being struck by a sea which caused the cases partly to collapse and so slackened the lashings. By 6 p.m. the tarpaulins were badly damaged. There was a head wind from the southwest and the ship was shipping water. On Tuesday night (*i.e.*, Dec. 8) the tarpaulins were badly torn. At dawn on the Wednesday, it was seen that a few of the short hatch covers were missing, and the 21 ton bridge layer was adrift on the starboard side of the deck. Its wings had evidently come into contact with the tarpaulins and cut them. The bridge layer was relashed and the damage to the hatch covers was made good; but there was 11ft. of water in No. 2 hold, and the evidence was that the weight of this water would be round about 800 tons. The effect of this was to increase the mean draught by 14½ins., and the draught forward by 3ft. 6ins. On the Wednesday afternoon, although there was 10ft. of water in that hold, the engines were turning at the rate of 100 revolutions per minute, which meant that she was going almost full speed. On Wednesday night there was, again, a strong west wind and the speed had to be reduced, but on Thursday at 7 a.m., although there was 9ft. of water in the hold, the ship was going at full speed. On the Thursday morning, it was observed that the windlass motor room had been flooded. The electrical equipment there was saturated with sea water and a considerable amount of damage had been done. I accept the evidence that that damage would not have happened unless the vessel had been down by the head and been driven unduly fast against the seas. There was more trouble on Friday, but Saturday Dec. 12, was the more important day. There was a very high cross sea and at 2.30 a.m. the bridge layer again came adrift, and crashed across No. 2 hold—the aeroplanes too, were at large, being washed about—and it was seen that the hatch was stripped completely of 2½ sections of hatch covers. There were 32ft. 6ins. of water in the hold, and the evidence was that the weight of that water would be 2,243 tons, or thereabouts. The ship was down by the head by 10ft. 5ins. At 11 p.m. she safely reached Pontadelgada and the danger period was over.

I am satisfied that, except for the damage to the gun platform, the damage suffered would not have been suffered but for the tearing of the tarpaulins and the stripping of the hatch covers. It was due to the stripping of the hatch covers that at first the 11ft. of water and later the 32ft. 6ins. of water got into the hold. The weight of the water in the hold inevitably caused the ship to be deeper in the water and to be very materially down by the head. The ship thereby lost buoyancy and finally the well decks were awash and the ship became a very easy prey to the violence of the waves. But for the urgency of the operation, the master would have, when necessary, hove to or run before the wind. At times he did, but the urgency for speed induced him to forge ahead in the teeth of the gales, when he would not have done so had he but to consider the safety and wellbeing of the ship and not the urgency of the operation.

The question for decision in these cases is often put in this way: Would an underwriter insuring against the perils of the sea, but warranted free from the consequences of warlike operations, be liable for this loss. The provision is a limitation of liability in respect of loss caused by the insured perils. The underwriter is not to be liable for loss, albeit caused by perils of the sea, if that loss is in truth a consequence of a warlike operation. Doubtless, the damage would be covered by a policy against perils of the sea without any relevant exception. The sea did the damage. The fact that it did the damage because of the destruction of hatch covers would not prevent the loss being caused by a sea peril: see *Hamilton Fraser & Co.* v. *Pandorf & Co.* (1), where a cargo was damaged by sea-water escaping from a pipe on board the ship owing to the pipe having been gnawed through by rats. But that does not settle the question whether the damage was, or was not, caused by perils of the sea in consequence of a warlike operation. In the *Yorkshire Dale* case (2) Lord Wright said ([1942] 2 All E.R. 6, at p. 15):

> The stranding in this case was undoubtedly a peril of the seas, but we must look behind the stranding in order to ascertain whether the cause of the casualty was a peril which could be described as a consequence of warlike operations.

If the charterparty in *Hamilton* v. *Pandorf* (1) had contained an exception of consequences of damage done by rats the result would have been different.

In this case the plaintiffs submit two contentions. The first is the broad proposition, that damage caused by weather to a ship while engaged on a warlike operation is a consequence of that operation, even though the character of the operation has nothing to do with the damage suffered. The second contention is that, on the facts in this case, the nature of the operation created additional risks and perils which were the effective cause of the damage done. True, heavy weather was the immediate cause in point of time, but the heavy weather only caused the damage by reason of the extra risks and perils entailed by the warlike nature of the operation. It is plain, it is said, that the bulk of the damage to the ship would not have been suffered if there had been no deck cargo, or if the deck cargo had been of a lighter and more easily controlled character. The warlike operation demanded running the risks of heavy deck cargo and also the navigational risk of forcing the ship through the waves instead of heaving to or running before the gales.

As to the general submission, it is true that in the *Yorkshire Dale* case (2) Lord Wright and Lord Porter left the question open ([1942] 2 All E.R. 6, at pp. 18 and 21) but I have the view of MacKinnon, L.J., strongly expressed in the Court of Appeal decision in that case ([1941] 3 All E.R. 214, at p. 220) against the contention and then the present, though not final, view of Lord Wright. Humbly, I share that view. To my mind there is a clear distinction between a loss caused by a collision, or a stranding, and a loss caused by heavy weather. A collision or a stranding is due to something done by the ship in, and for the purpose of, the carrying out of the operation. Damage through heavy weather is due to something done to, not by, a ship while carrying out the operation. Would a collision caused by a ship not engaged on a warlike operation being driven into a ship engaged on a warlike operation but, for the time, stationary discharging her war stores, come within the reasoning in the *Yorkshire Dale* case (2)? The answer is, surely, given by Lord Wright when, speaking of the *Clan Line* case (3), he said ([1942] 2 All E.R. 6, at p. 17):

> Nothing done or not done by the Western Front could be regarded as the cause of the casualty.

Illustrations seldom help, but I suggest one which illustrates the distinction I have in mind. If, while hurrying in the blackout on a dark night, I collide with a shelter built on the footpath and hurt myself, I may fairly claim, according to the *Yorkshire Dale* case (2), that my injury is a consequence of my expedition; but if, while I am hurrying along, a slate falls from a roof and hits me, can I make the same claim? In the *Yorkshire Dale* case (2) Lord Porter seems to deal with this point ([1942] 2 All E.R. 6, at p. 21):

> It may be that, if a vessel, even when engaged on the warlike operation of proceeding from one war base to another, suffers damage by a definite external event, unexpected and unavoidable, in which the damaged vessel was not an active participant but a

quiescent sufferer, the loss should be attributed to that event and not to the passage of the ship through the water.

It is true that, while engaged on a warlike operation, the ship is regarded as a war vessel but the parallel has so far been limited to cases of collision and stranding: see *per* LORD WRIGHT ([1942] 2 All E.R. 6, at p. 18):

However, it is unnecessary to say more on the general contention, because I think the plaintiffs succeed on their second contention. I am satisfied that the damage in this case, although caused by a marine peril, would not have been caused but for the voyage being a warlike operation: *i.e.*, but for the carrying of deck cargo of a particularly heavy and warlike character on a voyage in winter across the Atlantic—a voyage during which speed was of great importance because of the requirements of an army in the field. The nature of the operation required these added perils and they were the real cause of the damage. In so far as the damage was due to proceeding through the water against the gales at a time when she would, but for the urgency of the operation, have hove to or run before the wind, the case is covered by the language of LORD PORTER, where he said ([1942] 2 All E.R. 6, at p. 21):

> . . . I should be prepared to hold that almost any casualty befalling a vessel as a result of her own action in proceeding on a voyage, in a case where proceeding on that voyage was a warlike operation, was caused by a warlike operation . . .

LORD WRIGHT also said the same thing.

There are some interesting remarks by SHEARMAN, J., in *Hindustan Steam Shipping Co.* v. *The Admiralty* (4), where he deals with the question of added risks, *i.e.*, risks and new perils added by virtue of the operation being a warlike operation (8 Ll.L.R. 230, at p. 231):

> No doubt *primâ facie* a fire breaking out from spontaneous combustion is a marine risk and not a war risk, but this case comes under that line which has been so often discussed, as to whether in the circumstances an entirely new risk was brought about by this ship being engaged in warlike operations. In my opinion, an entirely new risk did arise, at any rate when she was put under the orders of the captain of the Indefatigable in September. She then became a combatant ship, and the risk of being kept there is entirely different from the ordinary risk of a marine charterparty if combustion breaks out . . . It was the proximate and direct result of the new risk by the ship being required to become practically part of the combatant flotilla . . .

Here, there can be no question but that, because of the warlike character of the operation, new and additional risks and perils were incurred, notably by the carrying of this deck cargo, and also by the necessity for speed.

I am only going to refer to one other case, but it seems very similar to the one with which I have to deal. It is *Reischer* v. *Borwick* (5). There, the headnote is this:

> A ship was insured against damage from collision with any object, but not against perils of the sea. The ship ran against a snag in a river, and, the collision causing a leak, the ship was anchored and the leak temporarily repaired, so that the ship was out of immediate danger. A tug was sent to tow the ship to the nearest dock for repairs; but the effect of the motion through the water was that the leak was opened again, and the ship began to sink, and was run aground and abandoned:—*Held*, that inasmuch as the injury to the ship remained throughout, the collision was the proximate cause of the damage, and that the loss of the ship was covered by the policy.

LINDLEY, L.J., said ([1894] 2 Q.B. 548, at p. 550):

> There is no doubt that, in considering the liabilities of underwriters of marine insurance policies, it is a cardinal rule to regard proximate, and not remote, causes of loss. This rule is based on the intention of the parties . . . but the rule must be applied with good sense, so as to give effect to, and not to defeat, those intentions.

He then dealt with the facts, and said ([1894] 2 Q.B. 548, at pp. 550-552):

> If the ship had sunk, and been lost under such circumstances as to render the inference unavoidable that the collision caused the loss, it is plain that the cost of repairing the damage would not be the measure of the liability of the underwriters. The moment however, that this conclusion is arrived at, it is difficult to see on what principle liability for a loss occasioned by that injury can be excluded, except upon the ordinary principles applicable to remoteness of damage. The fact that some fresh cause arises, without which the injury would not have led to further loss, is, I think, in such a case far from conclusive. Assume that this ship would have floated in calm water notwithstanding the injury she had sustained by the collision, and suppose that, before such injury

> could be made good, the water became so rough as to get into her and sink her, by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision, and would fall on the underwriters of a policy worded as this policy is. It may be that such a loss would also be covered by a policy against the perils of the sea in the ordinary form; but this does not, in my opinion, show that no liability attaches under a policy such as the present. Policies may be so worded as to overlap and cover some risk common to them all. The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other; each was as much a proximate cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy . . . I feel the difficulty of expressing in precise language the distinction between causes which co-operate in producing a given result. When they succeed each other at intervals which can be observed it is comparatively easy to distinguish them and to trace their respective effects; but under other circumstances it may be impossible to do so. It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury—*i.e.*, under circumstances which, but for that injury, would not have affected her safety. It follows that if, as in this case, a policy is effected covering such an injury, it will in the circumstances supposed extend to the loss of the ship, for in the case supposed the injury will really be the cause of the loss—the *causa causans* and not merely the *causa sine qua non*.

Then, LOPES, L.J., said ([1894] 2 Q.B. 548, at pp. 552, 553):

> Damage received in collision must, therefore, in this case be the proximate cause of the loss to entitle the plaintiff to recover. The damage received in the collision was the breaking of the condenser, and it was the broken condenser which really caused the proximate loss. The tug was continuously in danger from the time the condenser was broken, and the broken condenser never ceased to be an imminent element of danger, though that danger was mitigated for a time by the insertion of the plug in the outside of this vessel. The cause of the damage to the condenser was the collision, and the consequences of the collision—that is, the broken condenser—never ceased to exist but constantly remained the efficient and predominating peril to which the damage now sought to be recovered was attributable.

DAVEY, L.J., said ([1894] 2 Q.B. 548, at p. 553):

> What is the *causa proxima* of the damage sustained in this case? The only answer seems to me to be the inrush of the water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger.

It seems to me that almost every word that I have read applies to this case. Here, no harm was done to the ship by the sea until some of the hatch covers were broken away, first on Tuesday night by the tank bridge layer and, maybe the aeroplanes, and secondly on the 12th, when the hold was completely stripped of part of its covering. This injury was caused certainly by the tank bridge layer crashing across the deck and doing the damage. It was the bridge layer which made the hole through which the water came. The damage claimed for was proximately caused by the injuries inflicted by the bridge layer and, maybe, the aeroplanes, in that water got through the injured parts and caused the ship to settle down in the water and become an easy prey to waves which would otherwise have been innocuous. To paraphrase DAVEY, L.J., the open hold was " a continuing source of risk and danger " and, while open, it never ceased to be an imminent source of danger. The cause of the open hold was the carrying and breaking loose of the deck cargo, an additional risk imposed by the necessity of the warlike operation. The open hold " constantly remained the efficient and predominating peril to which the damage now sought to be recovered was attributable " —directly attributable inasmuch as the damage was done by the 800 tons and 2,000 odd tons of water in the hold, and indirectly attributable (but none the less naturally and inevitably) to the ship being low in the water and without buoyancy. This effective and predominating peril was aggravated by the necessity for speed, another attribute of the warlike operation. At the very least, the warlike operation was an effective cause of the loss and would be covered by what is said in HALSBURY, Hailsham Edn., Vol. 18, p. 306:

> It seems that there may be more than one proximate . . . cause of a loss. If one of these causes is insured against under the policy, and none of the others is expressly excluded from the policy, the assured will be entitled to recover.

Therefore, in my judgment, the damage, with the exception of the damage done to the gun carriage, has been proved to be the consequence of the warlike operation on which the ship was engaged. I am not satisfied about the gun carriage and, therefore, the defendants have got to have the benefit of that. But, for the rest, I accept the evidence and I think that the expression of opinion at the end of the report was well founded :

> In my opinion the primary cause of the above-mentioned incidents [*i.e.*, which
> A endangered the safety of the ship] is the stowage of deck cargo over the hatches of the fore deck.

Judgment for the plaintiffs for an amount, failing agreement, to be assessed by the court.

Solicitors : *Bentleys, Stokes & Lowless*, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the plaintiffs) ; *Hill, Dickinson & Co.* (for the defendants).
B

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

R. *v.* THE JUSTICES OF THE APPEALS COMMITTEE OF THE COUNTY OF LONDON QUARTER SESSIONS.

C [COURT OF APPEAL (MacKinnon, Tucker and Bucknill, L.JJ.), December 4, 18, 1945.]

Criminal Law—Appeal—Criminal cause or matter—Sale of intoxicating liquor without excise licence—Application for order of prohibition—Refusal—Appeal to Court of Appeal—Jurisdiction—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 31 (1) (*a*).

D A metropolitan police magistrate dismissed three informations preferred by an officer of excise alleging that the appellant sold intoxicating liquor by retail without licence, contrary to the Finance Act, 1910, s. 50 (3), which prescribed in each case an excise penalty of £50 or, alternatively, an excise penalty equal to treble the amount of the full duty. The officer appealed to quarter sessions who adjourned the hearing to enable the
E appellant to apply for an order prohibiting the hearing and determination of the appeal. The Divisional Court refused to make an order of prohibition. On appeal to the Court of Appeal from the decision of the Divisional Court the preliminary point was taken that the appeal being in a criminal cause or matter the court had no jurisdiction to entertain it by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*a*) :—

HELD : the test to be applied in deciding whether the judgment under
F appeal was in a " criminal cause or matter " was whether the appellant might ultimately be in danger of being sentenced to some kind of punishment. Applying that test the appeal related to a criminal cause or matter within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*a*), and, accordingly, the Court of Appeal had no jurisdiction to hear the appeal.

Amand v. Secretary of State for Home Affairs (1) *applied.*

G [**EDITORIAL NOTE.** The question whether proceedings before justices for the recovery of customs or excise penalties are proceedings in a " criminal cause or matter " has not hitherto been considered in English courts, but it was decided in Southern Ireland in 1945 that the form of proceeding is the test, and that this is the view taken in English cases. In *Seaman* v. *Burley* (3) the importance in this connection of the *forum* was stressed by LORD ESHER, M.R., and the principle applicable is summed up by LORD WRIGHT in *Amand's* case (1), where he says that " if the cause or matter is
H one which, if carried to its conclusion, may result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a criminal cause or matter." It is held, therefore, that the appeal fails *in limine*, with the result that the decision of the Divisional Court that quarter sessions had jurisdiction to hear the appeal of the excise officer stands.

Informations for penalties were apparently regarded by BLACKSTONE as criminal, and any anomaly arises from the fact that by the Crown Suits Act, 1865, the revenue side of the Court of Exchequer was to be deemed a court of civil judicature. Informations filed by the Attorney-General thereby lost their criminal character, which, however, they retained when proceedings were taken before magistrates.

As to Criminal Cause or Matter, see HALSBURY, Hailsham Edn., Vol. 16, p. 740, para. 1261 ; and for Cases, see DIGEST, Vol. 14, pp. 551-554, Nos. 6271-6298.]

Cases referred to :

*(1) *Amand* v. *Secretary of State for Home Affairs*, [1942] 2 All E.R. 381 ; [1943] A.C. 147 ; *sub nom. R.* v. *Home Secretary, Ex p. Amand*, 167 L.T. 177 ; *affg.*, S.C. *sub nom. Re Amand*, [1942] 1 All E.R. 480.

*(2) *Ex p. Woodhall* (1888), 20 Q.B.D. 832 ; 14 Digest 551, *6271* ; 57 L.J.M.C. 71 ; 59 L.T. 841.

*(3) *Seaman* v. *Burley*, [1896] 2 Q.B. 344 ; 14 Digest 553, *6289* ; 65 L.J.M.C. 208 ; 75 L.T. 91.

(4) *Mellor* v. *Denham* (1880), 5 Q.B.D. 467 ; 14 Digest 29, *8* ; 49 L.J.M.C. 89.

(5) *R.* v. *Whitchurch* (1881), 7 Q.B.D. 534 ; 14 Digest 29, *10* ; *sub nom. Re Nottingham JJ., Ex p. Whitchurch*, 50 L.J.M.C. 99 ; *sub nom. Ex p. Whitchurch*, 45 L.T. 379.

(6) *Ex p. Schofield*, [1891] 2 Q.B. 428 ; 14 Digest 551, *6275* ; 60 L.J.M.C. 157 ; *sub nom. Rook* v. *Schofield*, 64 L.T. 780.

(7) *Payne* v. *Wright*, [1892] 1 Q.B. 104 ; 14 Digest 552, *6279* ; 61 L.J.M.C. 114 ; 66 L.T. 148.

*(8) *R.* v. *Hausmann* (1909), 3 Cr. App. Rep. ; 14 Digest 30, *15*.

*(9) *R.* (*Sherry*) v. *The County Court Judge and Chairman of Quarter Sessions for County Fermanagh*, [1935] N.I. 211.

*(10) *The State* (*Gettins*) v. *Judge Fawsitt*, [1945] I.R. 183.

*(11) *A.-G.* v. *Radloff* (1854), 10 Exch. 84 ; 14 Digest 28, *2* ; 23 L.J.Ex. 240 ; 23 L.T.O.S. 191.

Appeal against an order of the Divisional Court (Humphreys and Croom-Johnson, JJ.), dated July 2, 1945, reported *sub nom. R.* v. *Keepers of the Peace, County of London JJ.* ([1945] 2 All E.R. 298), refusing an application for an order of prohibition. A preliminary objection was taken by the Commissioners of Customs and Excise that by reason of the Judicature (Consolidation) Act, 1925, s. 31 (1) (*a*), the court had no jurisdiction to hear the appeal because the judgment under appeal was in a "criminal cause or matter." The facts are fully set out in the report of the hearing in the court below.

G. O. Slade, K.C., and *P. Colin Duncan* for the appellant.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *Valentine Holmes, K.C.*, for the Commissioners of Customs and Excise.

Cur. adv. vult.

Tucker, L.J. [delivering the judgment of the court] : The test to be applied in deciding whether the judgment under appeal was in a "criminal cause or matter" within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*a*), has been laid down by this court in several cases which have recently been considered and approved by the House of Lords in *Amand* v. *Home Secretary* (1).

It is not, we think, necessary to refer to more than two of these cases. In *Ex p. Woodhall* (2) the Court of Appeal held that the refusal by the Queen's Bench Division to order the issue of a writ of *habeas corpus* on behalf of a person who had been committed to prison under the Extradition Act, 1870, s. 10, was a decision in a "criminal cause or matter," and consequently no appeal lay to the Court of Appeal. In that case Lord Esher, M.R., said that the decided cases showed that the words "criminal cause or matter" should receive the widest possible interpretation and, later on in his judgment, he used these words (20 Q.B.D. 832, at p. 836) :

> I think that the clause . . . in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises.

Seaman v. *Burley* (3) was an appeal to the Court of Appeal from a judgment of the Queen's Bench Division in a case stated by justices in an application to enforce payment of a poor rate by warrant of distress. It was held that the judgment of the Queen's Bench Division was given in a "criminal cause or matter" and that no appeal lay. In that case Lord Esher, M.R., said ([1896] 2 Q.B. 344, at p. 347) :

> But the question is whether this procedure for the recovery of poor rate is criminal or civil for this purpose according to the rule laid down by this court in the cases on the subject. Those cases do not give an exhaustive definition, but they decide that

> when certain conditions are fulfilled the proceeding must be treated as a criminal proceeding within the meaning of the Judicature Act, 1873, s. 47. It has been held in those cases, as it appears to me, that when the proceeding is before magistrates, and it is one which may end in imprisonment, it must be considered to be a criminal proceeding within the Judicature Act, 1873, s. 47, and therefore one in which there can be no appeal to this court. In this case the proceeding was before magistrates to enforce payment of a poor rate. The person rated might, before the proceeding was taken, have disputed his liability to the rate and appealed against the rate to quarter sessions, in which case there might ultimately have been an appeal to this court, and possibly to the House of Lords. But the procedure for enforcement of the rate is by application to justices to issue a warrant of distress, and in default of distress by imprisonment. The cases cited, such as *Mellor* v. *Denham* (4), *R.* v. *Whitchurch* (5), *Ex p. Schofield* (6), and *Payne* v. *Wright* (7), all seem to me to show that the question is not whether the proceeding must, but whether it may end in imprisonment. If it is before justices and may end in imprisonment, the cases have held that it is criminal within the Judicature Act, 1873, s. 47.

It is to be observed that LORD ESHER emphazises the nature of the *forum*, *viz.*, proceedings before magistrates.

KAY, L.J., said ([1896] 2 Q.B. 344, at p. 349) :

> I think we are bound by the decisions on that point to hold that, though it does not necessarily follow that there will be a commitment to prison, yet, if the proceedings before magistrates may have that result, that is enough to show that the proceeding is in the nature of a criminal proceeding in which there is no appeal to this court.

Later on he used these words (*ibid.*) :

> It appears to me that, if there be a provision in a statute that that which is merely a civil liability may be enforced by a proceeding in its nature criminal, that proceeding is none the less criminal for the purposes of the Judicature Act, 1873, s. 47, because it is applied to a civil liability.

Both these cases were referred to with approval in *Amand's* case (1), where LORD WRIGHT summed up the result of the authorities in these words ([1942] 2 All E.R. 381, at p. 388) :

> The principle which I deduce from the authorities which I have cited and the other relevant authorities which I have considered, is that, if the cause or matter is one which, if carried to its conclusion, may result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a criminal cause or matter.

Our task is to apply these principles to this case, which relates to a refusal by the Divisional Court to make an order prohibiting the justices of the appeals committee of the County of London Quarter Sessions from hearing an appeal from an order of a metropolitan magistrate dismissing three informations laid against the present appellant for selling intoxicating liquor without having taken out an excise licence, contrary to the Finance (1909-10) Act, 1910, s. 50 (3), and claiming the prescribed excise penalty of £50. The section under which the informations were laid is as follows :

> If any person sells by retail any intoxicating liquor, for the retail sale of which he is required to take out a licence under this Act, without taking out such a licence, he shall be liable in respect of each offence, at the election of the commissioners, either to an excise penalty of fifty pounds or to an excise penalty equal to treble the amount of the full duty.

The Excise Management Act, 1827, s. 65, provided for the recovery of excise penalties by way of information exhibited before justices of the peace elsewhere than within the limits of the chief office of excise in London, in which case information might be exhibited before three or more of the commissioners of excise. In the latter case a right of appeal was given to commissioners of appeal appointed under sect. 81 and in the former case to quarter sessions.

By the Inland Revenue Regulation Act, 1890, s. 21 (3), the power of the commissioners to hear and determine such informations was abolished and the jurisdiction in all cases conferred on justices of the peace.

It appears that prior to 1827 such penalties had been recovered by proceedings in the Court of Exchequer and this right is expressly preserved by the Excise Management Act, 1827, s. 57, so that from then onwards the Crown has had the choice of two alternative proceedings in all such cases.

Counsel for the appellant in these proceedings contends that the principles laid down in the cases cited above are inapplicable to, and could not have been intended to extend to, proceedings by customs or excise officers to recover penalties which, he says, are purely civil in their nature and he referred us to the case of *R.* v. *Hausmann* (8), in which it was held that an information in the King's Bench Division to recover penalties for smuggling is not a criminal proceeding and that no appeal lies to the Court of Criminal Appeal. Lord Alverstone in that case said that the matter was almost concluded by the fact that on such a case appeal lay to the Court of Appeal. Although the nature of proceedings before justices for the recovery of customs or excise penalties does not appear to have come before the courts of this country, the matter has recently received consideration by the courts in Northern and Southern Ireland, and counsel for the appellant invited us to follow the decision of the Court of Appeal in Northern Ireland in *R.* (*Sherry*) v. *The County Court Judge and Chairman of Quarter Sessions for County Farmanagh* (9), in which it was held that proceedings before justices to recover treble duty by way of penalty for knowingly harbouring uncustomed goods were not proceedings in " a criminal cause or matter " so as to oust the jurisdiction of the Court of Appeal. Andrews, L.J., as he then was, gave the leading judgment in which he dealt with all the cases on the subject, including the decisions of the English courts. In expressing the conclusion at which he had arrived he said ([1935] N.I. 211, at p. 233) :

> In my opinion it would be an absurd conclusion at which to arrive, and one which, I conceive, would be at variance with the true view of our law, that when a person is charged with an offence under the Customs Acts, the character of the proceedings, with all that it involves, should be determined by the persons arbitrarily selected either by the Attorney-General or by a customs official. It would be doubly absurd if the smaller offences which would naturally be brought before the justices were branded as criminal whilst the more serious cases tried in the High Court were regarded as of a purely civil character.

We trust we are not doing injustice to the closely reasoned judgment of Andrews, L.J., be selecting this passage as indicating what was, in his view, the really decisive element in the case.

On the other hand, when a very similar question arose in the Courts of Southern Ireland, a different decision was reached by the majority of the court. The case is *The State* (*Gettins*) v. *Judge Fawsitt* (10). In that case the proceeding under discussion was an information laid before the district judge to recover a penalty of £100 for attempting to export certain articles for which an export licence had not been obtained. The question in issue was whether such a proceeding was a criminal case within the meaning of a section of an Irish statute, which provided that :

> . . . an appeal shall lie in all cases other than criminal cases from any decision of a justice of the district court to the judge of the Circuit Court.

The judgment of the majority of the Supreme Court was delivered by Murnaghan, J. The authorities were again reviewed, including the decision of the Court of Appeal in Northern Ireland in *Sherry's* case (9), with regard to which Murnaghan, J., used these words ([1945] I.R. 183, at p. 193) :

> The reasoning of Andrews, L.C.J., in Northern Ireland largely rests upon the absurdity of proceedings before justices being a crime, and proceedings for a similar matter in the High Court not being a crime. If the form of proceeding is the test of criminal or civil proceedings, I personally see no absurdity in one proceeding being civil and the other being criminal. The information at the suit of the Attorney-General in the High Court is civil because it is a relic of mediaeval procedure, while the proceedings before the district justices have all the marks of criminal procedure and are in no way distinguishable from criminal proceedings for which the punishment is a penalty with imprisonment in default of payment.

We respectfully agree with the observations of Murnaghan, J. The English cases show that the form of the proceeding is the test and this seems to us to be a conclusive answer to the apparent anomaly.

We are confirmed in this view by the fact that in *A.-G.* v. *Radloff* (11) the court was equally divided as to whether or not an information filed by the Attorney-General for the recovery of penalties for a breach of the customs laws was a criminal proceeding, and the matter was for all practical purposes settled a year later by the Crown Suits Act, 1855, which provided, by sect. 35, that the revenue side of the Court of Exchequer should be deemed to be a court of civil judicature within the Common Law Procedure Act, 1854, s. 103.

In this connection it may be of interest to observe that BLACKSTONE appears to have regarded such informations as criminal in their nature. In his COMMENTARIES, Vol. 4, p. 308, he writes:

> Informations are of two sorts, first, those which are partly at the suit of the King, and partly at that of a subject; and secondly, such as are only in the name of the King. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the King, and another to the use of the A informer; and are a sort of *qui tam* actions (the nature of which was explained in a former volume) only carried on by a criminal instead of a civil process.

It would, therefore, appear that originally there was no anomaly and that the present anomaly is due to the statutory provision applying the rules of civil procedure, and giving a right of appeal to the Court of Appeal, in a proceeding which was in its origin criminal.

For these reasons we are of opinion that the preliminary objection prevails B and that the order of the Divisional Court in this case was made in a "criminal cause or matter" with the result that no appeal lies therefrom to the Court of Appeal.

Appeal dismissed with costs.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *Solicitor for Customs and Excise* (for the Commissioners of Customs and Excise).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

C

DAGGER v. SHEPHERD.

[COURT OF APPEAL (Scott and Tucker, L.JJ., and Evershed, J.), October 29, 30, December 6, 1945.]

D *Landlord and Tenant—Notice to quit—"On or before"—Construction—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (*c.* 32), *s.* 3, *Sched. I* (*h.*)

The appellant was the landlord of a house to which the Rent Restrictions Acts applied. The house was let to the respondent under an agreement for one year from Mar. 25, 1939, at a rent of £50 per annum. The agreement further provided that the respondent was to have the option of remaining on the premises thereafter as a quarterly tenant, subject to a E determination of the tenancy by 3 months' notice. The respondent stayed on for a number of years without expressly exercising his option. On Dec. 20, 1944, the appellant's agent served the respondent with written notice to quit "on or before Mar. 25 next." The appellant then brought an action for possession on the ground that the alleged contractual tenancy had been duly determined by the notice to quit. At the trial the county F court judge, without considering any other questions raised in the pleadings, dismissed the appellant's claim on the ground that the phrase "on or before" in the notice to quit rendered it uncertain and ambiguous. The appellant appealed:—

HELD: the notice to quit served on the respondent was valid and effective, since it specified the date, *i.e.*, Mar. 25, 1945, on which the tenancy was to end. The insertion of the words "on or before" in the notice to G quit was, on a proper construction, an offer to the tenant to accept from him a determination of the tenancy on any earlier date than that named on which he would give up possession of the premises.

[**EDITORIAL NOTE.** It is essential to the validity of a notice to quit that it should be certain; that there should be "plain unambiguous words claiming to determine the existing tenancy at a certain time." What then is the effect of a notice to quit "on or before" a specified date? As regards a covenant to pay a sum of money H PARKER, J., observed in the *Tewkesbury Gas Co.* case (4) that "a covenant to pay on or before a certain day creates a liability to pay on the day named with an option of earlier payment," and this reasoning appears to be equally applicable to a notice to quit. The contrary view, as expressed by LUSH, J., in *Queen's Club Gardens Estates* v. *Bignell* (5), is held to be erroneous. Such a notice, therefore, amounts to notice to quit at a date certain, unless the tenant chooses to accelerate the date by an earlier delivery up of possession.

AS TO CONSTRUCTION OF NOTICE TO QUIT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 135-138, paras. 145-147; and FOR CASES, see DIGEST, Vol. 31, pp. 445-450, Nos. 5919-5971.]

Cases referred to :

*(1) *Phipps (P.) & Co. (Northampton and Towcester Breweries), Ltd.* v. *Rogers*, [1925] 1 K.B. 14 ; 31 Digest 448, *5947* ; 93 L.J.K.B. 1009 ; 132 L.T. 240.
*(2) *Gardner* v. *Ingram* (1889), 61 L.T. 729 ; 31 Digest 446, *5931*.
*(3) *Hankey* v. *Clavering*, [1942] 2 All E.R. 311 ; [1942] 2 K.B. 326 ; 111 L.J.K.B. 711 ; 167 L.T. 193.
*(4) *Re Tewkesbury Gas Co., Tysoe* v. *Tewkesbury Gas Co.*, [1911] 2 Ch. 279 ; 17 Digest 352, *1028* ; 80 L.J.Ch. 590 ; 105 L.T. 300.
*(5) *Queen's Club Gardens Estates, Ltd.* v. *Bignell*, [1924] 1 K.B. 117 ; 31 Digest 447, *5932* ; 93 L.J.K.B. 107 ; 130 L.T. 26 .
*(6) *De Vries* v. *Sparks* (1927), 137 L.T. 441 ; Digest Supp.
*(7) *Ahearn* v. *Bellman, Sedgwick* v. *Ahearn* (1879), 4 Ex. D. 201 ; 31 Digest 446, *5926* ; 48 L.J.Q.B. 681 ; 40 L.T. 771.

APPEAL by the plaintiff from an order of His Honour JUDGE CAVE, K.C., dated July 4, 1945, and given at Poole County Court. The facts are fully set out in the judgment of the court delivered by EVERSHED, J.

W. R. Rees-Davies for the appellant.

F. W. Beney, K.C., and *E. S. Fay* for the respondent.

Cur. adv. vult.

SCOTT, L.J. : I will ask EVERSHED, J., to read the judgment of the court.

EVERSHED, J. [delivering the judgment of the court] : This is an appeal from an order of the Poole County Court dismissing with costs the action of the appellant, the landlord of certain premises known as " Kenwood," Poole Road, Wimborne, in Dorset. The claim of the appellant was for an order for possession of the premises, which were and are in the occupation of the respondent, and for consequential relief. The premises were and are within the protection of the Rent Restriction Acts.

By her points of claim the appellant alleged that the premises were occupied by the respondent under the terms of an agreement dated Mar. 25, 1939, and that " the said tenancy was duly determined by notice to quit dated Dec. 20, 1944, and expiring on Mar. 25, 1945." The appellant then alleged facts designed to bring the case within para. (*h*) of the First Schedule to the 1933 Act. The particulars of defence in substance put in issue the whole of the matters alleged by the points of claim.

It is to be observed that the appellant founded her case exclusively on an alleged contractual tenancy duly determined by the above-mentioned notice to quit. There was no alternative claim founded on a statutory tenancy under the Rent Restriction Acts entitling the judge without any such notice to quit to order possession to be given to the appellant ; nor was any application to amend the claim made at the hearing in the county court. Upon the action coming on for trial the point was taken that the alleged notice to quit was on the face of it invalid or ineffective. The county court judge so decided, with the result that the claim as pleaded failed *in limine* and was dismissed with costs.

The terms of the notice to quit were as follows :

> Dear Sir, On behalf of our client, Mrs. W. A. M. Dagger, we hereby give you notice to quit " Kenwood " on or before Mar. 25, next. As we have already informed you, Mrs. Dagger requires possession of the house in order to occupy it herself with members of her family. Please acknowledge the safe receipt of this letter. Yours faithfully.

The ground of the judge's decision was that the insertion of the words " or before " in the phrase " notice to quit on or before Mar. 25 " rendered an otherwise good notice uncertain and ambiguous and was, accordingly, fatal to its efficacy. In so holding, the judge was following, as we were informed, previous decisions of his own and of other county court judges.

The argument by counsel for the appellant before this court was two-fold. His first contention was that upon its fair and reasonable construction the document of Dec. 20, 1944, meant, and must have meant, that the landlord gave notice terminating the alleged tenancy on Mar. 25, 1945, the words " or before " having only the effect of conferring upon the tenant an option of vacating the premises on an earlier date of his own choice and thereby terminating the tenancy on such earlier date. His second, and alternative, contention was that, even if the letter of Dec. 20, 1944, was ineffective to determine a contractual tenancy, nevertheless the county court judge should (since the premises fell within the scope of the Rent Restriction Acts) have examined the available evidence in the case, both written and oral ; that, had he done so, he would or might have found that in truth the tenancy had before the date of the hearing ceased to be a contractual tenancy and had become a statutory tenancy; and that accordingly the invalidity of the notice of Dec. 20, 1944, did not affect the appellant's right to possession. He asked, therefore, for a new trial on the ground that the county court judge was both entitled and bound to examine the available evidence notwithstanding the form of the appellant's points of claim and the absence of any application to amend, in order to apply the criteria of para. (*h*) of Sched. I to the 1933 Act.

The first branch of the appellant's argument raises a question of general importance, namely, whether in the absence of some special context (and we do not think any special context is to be found in the present case) the use in a notice to quit of the disjunctive phrase "on or before" in relation to a fixed date invalidates the notice on the ground of uncertainty. It is well-established that a notice to quit, being a "unilateral act" in exercise of a contractual right to put an end to an existing relation of landlord and tenant, must conform strictly to the legal requirements of the contract. Accordingly, in *Phipps* v. *Rogers* (1), ATKINS, L.J., quoted with approval the passage in *Gardner* v. *Ingram* (2) where LORD COLERIDGE, C.J., stated (61 L.T. 729, at p. 730):

> Although no particular form need be followed, there must be plain unambiguous words claiming to determine the existing tenancy at a certain time.

We refer also to the language of LORD GREENE, M.R., in *Hankey* v. *Clavering* (3), in regard to notices to quit to which our attention has been directed ([1942] 2 All E.R. 311, at p. 313):

> That takes me back to the real point in the case, namely, whether or not the notice was a good notice, that is to say, whether it had the effect of terminating the lease on Dec. 25, 1941. Notices of this kind, given under powers in leases of this description, are documents of a technical nature, technical for this reason, that if they are in proper form they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They are not consensual documents; they are documents which must do the thing which the proviso in the lease says they are to do; they must on their face and on a fair and reasonable construction do what the lease says they are to do. It is perfectly true that in construing such a document, as in construing any other document, the court in case of ambiguity will lean in favour of reading the document in such a way as to give it validity as a document; but I dissent entirely from the proposition that, where a document is clear and specific on a particular matter, such as that of date, it is possible to ignore the inaccurate reference to a date and substitute a different date because it appears that the date was put in by a slip.

There is a further general principle to be applied. The court must assume that the parties to the contract of tenancy are aware of its terms, particularly of the provisions relative to its termination: see, for example, *Phipps* v. *Rogers* (1), *per* ATKIN, L.J., ([1925] 1 K.B. 14, at p. 27).

Bearing these general principles in mind, the question for our determination is solely one of interpretation. What, upon its fair and reasonable construction, does the document of Dec. 20, 1944, mean? Is the tenant left by its terms in any doubt as to its intended effect? On the one hand, does the document, when correctly construed, contain a statement that the landlord intends to treat the relationship of landlord and tenant as determined upon some unspecified (and therefore uncertain) date between Dec. 21, 1944 (the day following the date of the document) and Mar. 25, 1945? Or does it contain an unequivocal statement to the tenant that on Mar. 25, 1945, the rights and obligations of his tenancy, including his right to possession of the premises, will come to an end, at the same time giving to him an option to deliver up possession at some earlier date of his own choosing? And if some such option is given, is it one impliedly subject to the condition of the tenant's continuing under the obligations of the tenancy—such as payment of rent—until Mar. 25, 1945? Or is it an option to bring the tenancy to an end for all purposes on the date when he in fact evacuates the premises? In short, is the true interpretation, "I give you notice that the tenancy will end on the named date, but, in case it suits you better to end it earlier, I here and now make you an offer to end it at any earlier date you like upon your accepting my offer"?—such offer being open to acceptance, presumably, by oral or written word or by conduct.

In our judgment, and treating the matter as one of the construction of the document without reference to any authority, its true effect was first to give to the tenant notice that the landlord did thereby give an irrevocable notice to determine on Mar. 25, 1945, and secondly, to make to the tenant an offer to accept from him a determination of that relationship on any earlier date (of the tenant's choice) on which the tenant should give up in fact possession of the premises.

If the view we take of the construction of the material phrase is well-founded, it follows that a notice to quit " on or before " a fixed date is *prima facie* valid and effective. Nor, as it seems to us, would the result be different if the option given to the tenant is not to determine the tenancy by the vacating of the premises on some date earlier than that named in the notice, but is an option merely to give up possession at such earlier date without any corresponding right to treat his obligations as a tenant as thereby determined. In both cases the effect is that the landlord intimates his intention to treat the tenancy as coming to an end on the certain date named in the notice, giving to the tenant an opportunity of further altering his position at some earlier time if he elects so to do. As regards the option, the next step is with the tenant. So far as the landlord is concerned, he has stated his position and thereby taken the step of finally fixing the end of the tenancy. Whether he could thereafter withdraw his offer to accept from the tenant an earlier determination, we need not discuss.

In this connection it is to be borne in mind that, as pointed out during the argument, the notice to quit, though in form only calling upon the tenant to do a particular act (namely, to vacate the premises), is beyond doubt intended upon its taking effect to put an end altogether to the relation of landlord and tenant. Though in terms such intention is not expressed, no one, we think, could for a moment be in doubt upon it. The intention must be read into the notice because that is its plain meaning. The tenant is called upon to " quit " on the named date simply because his right to remain will then have ceased. So read, the words " or before " necessarily import the offer : " But if you like to quit the premises on any day before that, I here and now give you my consent."

The alternative construction is to read the document as equivalent to a notice by the landlord that he intends to terminate the tenancy at some unspecified date not later (and perhaps earlier) than the date stated in the notice. So to construe it would import a claim of right to terminate on a shorter notice than the contract (arising by virtue of the quarterly option) would allow ; and to construe the document as importing an intention to break the contract must be wrong if there is another equally natural meaning which imports no breach. The maxim *ut res magis valeat quam pereat* applies. A similar conclusion follows from the uncertainty which that construction must inevitably (but unnecessarily) create. Such a notice would leave the initiative entirely with the landlord, and the tenant could not on the face of it know at what date in fact the landlord proposed to regard the tenancy as determined and to evict him, save that it would not be later than the date specified in the notice. If that were the true meaning of the notice it would obviously be so uncertain as to be invalid. Such a notice must of necessity import that the landlord has not yet decided upon the actual date for the termination of the tenancy and that he will have to take some further step, and notify the tenant accordingly when his decision has been made. In other words, this alternative construction of the notice not only makes it bad for uncertainty but also deprives it of that quality of finality which above all else a notice to quit must possess.

The use of the phrase " on or before " some fixed date is to-day by no means uncommon, particularly in covenants or demands for payment of money, and in such a context it cannot, in our judgment, be open to serious doubt that it means, and would be understood to mean that the covenantor or debtor is under obligation to pay the debt on (but not earlier than) the date fixed but has the option of discharging it at any earlier time selected by him : see *Re Tewkesbury Gas Co.* (4), *per* PARKER, J. ([1911] 2 Ch. 279, at p. 284). In our judgment that reasoning is equally applicable to a notice to quit and to a covenant or demand for the payment of money.

We turn now to the decided cases to which our attention has been drawn in the course of the argument. Three cases have been cited to us in which the phrase " on or before " has been judicially considered in reference to the termination of the relationship of landlord and tenant (all being cases before Divisional Courts), namely: *Gardner* v. *Ingram* (2), *Queen's Club Gardens Estates, Ltd.* v. *Bignell* (5), *De Vries* v. *Sparks* (6). In the first and third of these cases the question before the court was the effect, not of a notice to quit served by a landlord upon a tenant, but of a document addressed by a tenant to his landlord referring (in the one case) to an intention to surrender on the part of the tenant, and (in the other case) to an alleged agreement for surrender "on or before" a named date. In each case the decision of the court was based primarily upon the ground that the document in suit was not a notice to quit but (in the former case) was an expression of an intention "to do something which could not be done without the landlord's consent" and (in the latter case) amounted to an attempt to set up an agreement the existence of which was not established. But in *Gardner* v. *Ingram* (2), BOWEN, J., emphasised (61 L.T. 729, at p. 730), in reference to the facts of the case, the general principle that a notice, if effective to determine a tenancy, "must be plain and unequivocal in its terms, leaving no doubt as to the intention of the party giving it"; and in *De Vries* v. *Sparks* (6), SALTER, J., said (137 L.T. 441, at p. 443), that if the document there in suit was to be regarded as a notice to quit, it was ineffective as not being expressed (by reason of the use of the phrase "on or before") to expire on a fixed date.

In our judgment both these cases are distinguishable from the present. In both cases, as already stated, the documents relied upon as determining the tenancy were held not to be notices to quit at all. But assuming that the documents in the two cases should be considered as notices to determine the respective tenancies, it will be observed that they were notices served by the tenants of proposed surrender on their part. They did not call upon the respective landlords to do anything. They informed the landlords that "on or before" the relevant named dates the tenancies would be surrendered. The initiative rested with the parties giving the notices. The parties receiving the notices were in such circumstances left wholly uncertain of the dates on which in fact the tenants would take the initiative and claim that the tenancies were at an end. On principle, therefore, and for the reasons which we have already attempted to state, these cases cannot be cited as authorities applicable to a notice to quit given by a landlord to a tenant in which on the face of the document the initiative in selecting some date earlier than the date specified is left entirely with the party to whom the notice is addressed.

Queen's Club Gardens Estates, Ltd. v. *Bignell* (5) is more directly in point. In that case the landlord purported to determine a tenancy by giving to the tenant "the requisite week's notice for termination of the tenancy one week from Monday next on or before which date they will require vacant possession." It is to be observed that in this case the notice distinguished in terms between the date fixed by the landlord for termination of the tenancy (namely, "one week from Monday next") and the delivery up by the tenant of possession (which was left to be selected by the tenant on any date in the meantime). It was proved in fact that the tenancy was a weekly tenancy ending on the Saturday in each week, and the decision of the court (LUSH and ACTON, JJ.), was to the effect that the notice to terminate, being expressed to refer to the wrong day of the week, was ineffective. LUSH, J., however, made the following observations ([1924] 1 K.B. 117, at p. 122):

> I may say that I very greatly doubt whether a notice to quit, assuming it to be free from objection in other respects, can be said to be valid in which the landlord mentions a specific date for the termination of the tenancy and adds that "on or before" that date they will require possession. A notice to quit must be certain and definite, and I am by no means sure that a notice to quit in that form is a certain and definite notice to quit on the day specified. It may be that it is a notice that the landlord will require possession before that day, and, if so, it seems obvious that it must be a bad notice to quit. That view is, no doubt, somewhat technical, and it may be that the more reasonable interpretation of the notice is to read it as meaning merely that if the tenant likes to give up possession before the day specified, the landlord is willing to take it; but I have great doubt whether it is right to put so favourable an interpretation as that upon this notice to quit. I am not going to rest my judgment upon these last words of the notice, but leave the question of their interpretation without expressing any definite opinion with regard to it, because in my view, apart altogether from these words, this notice to quit is invalid.

There is no doubt that Lush, J., in the passage quoted, indicated that in his view the use of the phrase "on or before" in relation to the date specified for the termination of the tenancy rendered the notice to quit so doubtful in meaning and intention as to be invalid. With all respect to that judge, we are unable to share his opinion. In our judgment, the fair and reasonable construction of the notice to quit before him was that the landlords gave a final notice purporting in any event to terminate the contract of tenancy on the Monday week following the date of the notice but gave at the same time to the tenant the option of quitting the premises on an earlier date chosen by him and thus terminating the contract of tenancy on that earlier date. In so far as the above decisions express a different view from that now expressed by this court, they are in our judgment erroneous. But in the light of the decisions, and of the *dicta* to which we have referred, we think that the county court judge had no alternative to deciding as he did.

Before leaving the authorities we wish to refer to *Ahearn* v. *Bellman* (7). In that case the landlord had given to his tenant notice to quit the premises in question "on or before the 1st May, 1878," but added a further notice to the effect that if the tenant continued in possession after May 1, 1878, an enhanced rent would be payable by him. The argument turned solely upon the question whether the final provision wholly invalidated the notice to quit. The majority of the court (Bramwell and Cotton, L.JJ.), allowing the appeal, held that it did not. It is in our view significant that so far as can be observed from the report no point was taken either in the court below or in the argument before the Court of Appeal, or by Brett, L.J., (who dissented from the majority of the Court of Appeal) on the use of the disjunctive phrase "on or before." Though the case cannot be regarded as an authority upon the point now before us, it shows at least that to no one concerned in that case did the use of the phrase in itself suggest uncertainty or ambiguity.

The result is that in our judgment the county court judge was wrong in dismissing the action upon the point of law arising on the form of the notice. The appeal must, therefore, be allowed and the case referred back to another county court judge (in accordance with our usual practice) for consideration by him of all the other matters raised by the pleadings—including the question whether the tenancy of the respondent had, by exercise of the option, become determinable by a three months' notice at all; and although, if the tenancy had become quarterly, the notice to determine it was good, the judge will still have to exercise his discretion under sect. 3 (1) and the Schedule, para. (*h*), of the 1933 Act. The contention that the tenancy passed out of contract into status under the Rent Restriction Acts, by reason of the letter of Mar. 19, 1943, is not open unless leave to amend the points of claim is asked for and granted by the new trial judge; and that would be an entirely new case.

The judgment below must be set aside and the whole action re-heard before another judge. The appellant will have the costs of the appeal; the costs of the first trial will abide the event of the new trial.

Appeal allowed with costs. Judgment below set aside and the whole case remitted for re-hearing.

Solicitors: *Hughes, Hooker & Co.* (for the appellant); *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

MIST *v.* TOLEMAN & SONS (A FIRM).

[COURT OF APPEAL (MacKinnon, Tucker and Bucknill, L.JJ.), December 6, 7, 1945.]

Factories—Statutory duty—Breach—Health regulation for removal of dust—Tubercular condition of workman becoming active—Whether caused by breach of regulation—Onus of proof—Factories Act, 1937 (*c.* 67), *s.* 47 (1).

M. was employed by T. & Sons, on a spindle machine in their factory. The work on which he was engaged (*i.e.*, making heels for shoes) was one in which a great deal of dust was given off, and proper exhaust appliances were not "provided and maintained, as near as possible to the point of origin of the dust" as required by the Factories Act, 1937, s. 47 (1). During the time that he was working in the factory, M. coughed badly and began to cough up blood, and, after about a month, he was found to have tuberculosis. On the medical evidence, his lungs had been infected with the microbe of the disease at least 6 months before he entered T. & Sons' factory, but it was contended on behalf of M. that the alteration of the potentially tubercular condition to an active tubercular condition was due to the dust given off the machine on which he was working, and that T. & Sons were liable to him in damages by reason of the breach of their statutory duty under sect. 47 (1) of the 1937 Act. According to medical evidence, exertion was one cause of inherent tuberculosis becoming active; dust in itself was not a cause, although coughing (which could be due to dust in the atmosphere) would be a cause. While employed in the factory, M. had led an active life apart from his work in the factory and was a member of the Home Guard. It was contended by T. & Sons that there was no evidence that M.'s tuberculosis had become active as a result of their breach of the Factories Act, 1937, s. 47 (1), since it could have become so by any exertion. But on behalf of M. it was further contended that, since there had been a breach of a statutory regulation by T. & Sons, and since his tubercular condition could have become active as a result of that breach, the onus of proving that the disease was not the result of the breach was on T. & Sons, the employers:—

HELD: (i) where there has been a breach of a statutory regulation and a workman is injured in a way that could result from such a breach, the onus of proving that the injury is not due to the breach, is on the employers, only when that particular injury is the only one which the statutory regulation in question is designed to guard against or to prevent.

(ii) where, however, the injury is not the very class of accident which the regulation was designed to prevent, the onus is on the workman.

Vyner v. *Waldenberg Brothers, Ltd.* (1) *distinguished.*

(iii) the object of sect. 47 (1) of the 1937 Act was to prevent not merely tuberculosis but every uncomfortable, offensive or injurious effect of dust. The onus was, therefore, on the workman to prove that the breach of the regulation was the cause of his disease.

(iv) [BUCKNILL, L.J., *dissenting*] on the facts of the case and in view of the medical evidence, M. had failed to discharge the onus of proving that his tuberculosis had become active by reason of the breach of sect. 47 (1) by the employers.

[**EDITORIAL NOTE.** It is argued in this case that wherever there is a breach of the provisions of the Factories Act, and a workman is injured in a way which could result from the breach, the onus of proof shifts to the employer to show that the breach was not the cause. Sect. 47 has not before been construed, and the court refuses to apply the decisions on the fencing provisions to a case of tuberculosis since it is not, in the words of GODDARD, L.J., in *Lee* v. *Nursery Furnishings, Ltd.* (2), "the very class of accident that the regulations are designed to prevent." Sect. 47 is designed to prevent the injurious effects of dust and fumes, but quiescent tuberculosis might become active by reason of many things other than coughing. The onus of proof in those cases is on the workman.

FOR THE FACTORIES ACT, 1937, s. 47 (1), see HALSBURY'S STATUTES, Vol. 30, p. 238.]

Cases referred to:

*(1) *Vyner* v. *Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; 173 L.T. 330.

*(2) *Lee* v. *Nursery Furnishings, Ltd.* [1945] 1 All E.R. 387; 172 L.T. 285.

Appeal by the workman from a decision of Uthwatt, J., sitting as an additional judge of the King's Bench Division, Middlesex, on July 10, 1945. The facts are fully set out in the judgment of MacKinnon, L.J.

S. R. Edgedale for the appellant.

F. W. Beney, K.C., R. O. L. Armstrong-Jones, and *Gilbert Dare* for the respondents.

MacKinnon, L.J.: This is an appeal from a judgment of Uthwatt, J., sitting as an additional judge of the King's Bench Division. It is a claim by the plaintiff against the defendants for damages based upon a breach by the defendants of the statutory provision of the Factories Act, 1937, s. 47 (1). As in other cases, it is the duty of the plaintiff to establish his cause of action. Although the judge evidently sympathised with the plaintiff, he finally said that he was not satisfied that the plaintiff had discharged the onus of proof by establishing his case, and, in the result, he gave judgment for the defendants. The Factories Act, 1937, s. 47 (1) provides:

> In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the person employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust . . .

The plaintiff began work with the defendants towards the end of Dec., 1943. Before going to them he had been employed by another firm in a factory where the organisation of the factory was said to be very highly satisfactory and complied in every respect with the provisions of the Factories Act. The defendants' factory was a temporary place and it was found by Uthwatt, J., that it was not so equipped as to comply with the provisions of sect. 47 (1). The plaintiff was engaged in constructing heels for women's high-heeled shoes. He had to work on a spindle machine. A lot of dust came off in that process and in this temporary factory proper exhaust appliances were not "provided and maintained as near as possible to the point of origin of the dust." Having worked for a little over a month in the defendants' factory, the plaintiff began to cough up blood and was discovered to be in a condition of tubercular disease. The medical evidence was that his lungs were infected with the microbe of that disease at least six months before he came to the defendants' employ and he was in a condition potentially tubercular which might become an active disease, as it did in the beginning of February.

The plaintiff's claim is based upon the proposition that the alteration of this potentially tubercular condition in which he was before he came to the defendants to an active condition of tubercular disease was due to the dust given off the machine on which he was working, which dust was not dissipated by the safeguards required by sect. 47 of the Act. The medical evidence was in some minor points different, as between a series of medical experts who were called, but in substance they were agreed upon this: Dust, by itself, does not cause the inherent liability to tuberculosis due to previous infection to become active and actual. What does cause that unfortunate change is exertion or exercise. As a rather illuminative example, one of the experts said that if the man was in the most perfect atmospheric surroundings, in a high atmosphere in Switzerland, if he took to such hard exertion as breaking stones, notwithstanding the admirable atmospheric surroundings, the disease might break out and become active. The medical experts also agreed that an exertion which might cause this breaking-out of the active disease would be coughing; and it was agreed that dust in the atmosphere might cause a cough. But they also said that besides coughing many other forms of exertion and exercise might equally do this, and would perhaps more readily cause him to cough. Besides his actual work in the factory the plaintiff was leading an ordinary life, and he might well have exerted himself at other things outside the factory. Incidentally, one piece of evidence was that he was a member of the Home Guard. Those other activities of life, perhaps in the Home Guard, might well cause such exertion as would bring about this coughing.

Those being the facts and that being the medical evidence, Uthwatt, J., came to the conclusion that, although the plaintiff had established that the presence of the dust unmitigated by compliance with the Factories Act, 1937, s. 47 (1), might, by causing coughing, have been the cause of this oncoming of the disease, yet it was also apparent that there were many possible other causes for the outbreak of coughing, inasmuch as the evidence was that any form of exertion and exercise would cause it. In those circumstances the judge held that the plaintiff had not discharged the burden of establishing that this unfortunate illness to which he succumbed on Feb. 1, 1944, was caused by the breach by the defendants of sect. 47 (1) of the 1937 Act.

Counsel for the plaintiff has relied very strongly upon what he says is a statement of principle in regard to these Factory Acts laid down by this court in *Vyner* v. *Waldenberg Brothers, Ltd.* (1), in which I was a member of the court and the judgment of the court was delivered by Scott, L.J. That was a case of a breach by the employer of two safety regulations (issued by the Secretary of State under the Factories Act, 1901, s. 79) providing that any circular saw must be securely fenced with a guard and that that guard must be lowered over the circular saw to the utmost extent possible when putting wood under the guard so as to prevent the very obvious danger of a workman cutting his fingers, or his hand, with the circular saw. In that case the guard had not been properly adjusted, but had been habitually kept at a height of 3½ins. above the table on which the wood was pushed forward. The wood on which the workman was working was very much thinner and the guard could have been put down in accordance with the regulations. In the course of his judgment Scott, L.J., said ([1945] 2 All E.R. 547, at p. 549) :

> In these circumstances and but for the consideration of certain other aspects (which he considered and we will consider presently) the judge indicated that, if the case stopped there, it would mean judgment for the plaintiff. We agree with him. But we go further. If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause.

Counsel for the plaintiff argues that that is a pronouncement as regards any breach of any of the provisions of the Factories Act and that, therefore, inasmuch as it is established that there was a breach of sect. 47 (1) of the 1937 Act, as regards the ventilation to be provided where dust is produced, and since the activation of tuberculosis could result from that breach, the onus of proving that it did not result from that breach is cast upon the employer.

In my view, that is a misapplication of the words of Scott, L.J., which were directed to the particular case then under consideration. The statutory regulations, which were under consideration in that case, directed that a guard must be provided and kept properly adjusted to prevent a workman from cutting his fingers off by the circular saw. There was no possibility that his fingers could be cut off by any other cause than the circular saw and, therefore, when Scott, L.J. said, " If there is a definite breach of a safety provision . . . and a workman is injured in a way which could result from the breach," his mind was directed to the breach of the regulations regarding the adjustment of the guard to the circular saw to prevent the workman from cutting his fingers and the workman cutting his fingers by reason of the incorrect adjustment of that guard. That that is clearly what Scott, L.J., had in mind is, I think, shown by the sentence which he then quoted ([1945] 2 All E.R. 547, at p. 549), from the judgment of Goddard, L.J., in *Lee* v. *Nursery Furnishings, Ltd.* (2) ([1945] 1 All E.R. 387, at p. 390) :

> In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident . . .

The regulations which Scott, L.J., was considering were for the provision and adjustment of a guard to a circular saw to prevent people from cutting their fingers by the circular saw, and since the accident—*i.e.*, the cutting of the fingers—was the very class of accident which the regulations were designed to prevent, the court should not be astute to find that the breach was not connected with the accident.

Tuberculosis, however, is not the very thing that sect. 47 (1) is designed to guard against or to prevent. The object of sect. 47 (1) is to provide against every possible uncomfortable, offensive or injurious effect due to the presence of dust. Tuberculosis is not the very class of injury which, and which alone, is contemplated as the danger to be guarded against by this section for the removal of dust. The dust is a factor which may cause coughing, which coughing may be one of the many things which may activate a quiescent tuberculosis. But I think it is quite wrong to transfer the words of Scott, L.J., in *Vyner* v. *Waldenberg Brothers* (1), and similarly the words of Goddard, L.J., in *Lee* v. *Nursery Furnishings, Ltd.* (2), directed as they were to that particular rule about fencing a circular saw, so as to lay down a general proposition as regards any section in the Factories Act, with the result that, where any breach of the Factories Act is proved and that breach may be one of the causes which brought about the subsequent injury to the workman, the onus is then cast upon the employer to show that it did not do so.

In my opinion, therefore, the onus of disproving the possibility that this presence of dust may have been a cause contributing to or activating the tubercular condition of the plaintiff was not cast upon the defendants, but remained with the plaintiff; as it is the duty of every plaintiff to prove his cause of action. I agree with the judge that, in the circumstances and upon the evidence, the plaintiff did not satisfactorily establish his cause of action. Therefore, the judgment of Uthwatt, J., was right and the appeal must be dismissed.

Tucker, L.J.: I agree. Counsel for the plaintiff submits that, in any event, it is open to this court, and it is the duty of this court, to reconsider the evidence that has been given before Uthwatt, J., and he invites us on reconsideration to come to a different conclusion. He says that this is not the kind of case where the trial judge is in any more advantageous position than this court, because this is not a case of disbelieving the evidence on one side or the other. That is no doubt correct, but, having considered the details of this case, the judge was left in doubt with regard to many matters. In the first instance, he was left in doubt as to whether the active tuberculosis had flared up after the plaintiff came into the defendants' employment. He only noticed his condition (*i.e.*, in regard to coughing up blood, and so forth) after he had entered the defendants' employ; but he told one of the doctors called by the defendants that he had been run down from the outset of his employment with the defendants. I think that, on the evidence, the matter was left in doubt. It is a possibility as to which there was no very conclusive evidence one way or another. Apart from that, the judge was satisfied that the dust in the defendants' premises had caused the plaintiff to cough; but he was not satisfied that the coughing, any more than any other physical effort on the part of the plaintiff, had brought about his tubercular condition. That is a very difficult question, as almost all questions of causation are, and I do not feel disposed to differ from the conclusion at which the judge arrived. Whether or not I should have come to exactly the same conclusion if I had tried the case and heard the witnesses, I do not know; but I do not feel that there is sufficient material to justify me in saying that the judge came to an erroneous conclusion on this evidence.

In regard to the onus of proof, if counsel for the plaintiff is right in his submission, it would appear that if coughing had brought about a rupture in a man —he being in a condition whereby he was disposed to be ruptured—once it was established that a rupture had occurred and that coughing was a possible cause of rupture—one amongst many other possible causes—the onus would shift to the defendants to disprove that the rupture had been caused by their breach of sect. 47 (1). The answer of counsel for the plaintiff to that was that sect. 47 (1) was not designed to deal with that class of accident or disability, but was primarily designed to prevent the very thing that had happened in this case *viz.*, tuberculosis. From a laymen's point of view, I should have been inclined to be attracted at first sight by that argument, but the medical evidence in this case shows quite clearly that it is erroneous. Sect. 47 (1) is not designed against the contraction of tuberculosis any more than against the contraction of any other disease, because the medical evidence shows that it is not dust which brings about tuberculosis or hastens its onset, but that it is the coughing which may result from dust, or from many other things, that activates tuberculosis ; *i.e.*, it is the physical effort and not the mere inhalation of dust. Therefore, I think that it is wrong to say that there has resulted, in this case, the very disease against which sect. 47 was directed.

For these reasons, in my view, this appeal fails.

BUCKNILL, L.J. : In my view this appeal should be allowed. The gist of the judgment of UTHWATT, J., is in the following sentence :

> In the result, I find myself left in considerable doubt on the question whether the coughing due to dust had anything to do with the matter at all and in these circumstances the action must be dismissed.

With great respect to the judge, I think the evidence should have satisfied him that the coughing had a great deal to do with the matter, and that he was in error in so directing himself. In my view, the evidence establishes that the coughing contributed to the flare-up. I say that for these reasons. The man himself said ;

> When I started at Tolemans I was in perfect health and it was several days, perhaps a fortnight, before the cold came on me and then after that I developed a cough.

The judge does not reject that evidence. In fact, I think he accepts it, because in his judgment he says :

> Before his entry into the defendants' employment, he was employed for some time by Hamptons and I am satisfied that the working conditions at Hamptons were not such as in any way to bring about tuberculosis or to cause an existing tubercular condition to flare up. I am also satisfied that the plaintiff was not at any time before he entered the defendants' employment conscious that he had tubercular trouble.

It is true that, without knowing it, the plaintiff had got tubercular trouble and probably had had it six months before he went to the defendants' factory. UTHWATT, J., in his judgment, said that he was doubtful whether the tubercular condition had flared up before the plaintiff entered the defendants' employment. There is no evidence, however, that the tubercular condition had flared up before he worked in the defendants' factory. I think that all the evidence goes to show that it flared up after he went there. In my view the judge also misdirected himself on that point.

The plaintiff has proved three things. (i) He proved a breach of the statutory duty not to allow excessive dust in the factory. (ii) He proved that he coughed and coughed badly, during the 38 days that he was working there and that excessive dust produces coughing. (iii) He proved that the cough, like every physical exertion, is likely to cause a flare-up. Having proved those three things, I think that he established a cause of action. He has proved negligence and he has proved damage resulting from the negligence. In my view, the point that he might have had a flare-up in any event does not decide the question of liability, but only affects the amount of damages. He was tuberculous, but the disease might very well have never had a flare-up but for the coughing caused by the negligence of the defendants.

For these reasons I think that the appeal should be allowed.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors : *Shaen, Roscoe & Co.* (for the appellant) ; *Hewitt, Woollacott & Chown* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

PHILLIPS (INSPECTOR OF TAXES) *v.* EMERY.

[King's Bench Division (Macnaghten, J.), November 6, 1945.]

Income Tax—Sched. E—Weekly wage earner—Housewife directed to work in factory—Travelling expenses—Whether claim for deduction admissible—Income Tax Act, 1918 (*c.* 40), *Sched. E, r.* 9—*Finance Act,* 1941 (*c.* 30), *s.* 23.

The respondent, previously engaged in household duties, commenced work on June 27, 1942, at a factory to which she was directed by the Ministry of Labour. In consequence she incurred travelling expenses between her home and her place of employment amounting to £6 13*s.* 0*d.*, for the period June 27, 1942, to Apr. 5, 1943. The respondent claimed that she was entitled to deduct that sum from her weekly earnings assessed for income tax purposes under the Finance Act, 1941, s. 23, which provided that: "If it is shown in the case of a weekly wage earner assessed to income tax in accordance with r. 2 of the rules applicable to Cases I and II of Sched. D that his place of work or his residence has changed through circumstances connected with the present war, and that in consequence he is obliged to incur and defray out of his wages additional expense in travelling between his residence and his work, the additional expense so incurred and defrayed by him in the half-year, up to five pounds, shall be deducted from the wages to be assessed for the half-year." It was contended for the respondent that the discharge of household duties was "work" within the meaning of sect. 23. The General Commissioners on appeal allowed the deduction sought, and the Crown appealed:—

Held: the relief given under sect. 23 was restricted to persons working for reward who must have been engaged, prior to the Ministry of Labour's direction, on work which involved travelling expenses. As the respondent had incurred no travelling expenses when discharging her household duties, the deduction claimed by her was not admissible.

[**EDITORIAL NOTE.** The *ratio decidendi* of this case is that by implication the section requires that a claimant shall have earned wages both before and after the change in the place of work or residence which gives rise to the additional expense, so that since the claimant incurred no travelling expenses before the change, no claim lay. It is held, alternatively, that even on the view that the section applies to voluntary workers before the change, the claimant had incurred no travelling expenses before the change and could not, therefore, have incurred any additional expense.

As to Emoluments Derived from Office or Employment, see HALSBURY, Hailsham Edn., Vol. 17, pp. 215, 216, para. 436; and for Cases, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax Acts for the division of Newcastle borough in the county of Stafford for the opinion of the King's Bench Division of the High Court of Justice. On Oct. 27, 1943, the respondent, a married woman, appealed against two assessments made upon her in accordance with the Income Tax Act, 1918, r. 2 of the rules applicable to Cases I and II of Sched. D for the two half years ended respectively Oct. 5, 1942, and Apr. 5, 1943. The following facts were found by the Commissioners.

The respondent was directed by the Ministry of Labour to work at the Royal Ordnance (B.S.A.) Factory Cross Heath, on May 11, 1942, and she started to work there on June 27, 1942. Prior to that date she was fully occupied with household duties at 84, Hunters Way, Penkhull, aforesaid, but was not otherwise employed.

The sum of £6 13*s.* 0*d.* represented the expense which the respondent was obliged to incur between June 27, 1942, and Apr. 5, 1943, and defray out of her wages in travelling between her home at 84, Hunters Way, Penkhull, aforesaid, and her place of work at The Royal Ordnance (B.S.A.) Factory, Cross Heath.

On these findings the Commissioners decided to allow the respondent her claim for travelling expenses.

The Crown appealed.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *Reginald P. Hills* for the appellant (Inspector of Taxes).

Henry Wynn-Parry, K.C., and *Terence Donovan, K.C.*, for the respondent.

MACNAGHTEN, J. : I think this is a plain case. By the Finance Act, 1941, s. 23, it is provided :

> If it is shown in the case of a weekly wage earner assessed to income tax in accordance with r. 2 of the rules applicable to Cases I and II, of Sched. D, that his place of work or his residence has changed through circumstances connected with the present war, and that in consequence he is obliged to incur and defray out of his wages additional expense in travelling between his residence and his work, the additional expense so A incurred and defrayed by him in the half-year, up to five pounds, shall be deducted from the wages to be assessed for the half-year.

In the case provided for by that section, the additional expense incurred and defrayed by a weekly wage earner is to be treated as an expense necessarily incurred by him in the performance of the duties of his employment within the meaning of the Income Tax Act, 1918, Sched. E, r. 9.

B The conditions prescribed by the section are quite plain. The taxpayer must be a weekly wage earner. His work must be at one place and his residence at another. He must have changed either his place of work or his residence through circumstances connected with the present war, and in consequence of that must be obliged to pay out of his wages additional expense in travelling between his residence and his work.

In the present case the General Commissioners for the borough of Newcastle C in Staffordshire have decided that the respondent is entitled to the benefit of the section. She is the wife of a soldier, but it is said that the travelling expenses which she claimed to deduct were incurred while her husband was still living with her at home. She was directed by the Ministry of Labour to work at a factory at Cross Heath, and her home was at 84, Hunters Way, Penkhull. Before she was directed to work at the factory at Cross Heath she was occupied in the discharge of her household duties at home. She did no D other work. As the case states, she was fully occupied in her household duties, but was not otherwise employed.

Counsel for the respondent has argued that the respondent, in discharge of her household duties, was doing work, a proposition which no one can doubt, and, that, therefore, although she earned no wages, she should be regarded as a person who comes within the section. I do not so read the section. It E is dealing, I think, with the case of a person who is doing work for reward. Counsel for the respondent asked why should not a voluntary worker be allowed the benefit that is given to those who sell their labour ? The answer to that is that Parliament has thought fit to restrict the benefit to those who earn wages. The provision that the relief given by the section is in respect of the "additional" expense incurred by the taxpayer implies that before he changed his residence or his place of work he must have been engaged in work which involved travelling F expenses on his part. The respondent incurred no travelling expenses before she went to the factory at Cross Heath, so, even if it could be held that the section applied to unpaid workers, she would be debarred from relief.

I, therefore, think that the appeal must be allowed, and the decision of the General Commissioners must be reversed.

Appeal allowed with costs. Case remitted to the Commissioners for determination G *of the amount of the assessment.*

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Hall, Brydon & Harvey,* agents for *F. H. Woolliscroft,* Hanley.

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

EPPS *v.* ROTHNIE.

[Court of Appeal (Scott, MacKinnon and Lawrence, L.JJ.), July 12, 1945.]

Landlord and Tenant—Rent restriction—Recovery of possession—Plaintiff claiming as landlord—" Not being a landlord who has become landlord by purchasing the dwelling-house after Dec. 6, 1937 "—Unoccupied house purchased by plaintiff after statutory date—Subsequent tenancy agreement—" Landlord "—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *Sched. I* (*h*)*—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1938 (*c.* 26), *Sched. II.*

T.E. purchased an unoccupied house after Dec. 6, 1937. By an agreement in writing made on Apr. 4, 1942, the house was let for one year to R. The agreement was made on T.E.'s behalf by his brother, H.W.E., whose name was given therein as landlord but who was acting merely as agent for T.E. After the agreement had expired on Apr. 3, 1943, R. remained on in the house and continued to pay the rent to T.E. through the latter's agents. Later, T.E. required the house for his own occupation and brought proceedings to recover possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, and Sched. I (*h*). It was contended by R. (i) that the proceedings could not be brought by T.E. because in the agreement of Apr. 3, 1942, his brother, H.W.E., was stated to be the landlord ; (ii) by reason of the exception in Sched. I (*h*) to the Act of 1933 (as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, Sched. II), T.E. was not entitled to possession as landlord because he was " a landlord who has become landlord by purchasing the dwelling-house after Dec. 6, 1937 " :—

Held : (i) T.E. was entitled to bring the proceedings as landlord because he was not relying on the agreement of Apr. 4, 1942, and the relationship of landlord and tenant had been clearly established apart from that agreement. Moreover, even if T.E. had been compelled to rely on the written agreement, evidence would have been admissible to prove that his brother was signing merely as his agent.

(ii) since the house was unoccupied when T.E. purchased it, the exception to Sched. I (*h*) to the 1933 Act did not apply, because T.E. did not " become landlord by purchasing the dwelling-house." The object of the exception in para. (*h*) was to protect a tenant in occupation of a house which was being sold ; the exception did not apply where an unoccupied house was purchased after the statutory date and subsequently let. T.E. was, therefore, entitled to possession under Sched. I (*h*) to the 1933 Act.

[**EDITORIAL NOTE.** The court holds that a possession order may be made in favour of the landlord of Rent Act protected property, who requires it for his own occupation, although he purchased subsequently to Dec. 6, 1937, if at the time of such purchase the property was empty. The Act was intended to protect the sitting tenant, and in the case of empty property the relationship of landlord and tenant only comes into existence at the time of the subsequent letting.

As to Possession Required by Landlord for His Own Occupation, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396, and Supplement ; and for Cases, see DIGEST, Vol. 31, p. 580, No. 7283-7291.]

Cases referred to :

*(1) *Humble* v. *Hunter* (1848) 12 Q.B. 310 ; 1 Digest 639, *2606* ; 17 L.J.Q.B. 350 ; 11 L.T.O.S. 265.

*(2) *Formby Brothers* v. *Formby* (1910), 102 L.T. 116 ; 1 Digest 638, *2595*.

(3) *Drughorn* (*Fred*), *Ltd.* v. *Rederiaktiebolaget Transatlantic*, [1919] A.C. 203 ; 17 Digest 322, *1333* ; 88 L.J.K.B. 233 ; 120 L.T. 70.

*(4) *Danziger* v. *Thompson*, [1944] 2 All E.R. 151 ; [1944] K.B. 654 ; 113 L.J.K.B. 539 ; 170 L.T. 424.

Appeal by the tenant from an order of His Honour Judge Hurst, K.C., made at the Bromley County Court on June 5, 1945, in proceedings by the respondent to recover possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, and Sched. I (*h*). The facts are fully set out in the judgment of Scott, L.J.

B. L. O'Malley for the appellant.

P. H. M. Oppenheimer for the respondent.

SCOTT, L.J. : This is an appeal from an order of the judge of the Bromley County Court by the tenant of a house the occupation of which was given to him by an agreement for one year from Apr. 4, 1942. On the expiration of the [illegible]r of the house desired to obtain possession of the house [illegible] proceedings in the county court to obtain such possession. The county court judge held that he was entitled to possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I (*h*), and that greater hardship would result from refusing possession than from granting it. He gave a short and clear judgment with which I entirely agree. The only real point taken by the tenant on the appeal is that by reason of the exception in para. (*h*) of the Schedule the plaintiff is not entitled to possession.

Sched. I [as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, Sched. II] provides :

> A court shall, for the purposes of sect. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (*h*) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house . . . after Dec. 6, 1937) for occupation as a residence . . . Provided that an order or judgment shall not be made or given on any ground specified in para. (*h*) . . . if the court is satisfied that having regard to all the circumstances of the case . . . greater hardship would be caused by granting the order or judgment than by refusing to grant it.

It was argued for the defendant that the plaintiff was not a landlord within the meaning of the paragraph but was a landlord who was excepted from it by reason of the words "not being a landlord who has become landlord by purchasing the dwelling-house . . . after Dec. 6, 1937." The county court judge dealt with that contention very clearly. He said :

> In point of fact the plaintiff purchased the property after that [the statutory] date and became the owner. But the property was then empty. In my judgment, he did not become "landlord" by purchasing it, but by virtue of a subsequent act, namely, by his letting it for the first time to a tenant. A man is only a landlord where there is also a tenant.

Accordingly, the county court judge held, and in my view held rightly, that the plaintiff did not "become landlord by purchasing the dwelling-house." The judge took the view, with which I agree, that the object of the exception in Sched. I (*h*) is to protect a sitting tenant from having his house bought over his head, and it has no application to a case where an unoccupied house is purchased after the statutory date, and the owner thereafter lets it. In my opinion, the decision of the judge was right on this point and there is no ground for an appeal.

Another point was taken. In the original tenancy agreement which expired in Apr., 1943, the landlord is expressed to be, not Thomas Epps, the plaintiff in the proceedings in the court below, but his brother, Henry West Epps, who was acting for him in the matter of the tenancy. It was submitted on behalf of the defendant that, because the brother who became nominally a party to the tenancy agreement was therein called the landlord, the plaintiff was not the landlord within the meaning of Sched. I (*h*) to the Act of 1933. The first answer to that contention is that the plaintiff is not relying on that agreement. After it had expired, the rent of the house continued to be paid to agents on his behalf and was received by him, and, apart from the agreement, the relation of landlord and tenant was quite clearly established between the parties long before the proceedings were taken in the county court. The second answer to the contention is that the agreement was an ordinary agreement in writing and, even if the plaintiff was compelled to rely on it, evidence would have been admissible on ordinary principles applicable to any contract in writing, to prove that the person signing it as a contracting party was acting on behalf of an undisclosed principal. Two old cases were cited, *Humble* v. *Hunter* (1) and *Formby Brothers* v. *Formby* (2), where the view was taken that the particular contract under consideration was expressed in such terms as to prevent the application of the ordinary principles of agency in regard to an undisclosed principal, with the result that the parties were tied down to an agreement between the persons signing the document and no one else. Both these cases have been discussed on many occasions and I venture to express the opinion that they should no longer be regarded as good law, a view which is, I think, justified by the observations made on them by LORD SUMNER in *Fred. Drughorn, Ltd.* v. *Rederiaktiebolaget Transatlantic* (3). I think that the appeal fails on both the points argued before us, and must be dismissed.

MACKINNON, L.J.: I agree. I think that the county court judge was quite right in the construction which he placed on Sched. I (*h*) to the Act of 1933. If the construction for which counsel for the defendant contends is correct, it is inconceivable that the legislature would have wasted ink and paper by inserting the unnecessary words "who has become landlord by purchasing a dwelling-house," since it would have been sufficient simply to have said "not being a landlord who has purchased a dwelling-house." Counsel for the defendant discussed some cases which dealt with the meaning of the word "landlord" in the Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (1). The words in that subsection are:

> Where the landlord of a dwelling-house . . . is in possession of the whole of the dwelling-house at the passing of this Act . . . .

Manifestly, a landlord who had a tenant could not be in possession of the house, and that mere fact shows that the word landlord in that subsection does not mean one of the two parties to a contract of tenancy—that would be ridiculous—but the owner of a house who is in a position to become a party to such a contract. The considerations applicable to the meaning of the word "landlord" in that subsection are obviously entirely different from those which govern the meaning of the simple words "a landlord who has become landlord by purchasing a dwelling-house" which we have to construe. I agree that this appeal should be dismissed.

LAWRENCE, L.J.: I also agree. I will only add that if the plaintiff were suing on the agreement of Apr. 4, 1942, it might be necessary for us to consider the decision in *Danziger* v. *Thompson* (4), in which it was held that oral evidence was admissible to show that a person described as the tenant in a tenancy agreement entered into the agreement as the agent of another person. The plaintiff in the present case, however, is not suing on the agreement. Moreover it is to be observed that the only words in the agreement which could be contradicted by proof of agency are "hereinafter called the landlord," which are not necessarily inconsistent with the fact of the person so called being the agent for an undisclosed principal.

Appeal dismissed.

Solicitors: *Neil Maclean & Co.* (for the appellant); *W. J. Stoffel* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

TITHE REDEMPTION COMMISSION *v.* THE GOVERNORS OF THE BOUNTY OF QUEEN ANNE.

[CHANCERY DIVISION (Romer, J.), November 8, 9, 12, 13, 14, December 12, 1945.]

Ecclesiastical Law—Tithe rentcharge—Compensation payable in respect of extinguishment of tithe rentcharges—Deduction in respect of rates—No deduction to be made "in the case of a rentcharge created in lieu of any corn rent which was free from rates, or a rentcharge which was otherwise free from rates"—"Was"—"Free from rates"—Only rentcharges free from legal liability to be rated at the time they were created to be free from deduction for rates—Tithe Act, 1936 (*c.* 43), *Sched. I, Pt. I, paras.* 3 (*a*), 4.

By sect. 1 of the Tithe Act, 1936 (which came into force on July 31, 1936) tithe rentcharge was extinguished on Oct. 2, 1936, and, under sect. 2, the tithe owner received, in place of his tithe rentcharge, "redemption stock" (calculated according to sect. 2 (2)). Under sect. 4 of the Act, the Tithe Redemption Commission was established for the purpose (*inter alia*) of determining the amount of stock to be issued for compensation in respect of the extinguishment of the tithe rentcharges. Under Sched. I, Pt. I, to the Act, in determining the amount of stock to be issued, certain deductions were to be made from the gross annual value of a rentcharge. Para. 3 (*a*) of Sched. I, Pt. I, dealt (subject to the provisions of paras. 4 and 5) with the deductions to be made in the case of a rentcharge which was formerly attached to a benefice but vested in Queen Anne's Bounty by the Tithe Act, 1925. Para. 4 of Sched. I, Pt. I, to the 1936 Act provided: "In the case of a rentcharge created in lieu of any corn rent or like payment which was free from rates, or a rentcharge which was otherwise free from rates, no deduction shall be made in respect of rates." It was contended by Queen Anne's Bounty that, properly construed, para. 4 referred to the factual position in regard to rates on Oct. 2, 1936. The Commission contended (i) that when the 1936 Act took effect all tithe rentcharge (except certain rentcharges not within para. 3 (*a*)) was under a statutory liability to be rated except where express statutory exemption had been established, and that the words "free from rates" in para. 4 of Sched. I, Pt. I meant free from legal liability to be rated; (ii) that since the Act came into force on July 31, 1936, the word "was" in the phrases "which was free from rates" and "which was otherwise free from rates," could not be intended to refer to the state of affairs on Oct. 2, 1936:—

HELD: (i) at the passing of the 1936 Act every tithe rentcharge (except extraordinary tithe rentcharge which was not within para. 3 (*a*)) was liable to rates, unless the tithes for which it was originally substituted had themselves been exempted from liability by a local Act, or because it was awarded under the Tithe Act, 1860, in lieu of a corn rent which itself was exempted from liability by the local Act creating it.

(ii) the word "was," in the phrase "in the case of a rentcharge created in lieu of any corn rent which was free from rates," referred to the time when the rentcharge was created. Similarly, in the phrase "or a rentcharge which was otherwise free from rates," the word "was" must be construed as referring to a past event and not to the state of affairs on Oct. 2, 1936.

(iii) the words "free from rates," in both parts of para. 4, referred to freedom from statutory liability for rates, and not to the factual position.

(iv) on their true construction, the words in Sched. I, Pt. I, para. 4, "in the case of a rentcharge created in lieu of any corn rent or like payment which was free from rates, or a rentcharge which was otherwise free from rates" meant "in the case of a rentcharge created in lieu of any corn rent or like payment which was, at the time the rentcharge was created, free (by reason of statutory exemption) from liability to be rated, or a rentcharge which was otherwise created free (by reason of statutory exemption) from liability to be rated, no deduction shall be made in respect of rates."

(v) deductions must be made under para. 3 (*a*) of Sched. I, Pt. I, to the 1936 Act in the case of every rentcharge which was unable to claim immunity, by reason of statutory exemption, from liability to be rated.

[**EDITORIAL NOTE.** The effect of the Tithe Act, 1936, was to replace tithe rentcharge proper by a redemption annuity, as from the "appointed day," namely, Oct. 2, 1936. This case deals with the deduction on account of rates to be made in assessing the compensation to be paid to the Governors of Queen Anne's Bounty. The Act refers to a rentcharge created in lieu of any corn rent or like payment which "was free from rates," or a rentcharge which "was otherwise free from rates." ROMER, J., reviews the history of the liability of tithe and tithe rentcharge for rates, and holds that the material time in regard to freedom from rates is the time when the rentcharge was created. The phrase refers to freedom by reason of statutory intervention and not a mere factual freedom at the "appointed day," as to which the word "was" would be quite inappropriate.

AS TO RATES ASSESSED ON TITHE RENTCHARGE, see HALSBURY, Hailsham Edn., Vol. XI, pp. 890, 891, para. 1597, and Supplement; and FOR CASES, see DIGEST, Vol. 38, pp. 501-504, Nos. 564-590.

FOR THE TITHE ACT, 1936, see HALSBURY'S STATUTES, Vol. 29, p. 923.]

Cases referred to:

(1) *R.* v. *Christopherson* (1885), 16 Q.B.D. 7; 38 Digest 503, *579*; 55 L.J.M.C. 1; 53 L.T. 804.

(2) *R.* v. *Joddrell* (1830), 1 B. & Ad. 403; 38 Digest 572, *1098*; 9 L.J.O.S.M.C. 26.

ADJOURNED SUMMONS by the Tithe Redemption Commission to determine certain questions arising under the Tithe Act, 1936, Sched. I, Pt. I, para. 4, in regard to the deductions on account of rates to be made from the compensation payable by them to the Governors of Queen Anne's Bounty in respect of the extinguishment of tithe rentcharges. The facts and the relevant provisions of the Tithe Act, 1936, are fully set out in the judgment.

W. F. Waite for the Tithe Redemption Commission.

C. L. Henderson, K.C., for Queen Anne's Bounty.

Cur. adv. vult.

Romer, J. : This summons was issued for the purpose of obtaining a decision upon a point of difference which has arisen between the plaintiffs, the Tithe Redemption Commission, and the defendants, the Governors of Queen Anne's Bounty, in relation to the compensation payable by the former to the latter under the Tithe Act, 1936. The compensation is payable in respect of the extinguishment of tithe rentcharges, and the particular provision of the Act upon which the decision of the court is sought is that dealing with the deduction on account of rates which has to be made from the compensation payable in respect of tithe rentcharges unless they were, in the language of para. 4 of Sched. I, Pt. I, to this Act " free from rates."

Sect. 1 of the 1936 Act, which received the Royal Assent on July 31, 1936, provides :

> Subject to the provisions of this Act, all tithe rentcharge shall be extinguished on Oct. 2, 1936 (in this Act referred to as " the appointed day "), and accordingly as from that day the land out of which any tithe rentcharge issued immediately before that day shall be absolutely discharged and freed therefrom.

By sect. 2 (1) redemption stock :

> . . . charged by way of guarantee on the Consolidated Fund and the growing produce thereof, shall be issued for the compensation of the persons interested in a tithe rentcharge in respect of the extinguishment thereof by this Act.

By sect. 2 (2) :

> The amount of stock to be issued for compensation in respect of a rentcharge shall be such an amount as will yield interest equal in amount to the gross annual value of the rentcharge less the deductions specified in Sched. I, Pt. I, to this Act : Provided that, in the cases specified in Pt. II of the said Sched. I, the amount of stock to be issued shall be modified in accordance with the provisions of the said Pt. II.

Sect. 2 (3) then prescribes the method which is to be adopted for the purpose of ascertaining the gross annual value of a rentcharge for the purposes of the Act. Sect. 3 of the Act provides for the charging of an annuity (to be called " a redemption annuity ") :

> . . . in respect of the land out of which a tithe rentcharge extinguished by this Act issued immediately before the appointed day, for the use of His Majesty, for the period commencing on the appointed day and ending on the day preceding the sixtieth anniversary thereof.

The plaintiff Commission was established by sect. 4 (1) of the Act which (by sect. 4 (2)) put upon the Commission the duty, amongst others :

> (*a*) to determine what tithe rentcharges have been extinguished by this Act, the amount of stock to be issued for compensation in respect of the extinguishment thereof and the persons entitled to receive the stock to be so issued.

Sect. 23 (4) provided :

> For the purposes of valuation lists in force at the commencement of this Act, a tithe rentcharge to be extinguished by this Act shall, as from Oct. 1, 1936, be deemed to have no rateable value, and, notwithstanding anything in any enactment relating to rating and valuation, no particulars with respect to such a tithe rentcharge shall be included in any subsequent valuation list.

Under sect. 25 (1) there was established :

> . . . an account which shall be called the Redemption Annuities Account and shall be under the control and management of the Treasury.

Sect. 25 (4) provided :

> The Treasury shall issue from the Account . . . (*e*) such sums, by way of contribution towards making good the loss of rate income of rating authorities occasioned by the extinguishment or reduction of tithe rentcharge, as may be required for giving effect to the provisions of Sched. V to this Act [but subject as therein mentioned].

Under sect. 32 :

> (1) The rating authority by whom a rate has been made shall, on being requested by the Commission so to do, supply to the Commission any information . . . in their

possession as to the amount paid or payable on account of the rate so far as assessed on any tithe rentcharge issuing out of land in the area to which the rate applied. (2) A rating authority shall . . . inform the Commission as respects any land in their area whether it was on Apr. 1, 1936, land in respect of which rates were assessable.

Pt. I of Sched. I to the Act is headed :

> Deductions from gross annual value of a tithe rentcharge for determination of amount of compensation.

A It is divided into six paragraphs, of which para. 4 is in the following terms :

> In the case of a rentcharge created in lieu of any corn rent or like payment which was free from rates, or a rentcharge which was otherwise free from rates, no deduction shall be made in respect of rates, and, subject to the provisions of para. 5 of this Part, in a case in which the owner of a rentcharge was liable during the 3 years aforesaid [*i.e.*, the years ending on Mar. 31, 1934, 1935 and 1936] to be charged only a proportion of any rate, the deduction in respect of rates shall be that proportion of the sum calculated B in accordance with the provisions of the last foregoing paragraph.

Sched. V contains elaborate provisions for the issue and distribution of the sums payable under sect. 25 by way of contribution in respect of the diminution of the income of rating authorities.

The respective views of the plaintiffs and the defendants on the difference which has arisen between them may be shortly stated. The plaintiff Commission contends that the words " free from rates " in para. 4 of Sched. I, Pt. I, to the Act are referable solely to the question of legal liability, *i.e.*, that the only rentcharges which were to be exempt from the relevant deductions were those which, by reason of some legislation, were at the " appointed day " free from the liability to rates to which all corn rents, tithes and payments in lieu of tithe were originally subject. The defendants, on the other hand, who are interested in the dispute by reason of the rentcharges which became vested in them by virtue of the Tithe Act, 1925, contend that the plaintiff Commission is not concerned with the question of legal liability but with the factual position alone, and, if on the appointed day a particular rentcharge was found for any reason not to be assessed for rates, then such rentcharge was " free from rates " within the meaning of Sched. I, Pt. I, para. 4.

It is apparent at once that a necessary foundation of the plaintiffs' argument is that corn rents and tithes, in respect of which tithe rentcharges were created, were in fact legally rateable ; and an interesting discussion took place at the hearing upon this question. The matter originates with the Poor Relief Act, 1601, s. 1, which provided, amongst other things, that a poor rate should be raised :

> . . . by taxation of every inhabitant parson vicar and other, and of every occupier of lands houses tithes impropriate or propriations of tithes, coalmines or saleable underwoods, in the said parish in such competent sum and sums of money as they shall think fit, a convenient stock of flax . . . to set the poor on work ; and also competent sums of money for and towards the necessary relief of the lame impotent old blind and such other among them being poor and not able to work, and also for the putting out of such children to be apprentices, to be gathered out of the same parish according to the ability of the . . . parish . . .

It will be noticed that the only express mention of tithes in this enactment is the reference to " tithes impropriate or propriations of tithes," and neither of those expressions is apt to describe tithes in the hands of the parson. Nevertheless, it is I think quite clear that such tithes were treated, long before the Tithe Act, 1836, as assessable to rates.

In *R.* v. *Christopherson* (1) the Court of Appeal, in considering this question, pointed out that the Act of 1601 had to be construed in the light of many former decisions from which it would be wrong to depart. The court came to the conclusion that the undoubted fact that from earliest times tithe in the hands of a parson had been assessed to rates by virtue of the Act was because such tithe formed the visible means of the parson which the overseers could see and estimate. In the view of the court, the parson was rated in respect of his tithe under that part of the Act which was directed against " inhabitants " and not under that part which was directed against " occupiers." By the Poor Rate Exemption Act, 1840, it was provided :

> It shall not be lawful for the overseers of any parish . . . to tax any inhabitant thereof, as such inhabitant, in respect of his ability derived from the profits of stock

> in trade or any other property, for or towards the relief of the poor: Provided always that nothing in this Act contained shall in anywise affect the liability of any parson or vicar, or of any occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods, to be taxed under the provisions of the said Acts [*i.e.*, the Poor Relief Act, 1601, and the Amending Act of 1662] for and towards the relief of the poor.

The parson, therefore, was expressly excluded from the relief granted by this enactment to inhabitants of a parish and the statute plainly recognises that the parson was in fact within the area of liability created by the Act of 1601.

In my judgment, it is far too late at the present time to question the validity in law of the assessments made under the Act of 1601 upon parsons in respect of tithe in their hands. Such assessments were not made in respect of tithe alone. From early times the disadvantages attending the tribute of tithe *in specie* had been obviated by methods of commutation under which payments in money had been substituted for payments in kind. I need not consider in any detail the different ways, statutory and other, in which these commutations were effected. I am only concerned with their result. In *R.* v. *Christopherson* (1) LORD ESHER, M.R., said (16 Q.B.D. 7, at p. 13):

> . . . when tithes came to be commuted, either by custom or statute, and the parson received instead of tithes an annual money payment, it was impossible, upon the assumption that the tithes were rateable under the Act of Elizabeth, to hold that the liability to the rate could be escaped by the commutation of the tithe into money. There might be more difficulty in estimating the amount, but it was reasonable to hold that, the tithes having been rateable, the money payment in lieu of them should be rateable also. It was, therefore, held that the parson was rateable in respect of money payments made in lieu of tithes, unless the Act under which they were made provided to the contrary.

It is clear, therefore, that at all material times all money payments made in lieu of tithe were, equally with tithe itself, assessable in general to rates. In this respect no distinction is to be drawn between corn rents and other money substitutes for tithe; all such rents were treated as subject to rates, unless they were exempted from such liability by the local Acts which created them: see, for example, *R.* v. *Joddrell* (2).

Such, then, was the position when the Tithe Act, 1836, was passed. The object of this Act was to extinguish tithe and substitute, by voluntary or compulsory arrangement, tithe rentcharge in its place. The Act was not confined to tithe in kind, but extended to "all moduses, compositions real and prescriptive and customary payments," but it did not apply to corn rents. For the purposes of the present case, I need only refer to sects. 37 and 69 of the 1836 Act. Sect. 37 provided:

> In every case in which the Commissioners shall intend making such award [*i.e.*, in respect of tithes] . . . in estimating the value of the . . . tithes [they] shall estimate the same without making any deduction therefrom on account of any Parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable; and whenever the said tithes shall have been demised or compounded for on the principle of the rent or composition being paid free from all such rates, charges, and assessments, or any part thereof, the said Commissioners . . . shall have regard to that circumstance, and shall make such an addition on account thereof as shall be an equivalent.

By sect. 69:

> Every rentcharge payable as aforesaid instead of tithes shall be subject to all Parliamentary, parochial and county and other rates, charges, and assessments, in like manner as the tithes commuted for such rentcharge have heretofore been subject.

From these sections certain inferences or results emerge: (i) that the legislature recognised the pre-existing liability of tithes to rates; (ii) that it recognised the pre-existing freedom from such liability of some tithe; and (iii) that such pre-existing liability, or freedom from liability, as the case might be, in the extinguished tithe should be precisely reflected in the tithe rentcharge which was substituted for it by virtue of the Act.

As I have already said, corn rents were outside the provisions of the Tithe Act, 1836. Provision, however, for the conversion of these rents into tithe rentcharge was made by the Tithe Act, 1860. Sect. 1 of that Act provides that the Commissioners, upon application as therein mentioned:

> . . . may by an award under their hands and seal convert [corn rents] into a rentcharge, to be thenceforth and for ever thereafter payable, in like manner and subject

> to the like incidents as rentcharges awarded under [the Tithe Act, 1836, and amending Acts] are payable and subject to : Provided always, that nothing in this Act contained shall be construed to render any such rentcharge liable to parochial or other rates or taxes from which the corn rents in respect of which such rentcharge shall have been awarded were free and exempt.

From this section are to be drawn inferences similar to those arising out of sects. 37 and 69 of the 1836 Act.

Since the 1836 Act the liability of tithe rentcharge in general to rate assessment has received Parliamentary recognition in a number of statutes, amongst which I may mention the Tithe Rating Act, 1851, the Tithe Act, 1891, and the Tithe Rentcharge (Rates) Act, 1899. The 1899 Act provided, by sect. 1 :

> The owner of tithe rentcharge attached to a benefice shall be liable to pay only one half of the amount of any rate to which this Act applies, which is assessed on him as owner of that tithe rentcharge, and the remaining one half shall, on demand being made by the collector of the rate on the surveyor of taxes for the district, be paid by the Commissioners of Inland Revenue out of the sums payable by them to the local taxation account, on account of the estate duty grant.

By sect. 4 the Act was to apply to every rate as defined by the Agricultural Rates Act, 1896, s. 9, except as therein mentioned, which meant, in effect, that it was to apply to poor rate, highway rate, district rate and other rates that were usually understood to fall within the term. Then by the Ecclesiastical Tithe Rentcharge (Rates) Act, 1920, partial relief in respect of liability to rates was granted to the owners of tithe rentcharge attached to an ecclesiastical corporation or benefice.

The next Act to which I must refer is the Tithe Act, 1925. Sect. 3 of this Act transferred to Queen Anne's Bounty all tithe rentcharges attached to benefices, to be held in trust for the incumbents of the benefices to which they were previously attached. Under sect. 5 (1) (*b*), Queen Anne's Bounty were to make certain annual payments as therein mentioned to the Commissioners of Inland Revenue :

> . . . to be applied by them towards the payment of the sums hereinafter directed to be paid by them on account of rates . . . Provided that (i) where any such tithe rentcharge is a tithe rentcharge created in lieu of any corn rent or like payment which was free from rates, or a tithe rentcharge which is otherwise free from rates under any local Act, no such payment to the Commissioners of Inland Revenue as aforesaid shall be made in respect thereof.

Sect. 7 provided, in effect, for the transfer to the Inland Revenue Commissioners of the obligation to pay rates thereafter assessed on the tithe rentcharges which became vested by virtue of the Act in Queen Anne's Bounty.

The Rating and Valuation Act, 1925, contained certain provisions relating to the assessment of tithe rentcharge to rates, but it will be more convenient if I consider these at the same time as I consider the arguments which were presented to me at the hearing on behalf of the defendants.

The conclusion at which I have arrived as a result of the considerations above referred to is that, at the date of the passing of the Tithe Act, 1936, all tithe rentcharge (apart from extraordinary tithe rentcharge with which I am not concerned in these proceedings) was liable to rates, unless the tithes for which it was originally substituted had themselves been exempted from liability by a local Act, or because it was awarded under the Tithe Act, 1860, in lieu of a corn rent which itself was exempted from liability by virtue of the local Act creating it. This is, in substance, the argument of counsel for the plaintiffs and I accept it. I would add that it is also the view of the authors of certain well-known text books on the subjects of tithe and of rating to which I was referred during the argument.

In my judgment, accordingly, the foundation of the case presented by the plaintiffs, *viz.*, that when the 1936 Act came into operation all tithe rentcharge (so far as concerns this case) was under a statutory liability to be rated except such as had been granted express statutory exemption, has been established. I turn now to the true meaning and effect of para. 4 of Sched. I, Pt. I, to the Act. It seems to me quite clear that in the words " In the case of a rentcharge created in lieu of any corn rent or like payment which was free from rates," the expression " free from rates " means free from rates at the time of the creation of the rentcharge. The word " was " is solely applicable to that time and cannot, on any construction of the clause, be referred to a future date, *viz.*, " the appointed day " under the Act. From this it follows that one species of rentcharge which the legislature intended to exempt from any deduction in respect of rates was a rentcharge which was substituted for a corn rent or like payment which itself enjoyed freedom from rates, and that the relevant time for inquiry on this point was the date when the rentcharge was created. The question then arises : What does " free from rates " in relation to any such corn rent or like payment mean ? Does the phrase refer to the express exemption from liability to rates which some corn rents enjoyed by virtue of a local Act, or does it refer to the factual freedom of any given corn rent in relation to assessment at the time when it was replaced by a rentcharge ? In my judgment, it is reasonably plain that the phrase bears the former signification and not the latter. Counsel for the defendants argued, amongst other things, that any property may fairly and accurately be described as being " free from rates " which is not, for some reason or other, in fact assessed to rates, *e.g.*, because it has no rateable value. I cannot, however, believe that the legislature intended to impose upon the plaintiff Commission the task of ascertaining whether corn rents, for which tithe rentcharges were substituted by virtue of the Act of 1860, did or did not enjoy at the time of such substitution factual freedom from assessment. Nor, indeed, is it easy to appreciate what sensible end would be achieved by undertaking any such inquiry, for the fact that a corn rent was free from rates, in the sense advanced by the defendants, at the time when it was converted into a rentcharge by no means indicates that the freedom continued subsequently, still less that it continued down to 1936. In my opinion, accordingly, this construction of the words " free from rates," in relation to tithe rentcharge created in lieu of corn rent, cannot be accepted if any other be fairly open. The obvious alternative is that it means free from rates by reason of statutory intervention, *i.e.*, free from liability to be rated. The question whether a rentcharge enjoyed freedom in this sense could be ascertained without difficulty by the plaintiffs. Such freedom would, moreover, be perpetual, subject only to determination by some subsequent Act. I, therefore, hold that the words " free from rates," where first used in para. 4, mean free from legal liability to be rated.

Next come the words " or a rentcharge which was otherwise free from rates," and this expression is presumably directed mainly, if not exclusively, to rentcharges created under the Act of 1836. On this it is contended by the defendants that the words mean, or include, a rentcharge which was not assessed to rates pursuant to the valuation list which was in force during the rating period immediately preceding the " appointed day," but subject to any corrections with retrospective effect that might subsequently be made in such valuation list under the provisions of the Rating and Valuation Act, 1925, s. 37 (10). This argument involves two elements, *viz.*, (i) that the word " was " is directed not only to a future point of time but to a point of time altogether dissociated from that to which, in my judgment, it was directed in the first part of para. 4, and (ii) the contention, already referred to, that " free from rates " means factual freedom and nothing else.

Prima facie I should have thought (i) that the word " was " in its primary meaning refers to something that is past and not to something that is future, and (ii) that, on ordinary principles of construction, where a phrase is used twice in any document it was intended to bear the same interpretation on each occasion : so that, in the expression " was . . . free from rates," the word " was " should be taken to refer to the same point of time (regard being had where necessary to the principle of *mutatis mutandis*), and the quality of " freedom " should be taken to be the same in the one case as in the other. Accordingly, if no other matters had to be considered, I should have no difficulty, having construed the first part of the paragraph in favour of the plaintiffs, in accepting their views as to the proper construction of the second part as well. I must, therefore, now consider the reasons upon which counsel for the defendants relied as showing that such a construction is not the right one, that it would result in unfairness and hardship, that it is unworkable and should accordingly be rejected. Apart from arguments based upon construction, which I will deal with later on, the defendants' first contention is that the view presented on behalf of the plaintiffs involves, in effect, the usurpation by the Tithe Redemption Commission of powers which are vested, and vested solely, in the rating authorities. The defendants say that the plaintiffs are attempting to disregard the assessments of these authorities and to place upon tithe rentcharges rateable values of their own, notwithstanding that they have neither the right to do so nor the machinery that is necessary for the purpose. There was exhibited to an affidavit sworn by Mr. Clifford Amsden in these proceedings on behalf of the defendants a schedule in which are set out particulars of tithe rentcharges which were not assessed to rates during the rating period immediately preceding the appointed day. Pts. I and II of this schedule comprise tithe rentcharges which were exempt from rates by virtue of local Acts of Parliament and tithe rentcharges representing converted corn rents which (with one exception) were themselves so exempted by the Acts creating them. As to these tithe rentcharges there is no dispute; the plaintiffs admit that no deduction for rates falls to be made in respect of them. Pt. III of the schedule, however, contains particulars of other tithe rentcharges in respect of which no statutory immunity has been granted but which the defendants say are to be regarded as "free from rates" because no rates were paid or demanded in respect of them in the period preceding the appointed day. The rateable value of one of these rentcharges was shown in the rating assessment as nil. Many of the others were potentially nil assessments in that they probably had no rateable value. The defendants argue that the plaintiffs are seeking to override the values placed by the rating authorities on these tithe rentcharges and to place other values upon them themselves. Further, say the defendants, whereas a ratepayer has a right of appeal to quarter sessions against the valuations of a valuation committee, he would have no right of appeal to anyone against the value imposed by the Tithe Redemption Commission.

I do not propose to review in detail the various provisions of the Rating and Valuation Act, 1925, which regulated the complicated machinery of assessment to rates. There is no doubt as to the powers in general of the rating authority under the Act. Sect. 2 provides for the imposition of a general rate. Sect. 3 (2) enacts:

> Subject to the express provisions of this Act . . . all the provisions . . . relating to the general rate shall apply to a special rate, except that the owner of any tithe or tithe rentcharge . . . shall be liable to pay in respect of one-fourth part only of the rateable value [thereof].

Sect. 4 provides for the operation and incidence of rate. Sect. 7 specifies the matters as to which information is to be given in the demand note on which the general rate is levied. Sect. 19 deals with the making and operation of new valuation lists and sect. 20 makes such list "conclusive evidence of the values of the several hereditaments included" therein. Sect. 22 (in conjunction with Sched. II to the Act) lays down the manner in which the rateable value of a hereditament is to be ascertained. Notwithstanding this statutory guidance, I was told—and can well believe it—that there is no real uniformity in the ascertainment of rateable value and that there may be a considerable variation between the value placed on a hereditament in one rating area and the value placed on a similar hereditament in an adjoining area. Sect. 37 provides for the amendment of a current valuation list at the instance of any person who is aggrieved as therein mentioned; and under subsect. (10) any such amendment is to take effect "as from the commencement of the period in respect of which the rate was made." Sect. 64 (1) enacts:

> Subject as otherwise expressly provided in this Act, nothing therein contained shall affect . . . (*b*) any exemption from or privilege in respect of rating conferred by any local Act or order on the occupiers of hereditaments in any particular part of a rating area or on the occupiers of any particular hereditaments.

Sect. 64 (2) provides: "For the purpose of securing the continued operation, notwithstanding the passing of this Act, of any such privilege or exemption as aforesaid," schemes should be submitted by the relevant rating authorities or, if not submitted, should be made by the Minister. Sect. 68 defines "hereditament" as meaning:

> . . . any lands, tenements, hereditaments or property which are or may become liable to any rate in respect of which the valuation list is by this Act made conclusive.

Finally, it is convenient to note that the Local Government Act, 1929, s. 67, totally exempted agricultural land and buildings from rates.

I am quite unable to appreciate how the plaintiffs' construction in this case involves any claim to exercise themselves any of the powers, duties or functions entrusted to or imposed upon rating authorities by the above mentioned provisions, or to abrogate or ignore any decisions at which such authorities might have arrived at any relevant time. If, in fact, this were to be the necessary or even possible result of the view which the plaintiffs have urged, there would clearly be difficulty in its acceptance. It is quite plain, however, in my judgment, that no such question arises. The whole of the rentcharges with which I am concerned are rentcharges which were formerly attached to benefices and were vested for an interest in fee simple in possession in Queen Anne's Bounty by the Tithe Act, 1925. In the case of each such rentcharge, accordingly, all that the plaintiffs have to do is to make a perfectly simple arithmetical calculation. In the first place, they have to ascertain its gross annual value in accordance with the provisions of the Tithe Act, 1936, s. 2 (3). From the gross annual value, as so ascertained, they make the deductions for cost of collection and management and in respect of land tax, as required by paras. 1 and 2 of Sched. I, Pt. I, to the Act. Then, in respect of rates (subject only to the provisions of paras. 4 and 5 of Pt. I) they have to make a further deduction, *viz.*, of "a sum equal to one twenty-first part of the gross annual value of the rentcharge," as required by para. 3 (*a*). It is true that this method of computation may conceivably result in some deduction for rates being made in respect of a tithe rentcharge which has been assessed by the rating authority at nil, but it is the clearest possible result of the Act and is quite inconsistent with the defendants' view that, for purposes of rate deduction, all that the plaintiffs were intended to be concerned with was the factual position on, or immediately prior to, the appointed day as it existed between the rating authority on the one hand and the owner of a hereditament on the other. As it is clear that the plaintiffs will not in any sense be exercising, or have occasion to exercise, any of the powers that are vested in the rating authority, I am unable to accept the argument of the defendants so far as it is directed to this aspect of the matter.

The next contention of the defendants which I will consider is based upon sect. 25 and Sched. V to the 1936 Act. These provisions are directed to the compensation of rating authorities for the loss of rate income occasioned by the extinguishment or reduction of tithe rentcharge. The defendants' argument on these provisions is that, if the compensation to the rating authorities were to be counterbalanced by a deduction from the compensation payable to owners of tithe rentcharge whose rate payments are a loss to the rating authorities, then such provisions are logical; but that, if their result is that the plaintiffs are entitled to make a deduction from compensation payable to owners of tithe rentcharge who were not assessed to rates in respect of the rating period immediately anterior to the appointed day (*viz.*, the period between Apr. 1, 1936, and Sept. 30, 1936), and the rating authorities are not entitled to any compensating payment, the provisions are unfair and the plaintiffs benefit at the expense, in effect, of the parson. As to this, it is obviously right that the rating authorities should be treated on a factual basis in this regard in order to avoid their being either under or over-compensated. But, in my opinion, the fact that, in a comparatively small number of cases, deductions in respect of rates will not enure to the benefit of the rating authorities if the plaintiffs' contention is accepted, does not throw any considerable amount of light on the proper construction of that part of the Act with which I am concerned in the present case.

The next argument on behalf of the defendants which I have to consider is directed to the proper construction and effect of para. 4 of Sched. I, Pt. I, to the Act and is based on inferences which, it is said, should be drawn from a consideration of Sched. I as a whole. In support of the view that the word "was" in the phrase "or a rentcharge which was otherwise free from rates" is referable to the rating period immediately before the appointed day, the defendants rely on the language used in para. 5 of Sched. I, Pt. I. That paragraph deals with the deduction to be made in respect of rates "in the case of a rentcharge which was subject to a lease, or was held in trust for persons entitled in undivided shares, immediately before the appointed day." The defendants say that inasmuch as the Act came into force on July 31, 1936, and the appointed day under the Act was to be Oct. 2, 1936, there is a grammatical inaccuracy in using the word "was" in relation to that date and that the same word, when used in para. 4, should be construed in the light of this inaccuracy. I doubt myself whether in a proper context there is much inaccuracy in projecting forward, as it were, the word " was " to a future point of time as is done in para. 5. The use of the word in such a context is certainly not uncommon although it is not very artistic. Be that as it may, the word is linked by express language in para. 5 with the point of time to which it was intended to be related, with the result that there is no possible doubt as to its meaning. This is not the case in para. 4, and, in my judgment, no guidance to the meaning of this paragraph is afforded by the language of para. 5. Then the defendants point to para. 3 of Sched. I, Pt. II, which provides for an increase in compensation " in the case of a tithe rentcharge created in lieu of a corn rent or like payment which was free from income tax." The legislature in this provision, the defendants say, must have been looking to the factual position as it might be found to exist at the appointed day. If income tax were an invention of modern times, this contention would have much to commend it. Inasmuch, however, as (i) income tax goes back as far as the 18th century, and (ii) it is common ground that certain corn rents were granted exemption from Parliamentary taxes, as well as from parochial rates, by the Acts to which they owed their creation, it seems to me that this argument is unsupported by any sufficient foundation.

Finally, on construction, the defendants rely on sect. 32 of the Act and on Sched. I, Pt. I, para. 3 (*c*). These provisions, they say, show that the only tithe rentcharges with which the plaintiffs were to be concerned, for the purposes of making deductions in respect of rates, were those which had been assessed to rates and in respect of which the rating authorities could, by reference to the valuation lists, furnish to the plaintiffs all relevant and necessary information. It is, of course, quite plain that the vast majority of tithe rentcharges which would suffer a deduction in respect of rates would be rentcharges which had in fact been assessed to rates, so that it is not surprising that in relation to such deduction language is used which is appropriate to that position. The question, however, is whether the language is such as to negative, by sufficiently clear implication, the view that no deduction can be made in respect of a rentcharge which, at the relevant date, was not in fact subject to rate assessment. In my judgment, sect. 32 itself carries no such implication. By virtue of it the rating authority is bound to give to the plaintiffs certain information, and true it is that that information concerns hereditaments which are assessed to rates, and not hereditaments which are not. But, beyond that fact, the section does not appear to me to afford any assistance at all. Sched. I, Pt. I, para. 3 (*c*), deals with deductions in respect of rates in the case of rentcharges other than rentcharges which were formerly attached to benefices or ecclesiastical corporations and which vested for an interest in fee simple in possession in Queen Anne's Bounty by the Tithe Act, 1925. In the case of such other rentcharges, the plaintiffs are to ascertain as regards each of the three years ending on Mar. 31, 1934, 1935, and 1936 :

> (i) the poundage rate at which general rates were levied ; (ii) the poundage rate at which any rates, in respect of which tithe rentcharge was rated on a proportion only of its rateable value, were levied ; and (iii) particulars of deductions from net annual value in arriving at rateable value.

The plaintiffs are thereupon to " calculate the average annual rate of poundage at which the rentcharge was assessable to rates " during the three years ending on Mar. 31, 1934, 1935 and 1936, as therein mentioned.

I have already indicated that the only rentcharges with which I am concerned in these proceedings are those referred to in para. 3 (*a*) of Sched. I, Pt. I, and which are, therefore, outside the scope of para. 3 (*c*). Nevertheless, the defendants rely on the language of para. 3 (*c*) as elucidating, or tending to elucidate, the intention of the legislature as expressed in para. 4. They say that the " particulars of deductions from net annual value in arriving at rateable value " are necessarily applicable, and applicable only, to rentcharges which have been assessed to rates and that this confirms their contention that para. 4 also is directed exclusively to the question of assessment or non-assessment to rates. In elaboration of this view, the defendants say that this question of deductions from net annual value is purely a rating matter and that such deductions can only be ascertained from the assessment committee of a rating authority, as also can the net annual value and the rateable value of any particular hereditament. Para. 3 (*c*) (they say) presupposes that there has been an assessment to rates as distinct from the case of hereditaments which are not assessable at all (*e.g.*, agricultural land), on the one hand, and hereditaments which have received a nil assessment, on the other.

In answer to this argument, the plaintiffs say that the " particulars of deductions " referred to in para. 3 (*c*) are merely those specified in the Rating and Valuation Act, 1925, Sched. II, Pt. II, para. 3, and are not the actual deductions made by the rating authority in any particular case. Their argument is that the only information which the plaintiffs would need to obtain from a rating authority is general information relating to an area and not particular information relating to a given hereditament. It does not seem to me necessary to decide which of these two views is correct because, even if I accept that of the defendants, it does not, in my view, substantially affect the question which I have to decide. As I have already pointed out, the great majority of tithe rentcharges to which Sched. I, Pt. I, to the 1936 Act is applicable will in fact have been assessed to rates. In relation to such rentcharges, para. 3 (*c*) on the defendants' reading of it, is aptly phrased. To rentcharges which had not been assessed to rates, the machinery which it provides has no application. Am I then to conclude (*a*) that the legislature intended to exclude this latter class of rentcharges from deduction in respect of rates, or (*b*) that in the case of lay tithes (to which alone para. 3 (*c*) applies) any such tithes which had not been assessed to rates were overlooked, or (*c*) that, in the case of these latter rentcharges, the legislature was content to leave the matter to be governed by the general principles of the Rating Act, 1925, Sched. II, Pt. II, para. 3 ? I might have to choose between these three alternatives if I had any real doubt as to the construction of para. 4 of Sched. I, Pt. I, to the 1936 Act when taken by itself. I have reviewed the various considerations which it is said will assist me in construing an ambiguous provision, but I have now arrived at the point at which I am free to say that the provision does not appear to me to be open to any real ambiguity at all. Once it is established, as I hold that it has been established, that tithes, corn rents and moneys paid in lieu of tithe were in general liable to be rated (as has been recognised in many statutes, to some of which I have referred), but that some of them were exempted from such liability by express enactment, the meaning of the legislature, as expressed by para. 4, is, in my judgment, free from difficulty. The object of the paragraph is to exempt certain tithe rentcharges from the operation of para. 3. To take the latter part of para. 4 first, it is clear that the partial exemption thereby conferred is related to enactments such as the Tithe Rentcharge (Rates) Act, 1899 ; in other words, it refers to rentcharges which, by reason of statutory intervention, had received partial freedom from liability to be charged to rates. The first part of the paragraph is, as I have already stated, directed, in my judgment, to rentcharges which enjoyed total freedom from liability to be charged to rates. I have already indicated that this part cannot, in my opinion, be construed as referring to the factual position of a corn rent but to its freedom from legal liability, and that the only relevant point of time to which an inquiry on this question should be directed is the time when a rentcharge was created in its place. I have further indicated that in its usual sense the word " was " is referable not to a future but to a past event, and that, as a matter of construction, the phrase " was . . . free from rates " should *prima facie* receive the same interpretation when secondly, as when first, employed. In my judgment, the considerations which have been advanced by the defendants are quite insufficient to justify me in departing either from the ordinary and normal usage of the word " was " or from the principle of construction to which I have referred. Finding also, as I do, that both the first and the last parts of para. 4 are dealing with cases of statutory exemption, total or partial, from rates, the conclusion is not only logical but almost irresistible that the second part of the paragraph is also directed and confined to statutory exemption conferred at some time in the past.

In my judgment, the first and second parts of the paragraph should accordingly be construed as meaning " in the case of a rentcharge created in lieu of any corn rent or like payment which was, at the time the rentcharge was created free from liability to be rated, or a rentcharge which was otherwise created free from liability to be rated, no deduction shall be made in respect of rates." As already indicated, I mean by " free from liability to be rated " free by reason of statutory exemption. It accordingly follows that a deduction falls to be made under para. 3 (*a*) of Sched. I, Pt. I, to the 1936 Act in respect of rates in the case of every rentcharge that is unable to claim immunity in the sense to which I have referred. It is true that quite a number of tithe rentcharges possessing no statutory exemption were not in fact assessed and, of course, it is that very fact that has necessitated this application. But whatever may be the explanation of what is an undoubted fact, it cannot affect the question of construction which I have to determine.

I was not asked to deal specifically with each item contained in the schedule and I think the point of principle which I have decided will cover all the cases comprised therein. Two special cases, however, should perhaps be noticed. In the tithe district of Rainsbury the tithe rentcharge was in lieu of tithes which had been exempted from rates by a local Inclosure Act of 1777. The exemption provided by this Act, however, was of a conditional nature, in that it was to endure so long as the vicar of the parish for the time being should do and perform all the offices of the church as vicar for the poor of the said parish who should receive alms without fee or reward, and no longer. As this condition has always been observed, the plaintiffs would be justified, in my view, in treating this rentcharge as "free from rates." Secondly, there is the tithe district of Marchington in which, apparently, the tithe rentcharge was created in lieu of tithes, moduses and Easter offerings. The question of the rateability of Easter offerings was touched upon during the hearing, but not argued at any length and, if necessary, there will be liberty to apply with regard to this rentcharge. The same observation will apply to any other particular rentcharge as to which any doubt may be felt in applying the relevant provisions of the Act in accordance with the construction which I have placed upon them.

Declaration accordingly.

Solicitors: *The Official Solicitor, Tithe Redemption Commission* (for the plaintiffs); *The Solicitor, Queen Anne's Bounty* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

TRUSTEES OF THE WILL OF FLORENCE CUNARD *v.* INLAND REVENUE COMMISSIONERS.

ELLA McPHEETERS *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Morton, L.JJ.), December 17, 18, 19, 20, 1945.]

Income Tax—Annual payments—Capital or income—Direction in will to make up deficiency of income out of capital—Payments made prior to ascertainment of residue—"Residuary estate"—Payments "in respect of income"—Irrelevant that payments made out of capital—Recurrent payments—"Annual payment"—Whether payments "in respect of" a limited interest in residue—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case III, r.* 1 (*a*), *rule* 21, *All Schedules Rules—Finance Act,* 1938 (*c.* 46), *ss.* 30 (2), 35 (3).

By her will, the testatrix devised a freehold house called The Grove to her trustees on trust to allow her sister, Miss M., to live there rent free. The testatrix also gave certain annuities and directed that, pending appropriation, they were to be charged on her "residuary estate." Cl. 9 of the will contained the usual directions for sale, with power to postpone conversion, and it also provided that the net income arising from the unconverted property should "as from my death be applicable as income of my residuary estate." After providing for payment out of the proceeds of sale of her debts, etc., and the annuities given by her, and directing her trustees to invest the residue at their discretion, the testatrix further directed them to "stand possessed of the proceeds of the sale calling in and conversion of my said real and personal estate and any money belonging to me at my death and any part or parts of my said real and personal estate for the time being unconverted as well as the said investments (hereinafter called my residuary estate") on trust during Miss M.'s lifetime to pay all outgoings in respect of The Grove out of the income of her residuary estate and, subject thereto and to certain income payments, to pay the remainder of the income to Miss M. during her life. If in any year the income of the residuary estate should not be sufficient to enable Miss M. to live at The Grove in her customary degree of comfort, the trustees were empowered, by cl. 10 (*b*) of the will, "to apply such portion of the capital of my residuary estate by way of addition to the income as they in their absolute and uncontrolled discretion may think fit, moreover any capital so applied shall not be replaced out of the income of a subsequent year but shall be treated as an additional bequest to my sister." The testatrix died on Jan. 24, 1935, and the residue of the estate was ascertained on Feb. 9, 1940. Payments out of capital had been made to Miss M. under cl. 10 (*b*) during each of the income tax years ending 1939, 1940. The Crown claimed to recover tax from the trustees in regard to these payments under the Income Tax Act, 1918, All Schedule Rules, r. 21 (as amended by the Finance Act, 1927, s. 26), and to include the payments for sur-tax purposes in the total income of Miss M. The Crown further claimed that the payments were taxable income of Miss M. under the Finance Act, 1938, s. 30. It was contended by the trustees and Miss M. that payments made under cl. 10 (*b*) prior to Feb. 7, 1940, were not the taxable income of Miss M. because (i) they had been made out of the gross estate before the residue had been ascertained and, therefore, they had been made by the trustees without authority; (ii) they were made out of capital and were not, therefore, "income"; (iii) they were not an "annual payment" within the meaning of Sched. D, Case III, r. 1 (*a*), under which they had been classed; (iv) they were discretionary and, therefore, voluntary, payments and Sched. D, Case III, r. 1 (*a*) did not extend to voluntary payments. It was further contended that the Finance Act, 1938, s. 30, did not apply to the payments in question:—

Held: (i) upon the true construction of the testatrix's will, the words "my residuary estate" did not mean "the net residue of my estate ascertained in due course of administration," but meant the gross estate before all debts and other liabilities had been paid. Therefore, the payments in question had not been made by the trustees without authority, because they were made in strict accordance with the power given by the will. They came to Miss M. under the express terms of the will, and not as a "quasi-interest" enjoyed by a legatee pending the completion of administration.

Corbett v. *Inland Revenue Comrs.* (1) *distinguished.*

(ii) the payments in question were income in the hands of Miss M., and were liable to tax. The fact that they were made out of capital was irrelevant.

Brodie's Trustees v. *Inland Revenue Comrs.* (3) *applied.*

(iii) the payments were capable of being recurrent and were "annual" payments within the meaning of Sched. D, Case III, r. 1 (*a*), even though they were not necessarily recurrent year by year. The fact that they varied in amount was immaterial.

Moss Empires, Ltd. v. *Inland Revenue Comrs.* (4) *applied.*

(iv) although the trustees had a discretion whether or not to make these payments, they were not voluntary payments.

Lindus and Hortin v. *Inland Revenue Comrs.* (6) *applied.*

(v) the Finance Act, 1938, s. 30, did not apply to the payments in question because they were made under a discretionary power and not "in respect of" Miss M.'s "right" to the income.

Decision of Macnaghten, J. ([1945] 2 All E.R. 23) *reversed, except upon the construction of the Finance Act,* 1938, *s.* 30 (2).

[**EDITORIAL NOTE.** The Court of Appeal reverse the decision of Macnaghten, J., on the ground that the provision in the will for the payment of outgoings out of "my residuary estate" does not refer to the net residue ascertained in a due course of administration. *Corbett's* case (1) is therefore distinguishable, and the payments being properly made by the trustees in the exercise of their power to make up deficiency were income in the hands of the annuitant and liable to assessment as such. This being the ground of the decision, it becomes unnecessary to consider the application of the Finance Act, 1938, s. 30, but Lord Greene, M.R., indicates his view on the construction of this section, which is in accordance with that taken in the court below. The point of general interest in this case is that sums of capital of an estate paid to a beneficiary by executors or trustees in exercise of a discretion are income of the recipient, assessable on the payers under Rule 21 as annual payments: they are not voluntary payments in any relevant sense and the fact that they may not be repeated is immaterial.

As to Deficiency of Income to be Made Up out of Capital, see HALSBURY, Hailsham Edn., Vol. 17, pp. 248, 249, paras. 502, 503; and for Cases, see DIGEST, Supp., Income Tax, Nos. 349a, 349b.

For the Finance Act, 1938, s. 30, see HALSBURY'S STATUTES, Vol. 31, p. 340.]

Cases referred to:

*(1) *Corbett* v. *Inland Revenue Comrs.*, [1937] 4 All E.R. 700; [1938] 1 K.B. 567; Digest Supp.; 107 L.J.K.B. 276; 158 L.T. 98; 21 Tax Cas. 449.

*(2) *Barnardo's Homes* v. *Income Tax Special Comrs.*, [1921] 2 A.C. 1; 28 Digest 84, *483*; 90 L.J.K.B. 545; 125 L.T. 250; *sub nom. R.* v. *Income Tax Acts Special Purposes Comrs., Ex p. Dr. Barnardo's Homes National Incorporated Assocn.*, 7 Tax Cas. 646.

*(3) *Brodie* v. *Inland Revenue Comrs.* (1933), 17 Tax Cas. 432; Digest Supp.

*(4) *Moss Empires, Ltd.* v. *Inland Revenue Comrs.*, [1937] 3 All E.R. 381; [1937] A.C. 785; Digest Supp.; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264.

(5) *Smith* v. *Smith*, [1923] P. 191; 28 Digest 68, *361*; 92 L.J.P. 132; 130 L.T. 8.

*(6) *Lindus and Hortin* v. *Inland Revenue Comrs.* (1933), 17 Tax Cas. 442; Digest Supp.

*(7) *Williamson* v. *Ough*, [1936] A.C. 384; Digest Supp.; 105 L.J.K.B. 193; 154 L.T. 524; 20 Tax Cas. 194.

Appeals by the Crown from orders of Macnaghten, J., dated Apr. 16, 1945, and reported ([1945] 2 All E.R. 23), where the facts are fully set out.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellants.

Cyril King, K.C., and *A. C. Nesbitt* for the respondents.

Lord Greene, M.R.: I have the authority of Morton, L.J., to say that he has read the judgment I am about to deliver and agrees with it.

The question which falls to be decided is the same question in both appeals and relates to the assessability, in the first appeal, to income tax, and, in the second appeal, to sur-tax, of certain sums paid by the executors and trustees of the will of Mrs. Florence Cunard to her sister, Miss McPheeters, under a special provision in the will of Mrs. Cunard. The Special Commissioners decided in favour of the Crown, their decision was reversed by Macnaghten, J., and the Crown appeals to this court.

The payments in question were made out of the capital of the estate of the testatrix pursuant to cl. 10 (*b*) of her will. They were made before Feb. 7, 1940, the date when, according to the finding of the Special Commissioners, the residue of the estate was ascertained. The testatrix had died on Jan. 24, 1935, and payments out of capital in varying amounts were made to Miss McPheeters during the four income tax years, ending respectively Apr. 5, 1937, 1938, 1939 and 1940. The assessments with which we are concerned are in respect of the payments made in the two last-mentioned years. The main argument for the taxpayer, shortly stated, was to the effect that the payments in question, having been made out of capital at a time when the residue had not been ascertained, were not the taxable income of Miss McPheeters and that, accordingly, the Crown's claim to recover income tax from the trustees under the Income Tax Act, 1918, All Schedules Rules, r. 21, [as amended by the Finance Act, 1927, s. 26] and its claim to include the payments in the total income of Miss McPheeters for sur-tax purposes could not be sustained. In support of this argument reliance was placed on *Corbett* v. *Inland Revenue Comrs.* (1). It was argued on behalf of the Crown that the principle of that decision had no application to the present case and that, if, contrary to this view, it would have applied, the sums in question were to be regarded as taxable income of Miss McPheeters by virtue of the Finance Act, 1938, s. 30—a section which admittedly was passed in order to prevent the operation both of that decision and of the leading decision in *R.* v. *Special Commissioners of Income Tax, Ex p. Dr. Barnardo's Homes* (2), on which it was based. To the latter argument, reply is made that, on its true construction, sect. 30 has no application to such a case as the present.

The argument based on *Corbett's* case (1) assumes that, on the true construction of the will and in the events which have happened, the payments in question, if they are to be regarded as payments of an income nature, were made out of the gross estate of the testatrix before the residue was ascertained, and are to be regarded in the same light as the income was regarded in *Corbett's* case (1). In addition to the argument based on *Corbett's* case (1), it was argued that the payments in question could not in any event be assessable to income tax under Sched. D, Case III, and, in consequence, could not be regarded for purposes of sur-tax by reason of the special nature of the provision under which they were made. In order to appreciate the arguments it is necessary to look closely at the language of the will. By cl. 3, the testatrix devised her freehold property known as The Grove to her trustees on trust to allow Miss McPheeters to reside there rent free. She gave a number of specific and pecuniary legacies, including annuities, and, by cl. 9, she devised and bequeathed her real and personal estate not otherwise disposed of upon trust " that my trustees shall sell call in and convert the same into money " with the usual power to postpone conversion and a provision that the net income arising from her unconverted property should " as from my death be applicable as income of my residuary estate." By cl. 10, the testatrix directed that out of the clear moneys to arise from the sale, calling in and conversion, the trustees were to pay her debts, funeral and testamentary expenses and her legacies and annuities and duties thereon, and at their discretion to invest the residue. Then followed this direction:

> . . and shall stand posssessed of the proceeds of the sale calling in and conversion of my said real and personal estate and any money belonging to me at my death and any part or parts of my said real and personal estate for the time being unconverted as well as the said investments (hereinafter called " my residuary estate ") upon trust during the lifetime of my sister as follows . . .

This provision is inartistically drafted, but it seems to me impossible to construe the words " my residuary estate " as meaning the same thing as " the net residue of my estate ascertained in due course of administration." The words " my residuary estate " are here defined as including the proceeds of sale, calling in and conversion referred to in cl. 9. But these proceeds are gross and are not the net residue remaining after payment of debts, legacies, etc. As will presently appear, this view is confirmed by other provisions in the will.

The testatrix then directed as follows. By cl. 10 (*a*) the trustees were to pay all outgoings in respect of The Grove " out of the income of my residuary estate and subject thereto " and to other income payments, they were to pay " the remainder of the income to or for the benefit of " Miss McPheeters " during her life." By cl. 10 (*b*):

> If in any year the income of my residuary estate shall not be sufficient to enable my sister to live at The Grove in the same degree of comfort as she now lives there with me then I empower my trustees to apply such portion of the capital of my residuary estate by way of addition to the income as they in their absolute and uncontrolled discretion may think fit moreover any capital so applied shall not be replaced out of the income of a subsequent year but shall be treated as an additional bequest to my sister.

The payments now in question were made by the trustees under this last provision.

My view that the phrase " my residuary estate " is not used in the sense of what is, strictly speaking, the " net residue " of the estate when ascertained in due course of administration, is confirmed by several indications. In cl. 10 (*a*) the direction to pay the outgoings in respect of The Grove is to pay them out of the income of " my residuary estate " : but it is quite clear that these payments are to be made as from the death of the testatrix, *i.e.*, at a date when the net residue could not have been ascertained. In cl. 7 (*d*) the testatrix directed that, pending appropriation, annuities bequeathed by her were to be charged on her " residuary estate." There are other indications in the will to the same effect.

Counsel for the respondents argued that the payments in question, having been made at a time when the net residue had not yet been ascertained in due course of administration, had been made by the executors without authority and, assuming them to be of an income character, stood in exactly the same position as the payments in respect of income which were in question in *Corbett's* case (1). I am unable to accept this view. The payments, in my opinion, could be made by the trustees, in strict accordance with the power given by the will, at any time after the death of the testatrix, irrespective of the fact that, at the date of any particular payment, the " net residue " had not been ascertained. The payments were to be treated as additional bequests and would attract legacy duty. Of course, in framing the accounts of the estate, the payments must be debited to the ultimate net residue and these " additional legacies " could not compete with the other legacies bequeathed if the estate was insufficient to provide for both. But there was no question of this. The payments, therefore, in my opinion, were properly made and at the moment of payment became income of the recipient, Miss McPheeters. They were in their nature entirely different from the payments in question in *Corbett's* case (1). Miss McPheeters' title to the income arose when the trustees exercised their discretion in her favour and not before. At that moment, a new source of income came into existence. The payments came to Miss McPheeters under the express terms of the will and not by virtue of what I may call the quasi-interest enjoyed by a residuary legatee pending the completion of administration, as was the case with the payments in *Dr. Barnardo's Homes* case (2) and *Corbett's* case (1).

That the payments were " income " in Miss McPheeters' hands is, in my opinion, beyond dispute, and the fact that they were made out of capital is irrelevant. The payments were to be made " by way of addition to the income " in order to enable Miss McPheeters to live in the same degree of comfort as before. The testatrix was in fact providing for a defined standard of life for her sister, that provision being made in part out of income and in part (at the discretion of the trustees) out of capital. The purpose was an income purpose and nothing else. A similar point was decided by FINLAY, J., in *Brodie's Trustees* v. *Inland Revenue Comrs.* (3), which was, in my opinion, correctly decided. In that case, the trustees were bound to make payments out of capital as required and had not merely a discretion, as in the present case. But that is immaterial on the question whether the payments ought to be regarded as being of an income character. It is relevant to the entirely different point (referred to hereafter) as to whether the payments here ought to be regarded as purely voluntary payments.

Counsel for the respondents argued that those payments were not taxable because, on the true construction of the statutory provisions relating to Sched. D, Case III, under which the case so far has been treated as falling, (i) they were not annual payments and (ii) they were discretionary, and therefore voluntary, payments which Miss McPheeters could not claim as of right. Under Sched. D, Case III, the tax chargeable in respect of " annual profits or gains " is charged :

> . . . in respect of profits of an uncertain value and of other income described in the rules applicable to this case.

Sched. D, Case III, r. 1, provides :

> The tax shall extend to (*a*) any . . . other annual payment . . . either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout . . .

In order to be " annual " within the meaning of the rule, the payment need not necessarily be recurrent year by year. To use the language of LORD MAUGHAM ([1937] 3 A.E.R. 381, at p. 386), it is sufficient if it has " the quality of being recurrent, or being capable of recurrence " : see *Moss Empires, Ltd.* v. *Inland Revenue Comrs.* (4). It is quite clear that a payment under cl. 10 (*b*) of the will is one that is capable of recurrence because, in its very nature, it may be paid in any year when the income of the estate is insufficient for the purpose contemplated. The payments were in fact recurrent and the circumstance that they varied in amount does not remove their quality of being capable of recurrence.

The second argument also, in my opinion, fails. Even if it be assumed that the general words are to be read as limited by the phrase " a charge on any property " as to which, see *Smith* v. *Smith* (5)—it is not suggested that the phrase means a charge in the strict sense. It was suggested, however, that Sched. D, Case III, r. 1 (*a*) does not extend to mere voluntary payments. But the payments here were not voluntary in any relevant sense ; they were made in the exercise of a discretion conferred by the will out of a fund provided for the purpose by the testatrix. It is true that the trustees had an absolute discretion whether to make a payment or not ; but the question whether they should do so was one which they were bound to take into their consideration. They could not refuse to consider whether the income of the estate was sufficient to give Miss McPheeters the required degree of comfort. The fact that, after examining that matter, they might come to the conclusion that it was sufficient and, therefore, decline to make a payment out of capital, does not, in my opinion, give to a payment, if and when made, the character of a voluntary payment in any relevant sense. The money, when received by Miss McPheeters, was received by her through the joint operation of the will and the exercise of their discretion by the trustees. This very question was considered by FINLAY, J., in *Lindus and Hortin* v. *Inland Revenue Comrs.* (6). There, as here, the trustees had a discretion to supplement the income of a tenant for life out of capital. This discretion was absolute and it was argued there, as here, that the payments were not income because there was a discretion on the part of the trustees, and there was no right in the beneficiary to claim them. I am in agreement with the decision of FINLAY, J., on this point. The observations of LORD RUSSELL OF KILLOWEN ([1936] A.C. 384, at pp. 391, 392), in *Williamson* v. *Ough* (7), appear to me to confirm this view. That case, like *Lindus*' case (6) and the present case, fell under Sched. D, Case III. I may also refer to the language of LORD STERNDALE, M.R., ([1923] P. 191, at pp. 196, 197), in *Smith* v. *Smith* (5), on the general question of the construction of Sched. D, Case III, r. 1 (*a*).

The Crown contends that the payments in question are brought into charge as taxable income of Miss McPheeters under the Finance Act, 1938, s. 30. It is unnecessary for the Crown to rely on this argument in view of the opinion which I have formed, since tax would be payable in any event, quite apart from the provisions of the subsection. But the point was fully argued, and it is right that I should express my views upon it. The section relates to a person having what is called " a limited interest " in the residue of an estate or part thereof. By subsect. (2) any sum paid during " the administration period " (*i.e.*, the period between the death and the completion of the administration of the estate) " in respect of that limited interest " is to be deemed to be income of the person having the limited interest. The expression " limited interest " is not expressly defined in the Act, but sect. 35 (3) provides :

> A person shall be deemed to have a " limited interest " . . . during any period . . . where the income of the residue or of that part thereof . . . for that period would, if the residue had been ascertained at the commencement of that period, be properly payable to him . . .

In contradistinction to the case of a " limited interest," sect. 31 deals with the case of a person having an " absolute interest," *i.e.*, a person who would be entitled to the capital of the estate or part thereof if the residue had been ascertained : see sect. 35 (1).

Here Miss McPheeters was obviously and admittedly a person with a " limited interest " by virtue of her " right " to the income. But the payments in question were not paid to her in respect of her " right " to the income : they were paid under a discretionary power and were quite different in character. The words " limited interest " must, in my opinion, be read as meaning an " interest " of the kind described in sect. 35 (3)—what I have called earlier in this judgment, a quasi-interest. The language is necessarily involved, dealing as it does with the special position of residuary legatees before the residue is ascertained, *i.e.*, at a time when, as appears in *Dr. Barnardo's* case (2), they have, strictly speaking no interest in any property forming part of the unadministered estate. This appears to me to explain the use of the colourless words " in respect of " in sect. 30 (2). I cannot construe them as covering the payments here in question.

For convenience I have disregarded the fact that part of the last payment in question is referable to the period between the close of the administration on Feb. 7, 1940, and the end of the financial year on Apr. 5, 1940. As, in the result, the whole of the payment is subject to tax, I need say no more about this.

The appeals are allowed with costs here and below.

MACKINNON, L.J. : I agree.

Appeals allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Markby, Stewart & Wadesons* (for the respondents.)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

JOHNSON (INSPECTOR OF TAXES) *v.* W. S. TRY, LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), October 16, 1945.]

Income Tax—Trade receipt—Company engaged in ribbon development—Compensation paid to company—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I—Restriction of Ribbon Development Act,* 1935 (*c.* 47), *s.* 9.

Under a contract of sale dated Nov. 10, 1937, the respondent company took over the business of building contractors and estate developers carried on by one T. In 1936 T.'s application to build houses on land acquired for that purpose had been refused. After the transfer of the business to the respondent company an application was again made and refused. The respondent company then agreed to a proposal to sell the land to the local county council for £550. By an agreement dated Jan. 9, 1940, T., on behalf of the respondent company agreed to sell the land to the local county council, the purchase price being specified in the agreement as £5,350, of which £4,800 was stated as being in full settlement of the claim for compensation lodged by T. under the Restriction of Ribbon Development Act, 1935, s. 9. The sum of £5,350 was duly paid to the respondent company who credited it in their trading account for their financial year ending on Dec. 31, 1940. In the assessment made upon the company for the year 1941-42 the sum of £5,350 was included. The respondent company, while admitting that the sum of £550 was a trading receipt, contended that the sum of £4,800 was in the nature of a capital asset and should, therefore, be excluded from the assessment to tax under the Income Tax Act, 1918, Sched. D :—

HELD : land acquired by a company engaged in ribbon development formed part of its stock in trade, and its cost would come into the company's trading account as a trading expense, and correspondingly, the price of the land sold by the company would come into its trading account as a trading receipt. Compensation received for injurious affection of the land must similarly be regarded as a trading receipt. Therefore the sum of £4,800 was properly included in the company's assessment for the year 1941-42.

[**EDITORIAL NOTE.** Land acquired by a trader, to whatever purpose it is put, is, of course, a capital asset. But the question for tax purposes is whether it is fixed or circulating capital. In this case it is held that just as the cost of land acquired must come into the trading account as a trading expense, and on sale the price must be included in the trading account as a trading receipt, compensation payable by a council for refusal to permit development must also be treated as a trading receipt. The case is distinguished from *Glenboig Union Fireclay Co.* v. *I. R. Comrs.* (1) on this ground.

AS TO COMPENSATION A TRADE RECEIPT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 125-128, paras. 235-240 ; and FOR CASES, see DIGEST, Vol. 28, pp. 17-20, Nos. 87-99.]

Case referred to :

*(1) *Glenboig Union Fireclay Co.,* v. *Inland Revenue Comrs.,* [1921] S.C. 400 ; 12 Tax Cas. 427.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Uxbridge in the county of Middlesex, for the opinion of the King's Bench Division of the High Court of Justice. The respondent company, W. S. Try, Ltd., appealed against an estimated assessment to income tax in the sum of £10,000 made upon it under Sched. D of the Income Tax Acts, for the year ended Apr. 5, 1942, in respect of annual profits or gains arising from its business of building contractor and estate developer. The only item in dispute is the receipt by the respondent company of a sum of £4,800 as compensation for injurious affection under the Restriction of Ribbon Development Act, 1935, s. 9.

The respondent company was formed on Nov. 10, 1937, and took over under a contract of sale dated Nov. 18, 1937, the business carried on by W. S. Try, as a building contractor and estate developer. In 1936, Try, for the purposes of the business bought a strip of land, on which he erected 10 houses only. An application was made by Try, under the Restriction of Ribbon Development Act, 1935, s. 2, for consent to erect houses on a further part of the land which had a frontage of 530 feet. The consent was refused by a notice dated July 3, 1938, on the ground that it would be an extension of ribbon development. After the transfer of his business to the respondent company application was made for consent to the erection of houses on the remainder of the land which had a frontage of 1,100 feet ; and, by a notice dated Oct. 11, 1938, consent was refused. Thereupon Try, under sect. 9 of the 1935 Act, lodged a claim with the Buckinghamshire County Council for compensation for £2,040 in respect of the refusal dated July 3, 1936, and for £4,240 in respect of the refusal dated Oct. 11, 1938. After negotiation it was agreed that £4,800 was the proper sum payable by way of compensation in respect of the two refusals. A

The respondent company then agreed to sell the land to the Buckinghamshire County Council for £550. By an agreement dated Jan. 9, 1940, Try, on behalf of the respondent company, agreed to sell the land to the Buckinghamshire County Council, the purchase price being specified therein as £5,350 of which, it was stated, £4,800 was in full settlement of the claim under the Restriction of Ribbon Development Act, 1935.

The following facts were found by the Commissioners : B

> The respondent company makes up its accounts annually to Dec. 31, and the . . . sum of £5,350 . . . was credited in the company's trading account to Dec. 31, 1940. The assessable liability of the company for the year ended Apr. 5, 1942, is in the amount of its profits for the year ended Dec. 31, 1940. It was admitted by the company that the . . . sum of £550 was a trading receipt. . .
>
> The sum of £4,800 received by [the respondent company] in full discharge of their claim for compensation under the Restriction of Ribbon Development Act, 1935, C s. 9 . . . was not a trading receipt and should not, therefore, be taken into account in computing the profits of the company assessable to income tax under Sched. D.

The Crown appealed.

The Attorney-General (*Sir Hartley Shawcross, K.C.*) and *Reginald P. Hills* for the appellant (Inspector of Taxes).

J. Millard Tucker, K.C., and *John Clements* for the respondents. D

Macnaghten, J. : This is a case stated under the Income Tax Act, 1918, s. 149, by the General Commissioners for the Uxbridge Division of Middlesex, and the question submitted for the opinion of the court is whether a sum of £4,800, which was received by the respondent from the Buckinghamshire County Council as compensation for injurious affection under the Restriction of Ribbon Development Act, 1935, s. 9, ought or ought not to be included in an assessment made upon the respondent, W. S. Try, Ltd., for the tax year E 1941-42.

The respondent (hereinafter called the " company ") was incorporated under the Companies Act, 1929, on Nov. 10, 1937, and under a contract dated Nov. 18, 1937, took over as a going concern, the business of a building contractor and estate developer theretofore carried on by W. S. Try. As from that date the business was carried on by the company.

F In 1936, Try, for the purposes of the business, bought a strip of land with a depth of 200 feet fronting on a road called Iver Lane, in the county of Buckinghamshire ; and this strip of land was acquired by the company from him under the contract of Nov. 18, 1937. Before that date Try had erected ten houses on part of the land and he had applied to the Buckinghamshire County Council under the Restriction of Ribbon Development Act, 1935, s. 2, for consent to the erection of houses on a further part of it which had a frontage of 530 feet G to Iver Lane ; and, by a notice dated July 3, 1936, such consent had been refused on the ground that it would be an extension of ribbon development. After the transfer of his business to the company, an application was made for consent to the erection of houses on the remainder of the land which had a frontage of 1,110 feet to Iver Lane ; and, by a notice dated Oct. 11, 1938, consent was refused.

Thereupon Try lodged a claim under sect. 9 of the Act against the county H council for £2,040 as compensation in respect of the refusal dated July 3, 1936, and for £4,240 in respect of the refusal dated Oct. 11, 1938. Try, in making this application, acted as agent on behalf of the company and not on behalf of himself, since at that date he had ceased to have any interest in the land. That the county council were liable to pay compensation under sect. 9 of the 1935 Act does not appear to have been disputed, and, after negotiation, a sum of £4,800 was agreed as the proper sum payable by way of compensation in respect of the two refusals. When that had been done, the land being no

longer of any use to the company for the purpose of its business of ribbon development, negotiations took place for the sale of the land, and the county council agreed to buy the land at the price of £5,350, including in that price the agreed compensation of £4,800. Accordingly, by an agreement dated Jan. 9, 1940, expressed to be made between Try as vendor of the one part, and the Buckinghamshire County Council of the other part, it was agreed that Try would sell and the council would purchase the land in question at that price.
A It was, therefore, necessary that he should convey the land to the county council. In entering into this agreement in his own name, Try was admittedly acting on behalf of the company. The purchase price of £5,350 was paid by the county council to the company and was received by the company for its own use and benefit.

The financial year of the company ends on Dec. 31 and, this sum of £5,350 having been received in 1940, it was included in an assessment made upon the
B company for the tax year, 1941-42. The assessment is stated to have been an "estimated" assessment, but, so far as the sum of £5,350 is concerned, it was no estimate; it is the actual sum which was received by the company by way of compensation for the purchase of the land, made up of £550, the agreed price of the freehold, and £4,800, the agreed compensation for the refusal of the consent to its use for the purpose of ribbon development.

C The case came before the Uxbridge General Commissioners in Apr., 1943. It was admitted that the £550 must be treated as a trading receipt, and was, therefore, properly included in the assessment. But as to the £4,800, the company contended that it was a capital receipt, and ought to be excluded from the assessment. The Commissioners held that the £4,800 was not a trading receipt. In my opinion their decision was erroneous and must be reversed. Among the various authorities cited to the Commissioners was *Glenboig Union Fireclay*
D *Co., Ltd.* v. *Comrs. of Inland Revenue* (1). In that case the House of Lords decided that a sum of money paid to the Fireclay Co., by way of compensation for the requirement of the railway company that it should leave part of its fireclay deposits unworked, was a capital receipt and not a trading receipt; and it may be that the Commissioners thought that they were bound by that decision to hold that the £4,800 was a capital receipt. If that be so, the Commissioners failed to observe that the fireclay deposits were regarded by the
E House of Lords as a capital asset.

Although in many cases land belonging to a trading company forms part of its capital assets, in the case of a company engaged in ribbon development, the land which is acquired for the purposes of such development is not part of its capital. In such a case the land forms part of its stock in trade, just as much as the materials which it buys for the purpose of erecting the buildings on it. The cost of the land must come into its trading account as a trading expense.
F If it sells the land the price must come into its trading account as a trading receipt. And, likewise, compensation for injurious affection must also, in my opinion, be regarded as a trading receipt.

Counsel for the respondent company, urged that, after all, the question whether a particular receipt is a trading receipt or a capital receipt is a question of fact and on questions of fact the opinion of the Commissioners must be
G accepted. But on the facts stated by the Commissioners their decision is, in my opinion, erroneous in law. Therefore, the answer that I give to the only question submitted for the opinion of the court is that this sum of £4,800, which the respondent received in 1940 by way of compensation for the refusal of consent by the Buckinghamshire County Council to allow the land to be used for ribbon development, was a trading receipt and was properly included in the assessment made upon the company for the tax year 1941-42.

H Counsel for the respondent company, however, after concluding his argument on the question whether the decision of the General Commissioners was erroneous, applied for leave to raise a different point with regard to this assessment. As I understand it, the point is this. He desires to submit that the cases show that, although the £4,800 was in fact received by the company in 1940, it must, for the purposes of income tax, be deemed to have been paid at an earlier date and not to have been paid in one lump sum of £4,800, but in two sums, and part of it was to be deemed to have been paid and received on July 3, 1936, when the first refusal of the county council was notified and the rest on Oct. 11, 1938, when the second refusal was notified.

As the company was not in existence on July 3, 1936, the case must be treated as if the statement in the case that the company had received the £4,800 was a mistake; that it only received part of that sum for its own use and benefit. It received the rest of the £4,800 for the use of Try, who must be treated as having received the money on the date when the county council refused his application. That was an argument which, if well founded, would be very unsatisfactory to the Revenue, because the time has gone by in which Try could be assessed in respect of the money which he should be deemed to have received in 1936. I refused the application of counsel for the respondent company. I am bound to decide the case on the facts stated by the Commissioners. Whether the point that counsel for the respondent company desired to raise is a good one or a bad one is a matter on which, not having heard it argued, I express no opinion.

As the assessment of £10,000 made upon the company was expressed to be an "estimated" assessment, I apprehend the case should go back to the General Commissioners for them to deal with any items making up the £10,000 which were estimated sums and can be shown to have been wrongly estimated. But so far as the sum of £5,350 is concerned, namely, the price paid for the land, including the compensation due under the Restriction of Ribbon Development Act, 1935, s. 9, the General Commissioners must include that sum in the assessment as a trading receipt.

The appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Collyer-Bristow & Co.*, agents for *Bird & Lovibond*, Uxbridge (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

FRODINGHAM IRONSTONE MINES, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Macnaghten, J.), October 30, 1945].

Revenue—Excess profits tax—Purchase of shares in another company—Direction—Construction—Whether investment or capital employed in business—Finance Act, 1940 *(c.* 29), *s.* 28 *and Sched. V—Finance Act,* 1941 (*c.* 30), *s.* 35.

The shares in both the appellant company, which made excess profits, and in another company, which was being run at a loss, were held *in toto* by trustees of a will. With a view to reducing the liability of the appellant company to excess profits tax the trustees sold to the appellant company their holding in the second company at a purchase price part of which was paid in cash, the balance remaining on mortgage. By virtue of the Finance Act, 1940, s. 28, the second company thus became a subsidiary of the appellant company for purposes of excess profits tax. The Commissioners of Inland Revenue made a direction under the Finance Act, 1941, s. 35, that the excess profits tax liability of both companies should continue to be computed on the basis that they remained independent companies to which the provisions of the Finance Act, 1940, s. 28 and Sched. V do not apply. The question for the determination of the court was whether, upon a true construction of the direction, the sum employed in the purchase of the shares by the appellant company should for the purposes of excess profits tax be regarded as an investment or as capital employed in the business. It was contended on behalf of the appellants that since the provisions of the Finance Act, 1941, s. 35, enabled the Commissioners to give directions for adjustments to be made so as to counteract the avoidance or reduction of liability to excess profits tax it could not be right that a direction should, as this direction in fact did, increase the liability to excess profits of the appellant company beyond the amount which it would have been if the transaction had never taken place:—

Held: the transaction was in fact a purchase of an investment and the sum expended in the purchase of the shares must be so treated in the accounts of the appellant company whose liability to excess profits tax for the accounting periods affected should be computed accordingly. The appeal must, therefore, be dismissed.

[**EDITORIAL NOTE.** It is argued that a direction given by the Commissioners under the Finance Act, 1941, s. 35, must not be construed in such a way as to impose a greater liability to excess profits tax than if the direction had not been given. The purchase of the shares, however, undoubtedly constituted a payment of capital moneys for the acquisition of an investment, and it is held that it must be so treated although the scheme for tax avoidance failed by reason of the direction of the Commissioners.

FOR THE FINANCE ACT, 1940, s. 28 and Sched. V, see HALSBURY'S STATUTES, Vol. 33, pp. 179, 194 ; and FOR THE FINANCE ACT, 1941, s. 35, see *ibid.*, Vol. 34, p. 131.]

CASE STATED under the Finance (No. 2) Act, 1939, s. 21 (2) and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The sole point for determination was whether upon a true construction of a direction of the Commissioners of Inland Revenue a sum paid in cash by the appellant company towards the purchase of shares in another company should be regarded for the purposes of excess profits tax as an investment or as capital employed in the business.

It had been conceded in a previous appeal to the Commissioners, on the ground that the direction ought not to have been made, that the main purpose of the transaction of the purchase of the shares was the reduction of excess profits liability and that appeal failed.

The decision of the Commissioners was that the sum expended in the purchase should be properly regarded as an investment by the appellant company and not as capital employed in its business and that the company's liability to excess profits tax should be computed accordingly.

The facts are fully set out in the judgment of MACNAGHTEN, J.

G. G. Honeyman for the appellants.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *Reginald P. Hills* for the respondents.

MACNAGHTEN, J. : The appellant, the Frodingham Ironstone Mines, Ltd., is a company limited by shares which was registered under the Companies Act, on June 1, 1918. It was formed by the late Lord St. Oswald to take over and operate certain ironstone mines which belonged to him, and which he theretofore had been operating himself. About the same time he formed another company called the Nostell Colliery, Ltd., to take over a colliery belonging to him which up to that date he had been working. All the shares in these companies belonged to the late Lord St. Oswald. When he died, he bequeathed the shares to the trustees of his will on the trusts therein contained.

By the Finance Act, 1940, s. 28, it was provided that, where one company held more than a certain percentage of shares in another company, the two companies should be treated as a single unit for the purposes of the excess profits tax. It so happens that the appellant company is a prosperous company making excess profits ; whereas the colliery company is being carried on at a loss. For the purposes of reducing the liability to excess profits tax, the trustees of the estate of the late Lord St. Oswald, who hold all the shares in both the companies, decided that the appellant company should buy all the shares in the colliery company so that that provision might come into effect, and the amount payable as excess profits tax by the appellant company would be diminished.

It was provided by the Finance Act, 1941, s. 35, that, where the Commissioners of Inland Revenue are of opinion that the main purpose for which any transaction was effected was the avoidance or reduction of liability to excess profits tax, they may, if they think fit, direct that such adjustments shall be made as respects liability to excess profits tax as they consider appropriate "so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction." The price paid by the appellant company for the shares of the colliery company was £99,950, of which £19,950 was paid in cash, and the balance of the purchase price remained on mortgage.

There is no doubt that the purchase of the shares of the colliery company was entered into for the purpose of reducing the liability of the appellant company to excess profits tax. Therefore, the Commissioners of Inland Revenue thought fit to give a direction making the adjustments which they considered appropriate so as to counteract the reduction of that liability. The direction they gave was this :

> That the excess profits tax liability of both companies should continue to be computed on the basis that they remained independent companies to which the provisions of the Finance Act, 1940, s. 28 and Sched. V, do not apply.

The result of that direction is that the £19,950 which the appellant company has paid in respect of the purchase of the shares in the colliery company must, for the purposes of the calculation of the excess profits tax of the appellant company, be treated as capital moneys paid away for an investment acquired by the company, with the consequence that the standard of the appellant company, for the purposes of excess profits tax, is proportionately reduced, and the reduction of the standard raises the amount of the excess profits payable by the appellant company. There was an appeal against the direction on the ground that it ought not to have been made, but that appeal failed. There was no alternative appeal that this direction should be modified.

This present appeal is only concerned with the true construction of the direction. It is said that, since the provisions of sect. 35 [of the 1941 Act] enable the Commissioners of Inland Revenue to give directions for adjustments to be made so as to counteract the avoidance or reduction of liability to excess profits tax, it cannot be right that a direction should actually increase the liability to excess profits tax of the appellant company beyond the amount which it would have been if the transaction which gave rise to the power of the Commissioners to give the direction to make the adjustments had never taken place.

The direction seems to me to be perfectly right. Up till the time when the direction was given, for the purposes of excess profits tax, the profits of each of these companies was treated as a separate subject-matter of taxation. That has continued. In their assessment the excess profits tax is to remain the liability of each company separate from the other. In ascertaining the amount, if any, of the tax to which the company is liable, all the transactions which have taken place during the accounting period must be taken into account including the transaction whereby the appellant company parted with £19,950 in respect of the purchase of the shares of the colliery company. As it was in fact a purchase of an investment, it must be so treated in the accounts. That is the construction which the Special Commissioners placed upon the direction, and, in my opinion, they were right.

Therefore, this appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Currey & Co.* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

THOMAS *v.* THOMAS.

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Hodson, J.), October 16, 17, 18, 1945.]

Husband and Wife—Desertion—Quarrels between parties—Wife's withdrawal from cohabitation—Wife's offer to resume cohabitation rejected by husband—Husband continuing in desertion by refusal of wife's offer—Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39), *s.* 4.

The parties were married in Jan., 1944. On Mar. 12, 1945, the wife left her husband because of quarrels and his refusal to provide her with adequate necessities. On June 12, 1945, they met and the wife's offer to return was rejected by the husband. The wife then took out a summons against him for desertion under the Summary Jurisdiction (Married Women) Act, 1895. An order was made against the husband and the findings of the justices were as follows : (*a*) the quarrels and other similar incidents between the parties induced the wife to leave her husband ; (*b*) the refusal by the husband to resume cohabitation on June 12, 1945, and other circumstances, constituted desertion, notwithstanding his subsequent offer on the day of the hearing to resume cohabitation. The husband appealed on the ground that the finding of desertion was unjustified :—

Held : (i) a mere withdrawal from cohabitation by a wife, unaccompanied by any other matrimonial misconduct, entitled her to an order for maintenance if there was repentance and a genuine desire to resume married life, even though such separation on her part had been unjustified in the first instance.

(ii) by the same process a refusal by a spouse to accept a genuine offer to resume cohabitation turned that spouse into a deserter.

(iii) on the facts here, the husband was guilty of desertion.

[**EDITORIAL NOTE.** The principle laid down in *Fitzgerald* v. *Fitzgerald* (1) that desertion can only take place when the facts relied on bring to an end an existing state of cohabitation, has been frequently discussed, and, since the decision in *Pardy* v. *Pardy* (2) it has been inapplicable where the separation existing at the time of the alleged desertion was consensual. It is now held that there is no logical ground for its application where the separation originated in the adverse act of one of the spouses. A wife, therefore, who has withdrawn from cohabitation, may by a genuine offer to return, turn her husband into a deserter, just as it was held, in *Jones* v. *Newtown and Llanidloes Guardians* (4), that a wife who has left the matrimonial home may, by the expression of a genuine desire to return, render the husband once more liable for her necessaries. It must be pointed out that the court was dealing in this case with mere separation and the decision must not, therefore, be regarded as necessarily applicable where there has been some misconduct other than withdrawal from cohabitation.

As to Desertion, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-969 ; and for Cases, see DIGEST, Vol. 27, pp. 306-319, Nos. 2837-2977.]

Cases referred to :

*(1) *Fitzgerald* v. *Fitzgerald* (1869), L.R. 1 P. & D. 694 ; 27 Digest 307, *2845* ; 38 L.J.P. & M. 14 ; 19 L.T. 575 ; *subsequent proceedings* (1874), L.R. 3 P. & D. 136.

*(2) *Pardy* v. *Pardy*, [1939] 3 All E.R. 779 ; [1939] P. 288 ; Digest Supp. ; 108 L.J.P. 145 ; 161 L.T. 210.

*(3) *Jordan* v. *Jordan*, [1939] 2 All E.R. 29 ; [1939] P. 239 ; Digest Supp. ; 108 L.J.P. 104 ; 160 L.T. 368.

*(4) *Jones* v. *Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381 ; 27 Digest 76, *601* ; 89 L.J.K.B. 1161 ; 124 L.T. 23.

*(5) *Thomas* v. *Thomas*, [1924] P. 194 ; 27 Digest 315, *2925* ; 93 L.J.P. 61 ; 130 L.T. 716.

(6) *Russell* v. *Russell*, [1895] P. 315 ; 27 Digest 318, *2960* ; 64 L.J.P. 105 ; 73 L.T. 295.

Appeal by the husband from an order, dated Aug. 1, 1945, made by the justices for the county of Lancaster, sitting at Widnes, under the Summary Jurisdiction (Married Women) Act, 1895, s. 4. The facts are fully set out in the judgment of Lord Merriman, P.

H. C. Mortimer for the appellant.

G. A. Gardiner for the respondent.

Lord Merriman, P. : This is an appeal from the justices for the county of Lancaster, sitting at Widnes. On Aug. 1, 1945, the justices had before them a complaint by the wife that her husband had deserted her. They found the complaint proved, and made an order in her favour for 23*s*. a week. Nothing turns on the question of amount. The order is challenged on the ground that there was, in the circumstances of the case, no justification for the finding of desertion.

This is one of the cases in which the parties were only married a very short time. They were married in Jan., 1944, and a child was born in Aug., 1944. The child died in November, and on Mar. 12, 1945, the wife left the husband and has not since returned to him. We have had all the evidence read to us upon which the justices based their findings. The case on the evidence falls naturally into two parts, and was so dealt with by the justices, and, on the view that I take of the matter, in the light of what counsel for the wife has said to us, I think it will be unnecessary to review the evidence in detail. I have already said that the wife left the husband on Mar. 12, 1945. She did so, she said, because he was always nagging her and insulting her ; but this is clear beyond any doubt, that there was an interview (I think in connection with the household goods) on June 12, and on that day the wife says that she made a definite offer to return, which was rejected by the husband. Thereafter we have correspondence in which it is quite clear that the rival positions about what occurred on June 12 are asserted and re-asserted, the husband denying that any such thing occurred and the wife re-asserting that it did occur, and it is quite plain, on the face of the correspondence, that the husband refused the offer of the wife to return, which was renewed and repeated in these letters, except upon the condition, never withdrawn, that she would admit that she was lying about the interview of June 12.

That raises two distinct positions: first, what was the situation before June 12, with regard to the wife's withdrawal from cohabitation? With regard to that the justices say that they:

> . . . were of the opinion that the constant nagging of the wife by the husband, to use the complainant's words, in addition to his refusal to provide her with adequate necessities, caused her to leave him.

They do not say, in terms, that they consider that the circumstances to which they refer were a sufficient justification for her leaving him; they may have meant to say that. If they so held, and if the evidence warrants such a finding, there is nothing more to be said about this case; the wife would be in the right from the first, and nothing that has occurred subsequently could possibly put her in the wrong. But it is unnecessary, in my opinion, to examine the evidence, because counsel for the wife has said that he is quite prepared to accept that as a mere statement of fact, that these were the things which in fact caused the wife to withdraw from cohabitation, without going the step further and saying that she was justified thereby. I am bound to say that I think that that is a very wise way to deal with the matter, because the note of the evidence does make it clear that the material for saying that there was some grave and weighty reason for breaking up this marriage was somewhat slender. I am content, therefore, to deal with this case on the basis that the justices have not necessarily determined that matter, but have merely stated, quite rightly, that it was these incidents, quarrelling and the like, which induced the wife to leave home.

That brings me, therefore, to the second position: whether, on the footing that there is no finding in her favour that she was justified in bringing the cohabitation to an end on Mar. 12, she can set up a state of desertion against the husband by what she says occurred on June 12. Here again there is a conflict of fact, and upon that the justices find as follows (after the passage which I have already read):

> But later she, desirous of returning to him, informed him that she was desirous of resuming cohabitation, but this the husband refused to do, informing her that it was too late. The justices found that such refusal to resume cohabitation on June 12, 1945, and other circumstances, constituted desertion, notwithstanding his subsequent offer on the day of the hearing to resume cohabitation.

The husband in the face of the court made such an offer, but it is not surprising in view of the terms of his letters, to which I have referred, but which I do not propose to read at length, that the justices paid very little attention to that. They had before them the two conflicting stories about what happened on June 12, and they believed the wife. I see no reason whatever for differing from their conclusion upon that matter, and I propose to deal with this case on the footing that that finding is justified.

That brings me to what I think is the real point of importance in this case, because, I think for the first time, this court is driven to decide whether or not there is anything whatever left of the well-known passage in *Fitzgerald* v. *Fitzgerald* (1). Before I read it, the argument of counsel for the husband, in a word is this: it must now be accepted that when the cessation of cohabitation has been brought about by mutual agreement, if that agreement is brought to an end the resumption of cohabitation is no longer a condition precedent to the assertion of desertion, but in any other circumstances, and, in particular, where the spouse now complaining of desertion was the person responsible for the breaking up of the cohabitation, everything that was said in *Fitzgerald* v. *Fitzgerald* (1) still stands unimpaired. There, after giving instances of what would amount to desertion, Lord Penzance says this ((1869), L.R. 1 P. & D. 694, at p. 698):

> But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, "desertion" in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right

> to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of "desertion without cause."

It is quite clear that whatever qualifications have been made upon that passage in the years between, it ceased to have any validity in the case of a consensual separation after the decision of the Court of Appeal in *Pardy* v. *Pardy* (2). But, counsel for the husband says, that has left untouched the other limb of the sentence: "If the state of cohabitation has already ceased to exist, whether by the adverse act"—I emphasise the *adverse* act—"of husband or wife, 'desertion,' . . . becomes from that moment impossible to either . . ." I have ventured to point out on an earlier occasion that if that sentence is to be taken literally, it prevents the spouse against whom the adverse act has been committed, from asserting subsequently that the other spouse has become a deserter, which, I am bound to say, is a proposition which I would never be prepared to assent to. I cannot really imagine that LORD PENZANCE meant that, but, however that may be, the question we have to face now is whether, assuming this wife not to be in a position to justify her admitted withdrawal from cohabitation on Mar. 12 she could, by what was found to have occurred on June 12, not merely put herself right, but, to use the phrase which counsel for the husband employed, turn the tables on her husband and put him in the position of being the deserter from thenceforward.

I do not propose to attempt to survey all the cases in which this well-known passage in *Fitzgerald* v. *Fitzgerald* (1) has been canvassed and discussed. I am content to excuse myself from doing so by calling attention to the fact that I have done it in outline once before. The passage will be found in *Jordan* v. *Jordan* (3), where I referred ([1939] 2 All E.R. 29, at p. 35) to four cases as examples of the proposition that this judgment was not intended to be and could not be taken as being an exhaustive exposition of the law relating to desertion, and I also pointed out that history shows that it was not even the law which was ultimately applied in *Fitzgerald* v. *Fitzgerald* (1), for, not long after LORD PENZANCE's decision, after some two years or more had expired SIR JAMES HANNEN gave the wife a decree on the grounds of adultery and desertion, though it is plain beyond the slightest doubt that there had been no resumption of cohabitation, there had been no restitution suit, and there had been nothing more on her part than a formal demand that her husband should resume married life.

But we are asked to deal with this matter not upon the basis that *Fitzgerald* v. *Fitzgerald* (1) has been qualified over and over again, but upon the basis that that one sentence is either right or wrong; we are asked to say, one way or the other, whether, in the case where the complainant was originally the wrong-doer, the tables can be completely reversed by an appropriate action on his or her part short of a decree for restitution of conjugal rights. I am prepared to deal with the matter on that footing. I am bound to say that in principle I cannot see that there is any logical distinction between the case in which the original separation was by mutual consent and the case we are discussing. For the purposes of the argument I will assume, as in this case, that the allegation is that the wife was in the wrong in the first instance in withdrawing. In the one case, the consensual separation, the husband is justified in remaining apart by the fact that there has been a mutual consent; in the other case, so long as that state of things continues, he is justified in living apart and in refusing to maintain his wife by the fact that it is his wife who, without justification, has withdrawn from cohabitation. The question is whether, if the wife puts herself right, and restores herself to the position in which she is entitled to be maintained by her husband, there is any reason in principle why, by that very fact, she should not be entitled to make her husband the deserter if he refuses to comply, just as in the case of consensual separation it is established that when the agreement has been repudiated, and the repudiation accepted, so that the separation is no longer consensual, and one of the spouses desires to assert conjugal rights to the full, it is not a condition precedent to the establishment of desertion that cohabitation shall have been resumed.

I wish to make it clear that I am dealing only with the class of case in which there is a mere separation, uncomplicated by misconduct other than withdrawal from cohabitation. We are not, for example, dealing with the case of a wife who has committed adultery, a case which stands in a peculiar position, nor are we dealing with the case of a husband who has driven his wife from home by cruel conduct. There again, special considerations apply. We are dealing with a case where there is a mere separation, assumed to be unjustified on the part of the wife, in the first instance. With regard to such a case, it is clear beyond the slightest doubt that at any time the wife can repent, and by a mere repentance and an expression of a genuine desire to resume married life can restore herself at once to the position in which her husband is again bound to maintain her. That elementary proposition is very well expressed in *Jones* v. *Newtown and Llanidloes Guardians* (4), where the EARL OF READING, L.C.J., says ([1920] 3 K.B. 381, at p. 384) :

> There is no doubt that at common law if a wife chooses wilfully and without justification to live away from her husband she cannot, so long as she continues absent, render him liable for necessaries supplied to her, or for her maintenance by the union, [because that was a case where the union was acting] or for maintenance for herself, for the reason that she has of her own free will deprived herself of the opportunity which the husband was affording her of being maintained in the home. But the relief of the husband from the obligation of maintenance continues only so long as she voluntarily remains absent. Her absence, although wrongful, does not affect the relationship of husband and wife. She is entitled after however long a period of absence to return at any time.

SHEARMAN, J., in the same case, after saying that, so far as he was aware, adultery by the wife was the only case in which the husband's obligation was permanently determined, continues (*ibid.*, p. 385) :

> Where the wife voluntarily and without just excuse leaves her husband, so long as she of her own free will remains absent she cannot pledge his credit for necessaries, and the guardians cannot obtain a maintenance order against him in the event of her becoming chargeable. Her desertion of her husband does not, like her adultery, determine his obligation, it only suspends it during the time that she wilfully absents herself. Here, she might have returned to her husband and called upon him to maintain her at any time before she became insane.

Then it was held that upon her becoming insane her freedom of will came to an end, and the obligation of the husband revived.

I am not upon that point. I am upon the general principle. It is established beyond a shadow of doubt that by taking appropriate steps to repent the wife can re-establish the obligation of the husband to maintain her. The question is whether there is any reason why, by the same process, she should not turn the husband into a deserter without the preliminary of a restitution suit. Quite plainly, it is not necessary for the purpose of re-establishing her right to maintenance. I am bound to say that I can see no logical reason why the process which re-establishes her right to maintenance should not also establish her right to assert that the husband in his turn becomes the deserter, and in my opinion that is the inevitable conclusion from the well-known passage in the judgment of WARRINGTON, L.J., in *Thomas* v. *Thomas* (5). That was a case in which the husband had driven his wife from home by cruel conduct and sought to bring that state of what we call constructive desertion to an end by a mere offer to resume cohabitation. The Divisional Court of this Division had held that in these circumstances such an offer was derisory, and was not sufficient to put an end to the state of desertion, and that decision was upheld by the Court of Appeal. Dealing with the case of a mere withdrawal from cohabitation, uncomplicated by any other matrimonial offence, WARRINGTON, L.J., says ([1924] P. 194, at p. 201) :

> The learned judges of the Divisional Court do not decide, nor do I, that where there is nothing but a turning away of the wife, followed by a genuine expression of a desire on the husband's part for her return, the desertion would continue notwithstanding. In each case the question must be determined on its own merits, and here I think with the Divisional Court that the wife had reasonable cause for her refusal to return, and, therefore, the desertion was not determined.

That being a case in which the husband had driven the wife away by cruelty, the natural antithesis to that case is one in which he had merely turned her out, without any accompaniment of cruelty or anything else but mere desertion. The same thing, *mutatis mutandis*, must apply to the spouse who has merely withdrawn from cohabitation without any concomitant misconduct of another kind. It will be observed that Warrington, L.J., does not say anything about a turning of tables. He merely says, it is true, that desertion in such circumstances cannot be held to continue.

Now let us see how he deals with the other case, the case they were deciding where it was the husband's cruel conduct which had driven the wife out, and where it was his failure to give any assurance that it would not be repeated that was held to justify the wife in refusing to accept a mere offer to resume cohabitation. With regard to such a case he says ([1924] P. 194, at p. 201) :

> It has been determined by this court that a decree for restitution of conjugal rights cannot be obtained by a party whose conduct affords reasonable grounds for a refusal by the other party to afford those rights : *Russell* v. *Russell* (6). In my opinion the same principle applies to the present case ; there was ample ground for the wife's refusal to return, and under those circumstances I think the actual separation must continue to have the quality of desertion by the husband ; otherwise [and these are the important words] I see no alternative except to regard the wife as deserting him, which would be impossible.

Now just see what that means : it must mean that if by a mere offer to resume cohabitation, which is refused by the wife, the circumstances are such that the husband puts himself in the right, he turns the wife into the deserter, and that it was just because the circumstances in that case were not such that he could do so that no such turning of the tables was effected. In my opinion, although it is not expressed in the passage which I quoted first, it necessarily follows from the reasoning of Warrington, L.J., that, if the circumstances are such that the former deserter has merely to make a genuine offer to resume cohabitation to purge himself or herself of desertion, its refusal in turn by the other spouse turns him or her into the deserter ; and that result did not follow in the case with which they were dealing solely because a mere offer was not sufficient to get rid of the misconduct which had driven the wife away. But suppose a case where the wife had indeed been justified in withdrawing by the husband's conduct, but the circumstances have changed—(it is not necessary to go into detail, but I am supposing the class of case in which beyond any shadow of doubt the husband had given such assurances for good behaviour in the future that the wife could not possibly be held justified for all time in refusing to return to cohabitation)—if, in these circumstances, an offer is made which the wife is not entitled to refuse, then the alternative put by Warrington, L.J., would, in my opinion, expressly become operative. In such a case it would be right to say that there is no alternative except to regard the wife thenceforward as deserting him. *A fortiori*, in the case where there is no complication of misconduct and nothing but a mere withdrawal from cohabitation, once the original wrongdoer puts himself or herself right, it seems to me to follow necessarily that by the same process, so long as the other spouse is obdurate, the position that that spouse becomes the deserter is established. Accordingly I am prepared to say that, in my opinion, after the decision of the Court of Appeal in *Pardy* v. *Pardy* (2) the limitation on this subject contained in the passage in *Fitzgerald* v. *Fitzgerald* (1), which I have already read, can no longer be regarded as being the law.

Hodson, J. : I think that this appeal must be dealt with on the footing that the wife's original departure from the husband was wrongful, and counsel for the wife has assented to that course being taken. The justices have given the reasons which the wife assigned for her departure, without in terms saying that they were sufficient in law, and for my part I am bound to say that on the face of them the grounds for leaving are not very strong. The position then arises (and I need not again go over the facts) that the original departure being wrongful, the erring wife has asked to be restored to her position and the request has been refused, and it has been argued that in that state of affairs the husband cannot be a deserter because that would be turning the tables upon him, his wife having up to that moment been the deserter herself.

I agree that since the decision of the Court of Appeal in *Pardy* v. *Pardy* (2) it is quite impossible to hold that where the original parting is consensual, desertion cannot arise in circumstances like this, and I also agree that it is impossible to draw any distinction in principle where the original separation is brought about by the adverse act of one spouse or the other. After all, in many cases where there is a separation agreement, that agreement follows after a state of desertion. There the principle in *Pardy* v. *Pardy* (2) would surely apply, and the agreement could be brought to an end and desertion could arise even on the husband's own argument, but he says that, if the desertion continues throughout, the tables cannot be turned in any circumstances except by the bringing of a suit of restitution of conjugal rights. That is a very odd circumstance, because on facts like these, where there has been a mere turning away of one spouse from the other, there can be no defence to a suit for restitution of conjugal rights, and it is said that the court must perform what amounts, really, merely to a ministerial act, in order to give the one who is then in the wrong the necessary time for repentance—14 days, or such other time as the court might give. But that would be a position in which I should be reluctant to think that the court was now placed.

The question, as LORD MERRIMAN, P., has said, of turning the tables, had occurred to WARRINGTON, L.J., in *Thomas* v. *Thomas* (5), where *Fitzgerald* v. *Fitzgerald* (1), relied upon by the appellant here, was not cited, and where the precise point was not in question, but the view of WARRINGTON, L.J., was, in my opinion, perfectly clear. Since the decision in *Pardy* v. *Pardy* (2) there is no longer any room for doubt that the principle laid down in *Fitzgerald* v. *Fitzgerald* (1) has been got rid of in the case of a parting by consent, and I see no reason at all to doubt that it has gone now in a case where the original parting was by the adverse act of one spouse or the other. Indeed, I go so far as to say, even though I am unable to recollect the details of any particular cases, that there have been in past years in these courts, maybe in undefended cases, decrees pronounced where the original wrongdoer has been the petitioner, and the only way in which he or she has put the matter right has been by making an approach to the other side, whether personally or by letter or both, and, as in this case, the approach has been rejected.

I agree, therefore, that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Sydney Haworth*, Liverpool (for the appellant); *Stanley Williams*, Bootle (for the respondent).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

STENOR, LTD. v. WHITESIDES (CLITHEROE), LTD.

[COURT OF APPEAL (Lord Greene, M.R., du Parcq and Morton, L.JJ.), November 1, 2, 5, 6, 7, 8, December 11, 1945.]

Designs—Registration—Design for fuse for use in vulcanising machine—Novelty claimed only for shape of fuse—Fuse only for use in a particular type of machine—Shape dictated solely by functional considerations—Whether "a mere mechanical device"—Size of article to which design has been applied not relevant—Patents and Designs Acts, 1907-1938, *ss.* 49 (1), 93—*Designs Rules,* 1932-1938, *r.* 17.

S., Ltd. was a company engaged in marketing vulcanising machines for repairing tyres and other articles. On Jan. 25, 1939, the design for a metal cut-out or fuse for use in these machines was registered by them under the Patents and Designs Acts, 1907-1938, and the Designs Rules, 1932-1938. The claim of novelty indorsed on the application for registration was in regard to "the shape or configuration of the cut-out or fuse as shown in the representations." The fuse to which the design was actually applied was very small, being little more than half the average thumb nail in length. In an action brought by S., Ltd. against W. (C.), Ltd. for infringement of their copyright in the design, W. (C.), Ltd. challenged the validity of the design and counterclaimed for rectification of the register of designs by its removal therefrom. The trial judge dismissed S., Ltd.'s action and made an order on the counterclaim for the register to be rectified by the removal therefrom of S., Ltd.'s design on the ground that it was not a "design" within the Acts, (*a*) because it was not a "new or original design," as required by sect. 49 (1), and (*b*) because of the small size of the articles to which it was applied. On appeal, it was contended by S., Ltd (i) that the design was within the definition contained in sect. 93 of the

Acts; (ii) that the size of the articles to which the design had been applied was irrelevant. On behalf of W. (C.), Ltd., it was contended that the design was not a "design" within the definition in sect. 93 of the Acts, because it was "in substance a mere mechanical device." On the evidence of S., Ltd.'s witnesses, it was found that the shape shown in the registered design was dictated solely by functional considerations and the fuses to which it was applied were intended solely to operate a vulcanising machine which could be operated by these fuses and by no others. It was not clear, however, whether the vulcanising machine which was to be operated by a fuse made according to the design was already in existence when the design was registered on Jan. 25, 1939, or whether it then existed only in the designer's mind:—

Held: (i) the design in question was in substance a mere mechanical device, because novelty was claimed only in regard to the shape or configuration of the fuse and that shape or configuration was dictated entirely by the function which the fuse had to perform in a particular machine. Whether the particular machine in which the fuse was to be used had been manufactured at the date when the design was registered, or whether it existed only in the designer's mind, was immaterial.

(ii) since S., Ltd.'s design was "in substance a mere mechanical device," it was not a "design" within the definition in sect. 93 of the Patents and Designs Acts, and it was not, therefore, a proper subject for registration under the Acts.

(iii) [*per* Morton, L.J.] the fact that a design had been applied only to articles of small size would not affect its registration.

Dover, Ltd. v. *Nurnberger Celluloidwaren Fabrik Gebruder Wolff* (4) *distinguished.*

[**EDITORIAL NOTE.** This case illustrates the distinction drawn by Luxmoore, J., in the *Kestos* case (2) between a patent and a design, namely, that an article produced for a particular purpose may be the subject of a patent but not of a registered design. In the case of a design it is a mere mechanical device, the features of which are solely functional. The validity is to be determined at the time of application to register, and it is immaterial that at the time of such application the function which it is intended to perform cannot be carried out because the machine in which it is to be used is not yet constructed. No objective test of whether a design is registrable can be devised, and the matter may have to depend upon facts which were only known to the person submitting the design for registration.

Morton, L.J., refuses to accept the size of the design as a test of whether it is capable of registration, but as regards a design which cannot be inspected without a magnifying glass he reserves consideration until the question actually arises.

As to Registrable Designs, see HALSBURY, Hailsham Edn., Vol. 32, pp. 682-688, paras. 994-999; and for Cases, see DIGEST, Vol. 43, pp. 246-248, Nos. 884-893.]

Cases referred to:

*(1) *Tecalemit, Ltd.* v. *Ewarts, Ltd.* (*No.* 2) (1927), 44 R.P.C. 503; 43 Digest 247, *892*.

*(2) *Kestos, Ltd.* v. *Kempat, Ltd., and Vivian Fitch Kemp, Re Kestos, Ltd. Registered Design* (*No.* 725,716) (1935), 53 R.P.C. 139; Digest Supp.

(3) *Re Bayer's Design* (1907), 24 R.P.C. 65; *affd., sub nom. Bayer* v. *Symington, Re Bayer's Design* (1907), 25 R.P.C. 56; 43 Digest 246, *886*.

*(4) *Dover, Ltd.* v. *Nurnberger Celluloidwaren Fabrik Gebruder Wolff*, [1910] 2 Ch. 25;, 43 Digest 251, *914*; 79 L.J.Ch. 625; 102 L.T. 634.

Appeal by the plaintiffs from an order of Romer, J., dated May 18, 1945. The facts are fully set out in the judgment of Morton, L.J.

K. E. Shelley, K.C., and *James Mould* for the appellants.

Kenneth R. Swan, K.C., and *G. H. Lloyd-Jacob, K.C.*, for the respondents.

Cur. adv. vult.

Lord Greene, M.R. [read by du Parcq, L.J.]: I have had the advantage of reading the judgment which is about to be read by Morton, L.J. I am in complete agreement with that part of it which deals with the question whether the so-called design is in substance a mere mechanical device, and the question whether the smallness of the article to which it has been applied is sufficient to prevent the design being a good registrable design. I have a few words of my own to add on the former topic.

Counsel for the appellant plaintiffs contended that nothing could be a mere mechanical device which was not, so to speak, self-contained: or, in other words, that an article (such as a key or a spanner) intended to operate another article or piece of mechanism would not fall within the expression. I am quite unable to accept this view, which would lead to a large and obviously undesirable expansion of the class of registrable designs. But his main argument, apart from his submissions on the facts, was that the test to be applied must be a purely objective one, by which he meant that the question whether or not an alleged design is, or is not, in substance a mere mechanical device must be answered by reference to the entry on the register considered in relation to facts known to the public (or the particular branch of the public concerned with articles of the kind in question) at the date of registration, and to nothing else. It is curious to find that there is no authority in point. But, in my opinion, the argument is unsound. It may be inconvenient, as counsel for the appellant plaintiffs contended, to have to examine into facts which at the time of registration might well not be known to anyone except the person submitting the design for registration. But to allow a person to obtain a monopoly in an article designed solely with a view to operating a piece of mechanism invented by him, and unknown to anybody else, which he subsequently manufactures and puts on the market would lead to an extension of monopolistic rights which the legislature cannot, I think, have intended. The judgment of ROMER, J., in the *Tecalemit* case (1) can usefully be referred to in this connection. It seems to me that the inconveniences which counsel for the appellant plaintiffs says will flow from the adoption of any principle other than that which he puts forward can to a great extent be avoided by a strict compliance with the Designs Rules, 1932-1938. By r. 17:

> Every application [for registration of a design] shall state the article or articles to which the design is to be applied and where the Comptroller so requires, the applicant shall further state for what purpose the article to which the design is to be applied is used . . .

One reason why this power to inquire into the purpose for which the article is used was given to the Comptroller may well have been to assist him in deciding whether the alleged design is in substance a mere mechanical device. An accurate answer to such an inquiry, if made, and (in many cases) the mere statement of the article to which the design is to be applied, may clearly establish, or at least afford grounds for thinking, that the case is one of a mere mechanical device. In the present case, we have not seen a copy of the application, but the language contained in the certificate is no doubt based upon what was stated in it. In the certificate the article is stated to be "a metal cut-out or fuse for use in a vulcanising apparatus." In truth, the article was more than a fuse. It was a combined fuse and "key"; and it was (on the facts) intended for use in a particular form of vulcanising apparatus and, moreover, one which could only be made to work by means of a "key" of this particular shape. If these facts had been brought out, the true nature of the alleged design would at once have been apparent.

I do not think it necessary to express any concluded opinion upon the matter of novelty dealt with by ROMER, J., in his judgment. It must not be taken from this, however, that I agree with his reasoning or with the conclusions to which he came upon that matter.

DU PARCQ, L.J.: I also have had the advantage of reading the judgment of MORTON, L.J. Although I was much impressed by the proper insistence of counsel for the appellant plaintiffs on the difficulties which might be occasioned by any departure from what he called an objective test, I have come to the conclusion that the reasoning by which MORTON, L.J., supports his view that we are here dealing with what is in substance a mere mechanical device is sound and convincing.

As to the reasons given by ROMER, J., for his decision, I wish to associate myself with the observations of the Master of the Rolls.

I agree that the appeal should be dismissed.

MORTON, L.J.: In their statement of claim in this action the plaintiffs, who are the registered proprietors of design No. 833,097, alleged that the defendants had infringed the plaintiffs' copyright in their said design. They claimed an injunction and the usual ancillary relief. The defendants denied infringement, pleaded that if there had been infringement it was innocent and committed without knowledge of the plaintiffs' alleged rights, and relied upon the Patents and Designs Acts, 1907-1938, s. 54 (1), the provisions of which were not, as they contended, observed by the plaintiffs. The defendants also challenged the validity of the plaintiffs' design on several grounds, and they counterclaimed for rectification of the register of designs by the removal therefrom of the plaintiffs' design. ROMER, J., held that the plaintiffs' design was invalid because it was not " new or original " within sect. 49 (1) of the Patents and Designs Acts. He also held that the design was not a " design " within the meaning of the Acts, because of the small size of the articles to which the design was applied. He expressed the view that the defendants were altogether unaware of the plaintiffs' copyright in their design, and that the sale of the articles which were alleged to be infringements of copyright was effected in all innocence and without any intention of infringing the rights of any other persons. The action was dismissed with costs. On the counterclaim the judge made an order for the register to be rectified by the removal therefrom of the design No. 833,097, and ordered the plaintiffs to pay the defendants' costs of the counterclaim.

The plaintiffs appeal. Counsel for the appellant plaintiffs conceded that he could not ask this court to reverse the order made in the action; the conduct of the defendants did not come within sect. 60 (1) (*a*) of the Acts and, having regard to the judge's finding of fact that the defendants had acted innocently, their conduct did not come within sect. 60 (1) (*b*). Accordingly, the plaintiffs could not succeed in the action even if their design were held to be valid. The whole object of this appeal is to obtain a reversal of the decision of ROMER, J., [on the counterclaim] that the plaintiffs' design is invalid, and of his order directing the removal of that design from the register.

Counsel for the appellant plaintiffs contended that their design is a " design " within the definition contained in sect. 93 of the Acts, that it is a " new or original design " within sect. 49 (1), and that the size of the article to which the design has so far been applied is irrelevant. Counsel for the respondent defendants relied upon two contentions before this court: (i) the plaintiffs' so-called design is not a " design " within the definition in sect. 93 of the Acts, because it is " in substance a mere mechanical device "; (ii) even if the plaintiffs' design is a design within sect. 93, it is not " new or original." Both of these contentions were put before ROMER, J., at the hearing, but he did not deal with the former contention in his judgment. No doubt he thought it unnecessary to do so, as he was of opinion that, even if the plaintiffs' design was a " design " within the Acts, it was not a new or original design. Counsel for the defendants did not press before us any argument based on the small size of the articles to which the design has so far been applied, and for the moment I shall disregard that point.

The plaintiffs market vulcanising machines for repairing tyres and other rubber articles, and they, or their predecessor in business, Steiner (who is now their managing director), have done so for some years past. One of the requisites for the working of these vulcanising machines is the provision and application of a certain degree of heat; and each of the machines contains, as essential contributions to its purpose, an electric heating element and a fusible element. When the machine is in use the fusible element acts at first as a fulcrum, but when it has become heated by the electric heating element to a predetermined temperature, it disintegrates and thus causes a break in the electric circuit, so that no further heat is engendered. It is the design applied by the plaintiffs to those fusible elements (or fuses) which is in issue in these proceedings.

The certificate of registration certifies:

> In pursuance of and subject to the provisions of the Patents and Designs Acts, 1907-1938, and the Designs Rules, 1932-1938, the design, of which a copy is annexed, has been registered in the name of Leonard Steiner, trading as L. Steiner, in class 1 as of Jan. 25, 1939, in respect of the application of such design to a metal cut-out or fuse for use in a vulcanising apparatus.

The drawings annexed to the design show in perspective view, profile view and end view a circular bar or rod. The centre part of the rod is somewhat thicker than the two end parts and is divided or separated therefrom by bevelled collars. The central portion of the rod is slightly longer than the two end parts. The design, as shown in the drawings, possesses a definite appearance, but, as no scale is shown, no idea is afforded of the size of the object drawn other than what can be gathered from the verbal description of the application of the design which is contained in the certificate. In fact, the fuse to which the design has so far been applied is a minute object, its length being little more than half of that of the average thumb nail. The claim of novelty which is indorsed on the application is :

> The shape or configuration of the cut-out or fuse as shown in the representations.

Turning to the questions before us for determination, it seems to me logical to consider first whether the plaintiffs' design is or is not a design within the definition in sect. 93. The question whether it is a new or original design cannot arise unless and until this first question has been answered in the affirmative. The definition of " design " in sect. 93 of the Acts is as follows :

> " Design " means only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye ; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device.

I have come to the conclusion that the plaintiffs' so-called design is in substance " a mere mechanical device." These words were explained in *Kestos, Ltd.* v. *Kempat, Ltd.* (2) by LUXMOORE, J. (53 R.P.C. 139, at p. 151) as follows :

> A mere mechanical device is a shape in which all the features are dictated solely by the function or functions which the article has to perform : see *Tecalemit, Ltd.* v. *Ewarts, Ltd.* (*No.* 2) (1). In other words, if a person produces an article for a particular purpose, though that person may obtain the grant of letters patent for it, the producer cannot obtain a monopoly of that article by registration of a design for it. The only protection given by the registration is for the particular form of the article shown in the design registered. Moreover, the particular form must possess some features beyond those necessary to enable the article to fulfil the particular purpose, but the fact that some advantage is derived from the adoption of a particular shape does not exclude it from registration as a design : see *Re Bayer's Design* (3).

Having regard to the words " in substance " in the definition in sect. 93 of the Acts, the court must look to the real substance of the matter, as revealed in the evidence given at the hearing. After a careful reconsideration of all the evidence in the present case, I have reached the conclusion that the plaintiffs' design is a shape in which all the features are dictated solely by the function which is to be performed by the article to which the shape is applied, and that that shape possesses no features beyond those necessary to enable the article to fulfil its function.

The history of the matter begins in 1936. From 1936 to 1938 and, it would appear, right on to the time when the machine exemplified by exhibit D.1 was put on the market, the plaintiffs were marketing vulcanising machines of the type exemplified by the exhibit P.11. In this type there was no cover over the mechanism, and the machine could be worked with fuses which were merely a straight piece of wire of the correct alloy. It could also be worked with a fuse made according to the registered design, but such fuses were not used on the P.11 type of machine during 1936 to 1938. In Dec., 1938, Steiner, as the inventor, applied for letters patent for :

> Improvements in or relating to vulcanising machines for repairing motor vehicle tyres and other rubber articles.

The provisional specification was lodged at the Patent Office on Dec. 14, 1938, and the complete specification on Dec. 24, 1938. Letters patent No. 522,543 were granted as a result of this application. The drawings attached to the complete specification show a vulcaniser embodying the various features of the invention, and fig. 5 is a representation of a fuse of somewhat unusual shape. The vulcaniser has a lid or casing in which there is a slot so shaped that it will allow only a fuse of the shape illustrated in fig. 5 to pass through. The inventor does not, however, confine himself to a fuse of the shape illustrated, for he says, at p. 3 of the provisional specification :

> The fuse 16 employed to operate the switch mechanism may be of the form illustrated by fig. 5, and the edges of the slot 15 are correspondingly shaped to form a vertical slit to allow the fuse 16 to pass there-through.

His claims 11, 12 and 13 are as follows :

> 11. For use with a heating element according to claim 10, fusible members suitably shaped to pass through said insertion slot. 12. Heating elements for vulcanising machines substantially as herein described with reference to and as illustrated by the accompanying drawings. 13. Fusible members for operating heating elements according to any of the preceding claims, substantially as illustrated by fig. 5 of the accompanying drawings.

The provisional specification contains the following passage :

> In order to ensure that the switch mechanism can only be operated by the correct fuse, designed to disintegrate at the proper temperature according to the composition of the fusible alloy of which it is made, the correct fuses are made of a specific shape corresponding to that of an insertion slot in the casing of the switch mechanism, whilst the pivoted plate on which the fuse falls has a transverse slot on which the fuse falls which is too small in diameter to permit the correct fuse to drop through, but will allow a fuse of too small a diameter to fall through the plate and out of the casing through a hole, so that on depressing the operating member the switch mechanism will not operate. The correct fuse will, therefore, constitute a kind of key for operating the switch mechanism, which cannot be operated by an incorrect key.

Thus it is clear that in Dec., 1938, Steiner had invented a vulcanising machine with a casing inclosing the switch mechanism. It was a feature of his invention that the mechanism could only be operated by a fuse of the right shape and dimensions. He points out that a correct fuse will constitute a key for operating the switch mechanism and it is his intention that the mechanism will only operate if the correct key is used. If Steiner or the plaintiff company had succeeded in registering, as a design, the design shown in fig. 5 of the drawings attached to the complete specification, I think it is plain that such a registration would have been invalid, as the article to which that design was applied would clearly be " a mere mechanical device " within the definition of that term which was given by LUXMOORE, J., in the passage quoted above. The design now in question having been registered on Jan. 25, 1939, on Nov. 30, 1939, Steiner made application for another patent, as a patent of addition to No. 522,543. Letters patent No. 533, 816 were granted as a result of that application. In the complete specification Steiner says (at p. 1) :

> In conformity with my prior invention the machine comprises an electric element and a control switch therefor, which is operated, through a train of mechanism inclosed within a casing, by an operating member external to the casing, the said train of mechanism being completed and rendered operative by a fusible element inserted through a slot in the casing and transferred into a position where it is subject to the heat of the heating element and at the same time serves as a fulcrum for a contact-carrying member which when rocked about said fulcrum closes the circuit of the element. The particular advantage of this mechanism lies in the fact that the circuit can only be closed with the aid of the fusible element and only fusible elements of the predetermined correct shape which are so designed as to have the correct melting temperature and cause the heating element to attain the right degree of heat can be inserted into the casing and will be brought into position to serve as the fulcrum essential to the operation of the switch closing train of mechanism.

He continues (at p. 2) :

> Fig. 5 shows a suitable form of fusible member.

Fig. 5 is, in substance, a reproduction of the registered design. On p. 2 the following passage occurs :

> The casing 11 has an insertion slot 15 for the operating fuse member 16, which may be of the shape shown in fig. 5, or may be of any other selected shape. The insertion slot 15 corresponds in profile with the shape of the fuse member 16, so as to reject any fuse member having a part of greater thickness than the width of the insertion slot 15 at the corresponding part of its length. After insertion through slot 15 a fuse member 16 falls on contact carrying member 8, along a transverse slot formed therein between a lip 19 and a depressed lip 18. This slot 17 is of such a width that a fuse 16 of correct maximum thickness is retained lying along the slot, but a fuse of too small a maximum thickness drops through the slot 17 and falls out of the casing 11 through opening 20.

It is plain from the passage just quoted and from certain other passages that the inventor was not limiting his monopoly to any particular shape of fuse ; but it is equally plain that any fuse to be used for rendering the patented machine operative must be of a shape which would pass through the slot in the casing and would not pass through the transverse slot in the mechanism between the lip 19 and the depressed lip 18.

In or about Dec., 1939, the plaintiffs put on the market a vulcanising machine of the type exemplified by exhibit D.1. It is established by the evidence that D.1 is the machine described and illustrated in the specification No. 533,816. At this point it is convenient to quote the evidence-in-chief of the plaintiffs' first witness, Mr. C. S. Parsons, a chartered patent agent and consulting engineer of over 20 years standing. He was the draftsman of specifications Nos. 522,543 and 533,816. In the transcript of evidence the following passage occurs :

> . . *Q.*—Where you consulted in 1938 in connection with the fuses that were being used in the business of the plaintiff company ? *A.*—Yes, I was.
>
> *Q.*—Would you just tell my Lord the purpose of these fuses and how they work ? *A.*—The purpose of the fuse is to determine the heat attained by the heat and pressure vulcanising machine and the time during which that heat operates. That depends on the nature of the alloy of which the fuse is made and its size, and to a certain extent upon its thickness. The machine used by my clients had been using a fuse which was an ordinary straight piece of wire of the correct alloy, but it was found in practice that many people supplied with this machine were in the habit of running short of fuses and putting in an ordinary piece of wire, or something which was not of the right size and consistency in regard to alloy, with the result that the machine operated badly and vulcanising was incorrectly performed. In order to overcome this difficulty of people using incorrect fuses in the machine, my clients wished, if they could, to produce a fuse of their own and obtain registration of a design of that fuse so that they could ensure that only the correct fuses for use in their machines were available.

The concluding words " were available " are somewhat obscure, but I think they must mean " could be used." This last sentence is of great importance when one is considering whether or not the shape of the fuses produced by the plaintiffs was dictated by functional consideration. There is no doubt that from the time when machines of the type D.1. were put on the market, fuses shaped in accordance with the registered design were used in these machines. It is equally clear, to my mind, reading the evidence as a whole, that only fuses shaped in accordance with the registered design could operate the D.1 machines satisfactorily. If the evidence stopped there, however, it would fall short of establishing that the shape of fuses made in accordance with the registered design was dictated solely by the function of acting as the " key " for operating the mechanism of a particular vulcanising machine.

Counsel for the appellant plaintiffs contended, in my view correctly, that the validity of the registration must be determined as at the date of registration, and that if the design was not then a mere mechanical device, and the registration was, therefore, valid, it could not be rendered invalid *ex post facto*, even if features such as the collars on the fuses were subsequently made to serve a mechanical purpose. He suggested that the collars were intended merely to distinguish the plaintiffs' fuses from those of other manufacturers, and that the machine D.1 was invented later, the slots in the casing and in the mechanism being shaped so that only fuses made in accordance with the registered design could operate the machine. If this were the true conclusion to be drawn from the evidence I think that the plaintiffs would succeed on this part of the case. To my mind, however, the real effect of the evidence is that some time in 1938 Steiner conceived the idea of making fuses " of a specific shape corresponding to " the " insertion slot in the casing of the switch mechanism " of a vulcanising machine ; see the passage already quoted from the provisional specification No. 522,543.

The opening portion of Steiner's evidence is as follows :

> *Q.*—Are you at present the managing director of Stenor, Ltd. ? *A.*—I am, yes.
>
> *Q.*—Are they a company which took over a business carried on previously under your own name ? *A.*—Exactly.
>
> *Q.*—Did you put on the market a machine for vulcanising patches for repairing tyres in which a fuse was used consisting of a small length of straight wire ? *A.*—Exactly.
>
> *Q.*—Over what period was that machine on the market ? *A.*—It was put on the market and I sold the first machine in July, 1936, in this country.
>
> *Q.*—Were there a number of these machines distributed to garages up to, at any rate, the end of 1938 ? *A.*—Yes, quite a large number.
>
> *Q.*—At some time in 1938 did you apply your mind to preparing a special design of fuse and getting it registered ? *A.*—Yes, I did.
>
> *Q.*—Just anticipating a little bit, ultimately did you approve the design which is the

> subject matter of the present registration, and give instructions for it to be registered ? *A.*—Yes. I mean before we had several trials ; we tried different designs out which did not work, and then afterwards I started with the design with the two collars.

The words " which did not work " seem to me very significant. They indicate that Steiner was looking for a "special design " which could " work " something, and finally evolved the registered design ; the context indicates that the thing which it was intended to work was a vulcanising machine. The evidence continues :

> *Q.*—When the design was registered, which I think is on Jan. 25, 1939, what machines had your company distributed for vulcanising ? *A.*—None at all—I mean none at all of the new design.
>
> *Q.*—I will put the question again. At that date, Jan. 25, 1939, what machines were in existence, marketed by Stenor, Ltd., for vulcanising patches ? *A.*—Machines taking the straight fuse, the little straight pin.

It is to be observed that the first of these questions relates to machines which had been distributed, and the second question appears to be carefully limited to machines which were not only in existence on Jan. 25, 1939, but were on the market at that date. There is nothing in the replies to negative the existence of an experimental machine which was intended to be worked by fuses made according to the registered design. The evidence continues :

> *Q.*—The straight piece of wire ? *A.*—And also taking a bulged fuse which I put on a bit later.
>
> *Q.*—Have you got an example of the old machine ? *A.*—Yes ; I have also the two kinds of fuses.
>
> *Q.*—Just stick to one thing at a time. I want the old machine that was adapted to take a straight piece of wire ? *A.*—Yes.
>
> *Q.*—In that machine could you use a fuse in accordance with this registered design if you wanted to ? *A.*—Yes, definitely.
>
> *Q.*—And would it work all right ? *A.*—Yes.
>
> *Q.*—In fact you have tried it and it does work ? *A.*—Yes ; I mean it had to work, because all these machines on the market had to be used.

I take this last sentence as meaning that the machines of the old design P.11 had to be used right on in 1939 until the new machine D.1 was put on the market, and for this reason fuses according to the registered design were used in machines of the P.11 type. Continuing with the evidence :

> *Q.*—When a fuse made in accordance with your registered design was put into one of those old machines did the two collars that are illustrated on the design serve any functional purpose at all ? *A.*—No. You see it here—no function at all.

That answer is obviously quite correct ; the old machines could be worked equally well with a straight fuse or with a fuse made in accordance with the registered design, but the two collars were of no advantage if fuses made in accordance with the registered design were used in such machines. I now come to two answers which seem to me to be of great importance :

> *Q.*—After the design had been produced, did you set to work to improve the machine ? *A.*—Yes ; I was working on it already, but I was experimenting at the time.
>
> *Q.*—When did you produce the new type of machine in a condition ready to be marketed ? *A.*—I think we marketed the new machine only late in 1939, after the beginning of the war. As a matter of fact I could not say the exact date, but it could be easily checked.

Subsequently the witness identified the machine D.1 as being the " new machine " referred to here, and also as being in accordance with patent No. 533,816.

As I understand these answers, the position was that at the time when the design was registered, Steiner was experimenting on the new type of machine which was to be worked by fuses made according to the registered design. Whether or not there was in existence on Jan. 25, 1939, a machine which could only be worked by a fuse made according to the registered design, it seems to me clear from this evidence, read in conjunction with the whole of Mr. Parsons' evidence, that the registered design came into being as a result of Steiner's endeavour to find a " special design of fuse " which would " work " and that he was working at the same time on the machine which ultimately emerged in the form D.1. The evidence of Mr. Parsons and Steiner should, I think, be read in conjunction with specification No. 522,543 ; the fuse and machine illustrated in that specification are linked together in exactly the same way as a fuse made according to the registered design is linked up with D.1. In each case the fuse is intentionally so shaped that it is the " key " which unlocks the mechanism, and no fuse of any other shape will unlock it. Whether there was in existence, on Jan. 25, 1939, a vulcanising machine to which the " key " was a fuse made according to the registered design or whether such a machine then existed only in Steiner's mind, I do not know. Steiner's answer : " I was working on it already, but I was experimenting at the time " leads me to think that such a machine was in existence, though it had not been perfected. However this may be, I have formed the conclusion, on the evidence of the plaintiffs' own witnesses, that the shape shown in the registered design was dictated solely by functional considerations, and the fuses to which it was applied were intended solely to operate a vulcanising machine which could be operated by these fuses and by no others.

In my view, if a man produces a design for a fuse, claiming novelty only for the shape or configuration of the fuse, and if every feature of that shape or configuration is dictated by the function which that fuse has to perform in a particular machine, the design is in substance a mere mechanical device, and it matters not whether the particular machine in which the fuse is to be used has been manufactured at the date when the design is registered, or exists only in the mind of the designer. We were not referred to any case which covers the point, but, in my view, the words of Luxmoore, J., (53 R.P.C. 139, at p. 151), in the *Kempat* case (2) are most apposite :

> . . . if a person produces an article for a particular purpose, though that person may obtain the grant of letters patent for it, the producer cannot obtain a monopoly of that article by registration of a design for it.

If the view which I have just expressed were wrong, a man could obtain a monopoly for a machine, without taking out a patent, in the following simple way ; having conceived a machine which could only be operated by using an article of a particular shape, and being doubtful if his machine was patentable he could register the design for the article and thereby obtain, in effect, a monopoly for his machine. No one could manufacture the article according to the registered design, and accordingly it would be useless for any one to manufacture the machine, since he could not use it. Counsel for the appellant plaintiffs contends that if, for the purpose of determining whether an alleged design is or is not a mere mechanical device, it is permissible to consider what was in the mind of the designer at the date of registration, great difficulties will arise. For instance, supposing a design is registered and the benefit of it is assigned to a *bona fide* purchaser for value without notice of any flaw in the registration, the purchaser may subsequently find that the registration is invalid, for a reason which he could not possibly discover at the time of his purchase, *i.e.*, the existence of a particular machine in the mind of the designer at the time when the design was registered. No doubt cases of hardship may arise, but the view which I have formed seems to me to follow inevitably from the language of sect. 93 of the Acts. That " which is in substance a mere mechanical device " is not registerable as a design, and the answer to the question whether an alleged design is or, is not, in substance a mere mechanical device seems to me to depend upon the facts of each particular case. I cannot think of any objective test, to be applied by the intending purchaser of a registered design, which will infallibly tell him whether it is or is not in substance a mere mechanical device, and it seems to me that any purchaser of a registered design must take this risk. As I have already pointed out, strange results would follow if the view which I have expressed is wrong, and the door would be opened to grave abuse of the monopoly conferred by registration of a design. I should add that I have not overlooked certain later passages in Steiner's evidence, in which he suggested that the shape shown in the registered design was not wholly dictated by any functional considerations, but I think he had already let the truth out in the answers to his counsel which I have already quoted, and his answers to questions in cross-examination seem to me evasive, and not in accordance with the history of the matter as revealed in his earlier answers, in the evidence of Mr. Parsons, and in the patent specifications.

I do not think it is necessary to refer to any of the numerous cases as to " mode or principle of construction " or as to " mere mechanical device," which were cited to us. Accepting as I do the definition of a " mere mechanical device " which I have already quoted, I think that, in deciding this particular question, the court has to determine, on the evidence before it, whether the design in question does or does not fall within that definition, and earlier decisions are only of use by way of illustration. For the reasons I have stated, I am satisfied that the " design " which we are considering was not a proper subject for registration, because that which has been registered is, in substance, a mere mechanical device.

I would dismiss the appeal, on this ground. I cannot, however, agree with the view of ROMER, J., that the alleged design is not registrable because it has been applied to a fuse of small size. That which was registered was a design which might have been applied to a fuse of any size. Although the plaintiffs have so far applied it to a fuse of small dimensions, they might at any time have applied it to a fuse twice as large. Under the Designs Rules, 1932-1938, r. 17, the applicant for registration of a design is bound to state the article or articles to which the design is to be applied, and, where the Comptroller so requires, he is bound to state the purpose for which the article to which the design is to be applied is used and the material of which it is made. He is not, however, bound to specify the size of the article to which the design is to be applied. In the course of his judgment ROMER, J., said :

> In my judgment, if an article in respect of which a design for shape is registered and to which it is applied is so small that the naked eye cannot fairly discern or appreciate the features of that design, or ascertain with a reasonable degree of certainty what those features are, or, as a corollary, whether they have been pirated, then the design is not a design as defined by the Act and is accordingly outside the scope of statutory protection and its registration should be cancelled.

In the present case the members of the court have found no difficulty in discovering the features of the design without the aid of a magnifying glass, but I am by no means sure that " the eye " in sect. 93 of the Acts means, and means only, the eye unassisted by a magnifying glass ; and if that question should ever arise, I should desire to give it further consideration.

ROMER, J., continued :

> I notice that in the *Dover* case (4) BUCKLEY, L.J., said ([1910] 2 Ch. 25, at p. 31): " this Act was intended to protect designs which really have some merit by way of novelty or originality, and not to give colour to such paltry and trivial claims as have been set up in this case." I feel that a claim to protection in respect of the shape of an article which is so tiny as to present no definite appearance other than that of a thick piece of wire with two excrescences on it might also be described, without unfairness, as " paltry and trivial," and I, therefore, feel no reluctance in ordering, as I propose to order, that the design shall be expunged from the register.

With all respect to the judge, I do not think that the passage which he quotes supports his view. I think it is clear that BUCKLEY, L.J., was there speaking only of claims which were " paltry or trivial " in the sense that the design for which originality was claimed differed only to a paltry or trivial extent from its predecessors.

If I had come to the conclusion that that which was registered was a " design " within sect. 93 of the Acts, it would have been necessary for me to consider whether it was a " new or original design " within sect. 49 (1). As matters stand, this question does not arise, and I shall only add that I am inclined to agree with the decision of ROMER, J., on this point, though I doubt if I could accept without qualification the whole of the reasoning by which he arrived at that decision.

In my judgment, this appeal should be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors : *Warren & Warren* (for the appellants) ; *Stocken, May, Sykes & Dearman*, agents for *Baldwin, Weeks & Baldwin*, Clitheroe (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

JOYCE *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

[House of Lords (Lord Jowitt, L.C., Lord Macmillan, Lord Wright, Lord Porter, Lord Simonds), December 10, 11, 12, 13, 1945, February 1, 1946.]

Criminal Law—Treason—Allegiance—Alien—Holder of British passport—Passport issued on alien's declaration of being British subject by birth—Alien broadcasting propaganda for the King's enemies—Adhering to the King's enemies without the realm—Whether alien owing allegiance to the Crown—Rights and obligations of the holder of a British passport—Jurisdiction o English court to try alien for treason committed abroad—Treason Act, 1351.

The appellant was convicted on an indictment charging him with high treason by adhering to the King's enemies elsewhere than in the King's realm between Sept. 18, 1939, and July 20, 1940, in that he broadcast on behalf of the said enemies propaganda destined to be heard by the King's subjects, contrary to the Treason Act, 1351. He was born in the United States in 1906, the son of a naturalised American citizen and thereby became himself a natural-born American citizen. At the age of three he was brought to Ireland and stayed there until about 1921 when he came to England where he resided until 1939. On July 4, 1933, he made application for a British passport, describing himself as a British subject by birth having been born in Galway, and was granted the passport as such British subject by birth, for a period of five years. On Sept. 24, 1938, he applied for, and wa granted, a renewal of that passport for a further period of one year. On Aug. 4, 1939, he made a further application for the further renewal for one year of that passport, and the passport was again renewed to expire on July 1, 1940. On both occasions he described himself as a British subjec who had not lost that national status. The purpose of the last renewa was stated to be for "holiday purposes." At some date after Aug. 24, 1939 he left England and travelled to Germany where he remained throughou the war. On his arrest in Germany in 1945, a document was found in hi possession showing that he had been engaged by the German Broadcastin Corporation as from Sept. 18, 1939, as an editor, speaker and announce of news in English. While it was admitted that the appellant, being a alien within the realm, was a person owing allegiance to the King on Aug 24, 1939, it was contended on his behalf that (i) since allegiance due from an alien, being local in character, only continued so long as he reside within the King's dominions, the trial judge was wrong in law in directin the jury that the appellant owed allegiance to the King during the perio from Sept. 18, 1939, to July 2, 1940; (ii) that an English court had n jurisdiction to try an alien for treason against the King committed in foreign country; (iii) the renewal of the appellant's passport did not affor him, nor was it capable of affording him, any protection, at least after th declaration of war between Germany and England, nor had he ever availe himself or had any intention of availing himself of any such protection (iv) if there were any evidence of such facts, the issue was one for the jur and the trial judge had failed to direct them thereon :—

Held : (i) by obtaining a British passport the appellant, as a perso already owing allegiance to the King here, extended his duty of allegianc beyond the moment when he left England. It was immaterial that he ha obtained the passport by misrepresentation and that he was not in la a British subject. In all the circumstances of the case the appellant ha at the material times, adhered to the King's enemies beyond the realm and was, therefore, guilty of treason within the meaning of the Treaso Act, 1351.

(ii) the court had jurisdiction to try the appellant.

R. v. *Casement* (4) *applied.*

(iii) [Lord Porter dissenting] : the British passport held by the appellar entitled him to all the rights and protection afforded by such a passpor even if he had no intention of using it. There was no ground for holdin that the trial judge had misdirected the jury on the issue as to wheth the passport had remained at all material times in the possession of th appellant.

Decision of the Court of Criminal Appeal ([1945] 2 All E.R. 673) *affirmed*

[**EDITORIAL NOTE**. The House of Lords affirm the Court of Criminal Appeal on a question of far-reaching importance. It is held that on the issue of a passport the Crown assumes the burden of protection and the holder the duty of fidelity, so that as long as the passport is held the holder may be liable for treason, even though he is an alien and the acts in question are committed outside the realm. This would appear to be a considerable extension of the rule regarding local allegiance laid down in the Resolution of the Judges in 1707, but LORD JOWITT, L.C., describes it as being merely the application of an existing principle to circumstances unforeseen at the time of the enactment of the Treason Act.

It is always possible for an alien holding a British passport to withdraw from his allegiance on leaving the realm, either by surrendering his passport or otherwise, but whether he has done so or not is a question of fact in each case to be determined by a jury. It is on this point that LORD PORTER founds his dissenting judgment, as he holds that the jury, properly directed, might have found that the allegiance had terminated.

AS TO ALLEGIANCE, see HALSBURY, Hailsham Edn., Vols. 6 and 9, pp. 414-418, paras. 460-466, and p. 291, para. 432; and FOR CASES, see DIGEST, Vol. 11, p. 498, Nos. 8-18.]

Cases referred to:

*(1) *Calvin's Case* (1608), 7 Co. Rep. 1a; 11 Digest 496, *2*.

*(2) *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262; Digest Supp.; 90 L.J.P.C. 181; 125 L.T. 809.

*(3) *R.* v. *Brailsford*, [1905] 2 K.B. 730; 14 Digest 117, *861*; 75 L.J.K.B. 64; 93 L.T. 401.

*(4) *R.* v. *Casement*, [1917] 1 K.B. 98; 14 Digest 128, *1002*; 86 L.J.K.B. 467; 115 L.T. 267, 277.

*(5) *R.* v. *Turner* (1816), 5 M. & S. 206; 14 Digest 430, *4552*.

*(6) *R.* v. *Burdett* (1820), 4 B. & Ald. 95; 22 Digest 160, *1366*.

APPEAL by the accused from a decision of the Court of Criminal Appeal (VISCOUNT CALDECOTE, L.C.J., HUMPHREYS and LYNSKEY, JJ.), dated Nov. 1, 1945, and reported ([1945] 2 All E.R. 675). The facts are fully set out in the opinion of LORD JOWITT, L.C.

G. O. Slade, K.C., *Derek Curtis-Bennett, K.C.*, and *James Burge* for the appellant.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *Gerald Howard* for the Crown.

The House took time to consider its opinion.

LORD JOWITT, L.C.: My Lords, on Nov. 7, 1945, the Court of Criminal Appeal dismissed the appeal of the appellant, William Joyce, who had, on Sept. 19, 1945, been convicted of high treason at the Central Criminal Court and duly sentenced to death. The Attorney-General certified under the Criminal Appeal Act, 1907, s. 1 (6), that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. Hence this appeal is brought to your Lordships' House. And, though in accordance with the usual practice the certificate of the Attorney-General does not specify the point of law raised in the appeal, it is clear that the question for your Lordships' determination is whether an alien who has been resident within the realm can be held guilty and convicted in this country for high treason in respect of acts committed by him outside the realm. This is in truth a question of law of far-reaching importance.

The appellant was charged at the Central Criminal Court on three counts, upon the third of which only he was convicted. That count was as follows:

Statement of offence.

High treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the German realm, contrary to the Treason Act, 1351.

Particulars of offence.

William Joyce, on Sept. 18, 1939, and on divers other days thereafter and between that day and July 2, 1940, being then—to wit on the several days—a person owing allegiance to our Lord the King, and whilst on the said several days an open and public war was being prosecuted and carried on by the German realm and its subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without the realm of England, to wit, in the realm of Germany, by broadcasting to the subjects of our Lord the King propaganda on behalf of the said enemies of our Lord the King.

The first and second counts, upon which the appellant was found not guilty, were based upon the assumption that he was at all material times a British subject. This assumption was proved to be incorrect ; therefore upon these counts the appellant was rightly acquitted.

The material facts are few. The appellant was born in the U.S.A., in 1906, the son of a naturalised American citizen who had previously been a British subject by birth. He thereby became himself a natural-born American citizen. At about three years of age he was brought to Ireland, where he stayed until about 1921, when he came to England. He stayed in England until 1939. He was then 33 years of age. He was brought up and educated within the King's Dominions, and he settled there.

On July 4, 1933, he applied for a British passport, describing himself as a British subject by birth, born in Galway. He asked for the passport for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. He was granted the passport for a period of 5 years. The document was not produced, but its contents were duly proved. In it he was described as a British subject. On Sept. 26, 1938, he applied for a renewal of the passport for a period of one year. He again declared that he was a British subject and had not lost that national status. His application was granted. On Aug. 24, 1939, he again applied for a renewal of his passport for a further period of one year, repeating the same declaration. His application was granted, the passport, as appears from the endorsement on the declaration, being extended to July 1, 1940.

On some day after Aug. 24, 1939, the appellant left the realm. The exact date of his departure was not proved. Upon his arrest in 1945 there was found upon his person a " work book " issued by the German State on Oct. 4, 1939, from which it appeared that he had been employed by the German Radio Company of Berlin, as an announcer of English news from Sept. 18, 1939. In this document his nationality was stated to be " Great Britain " and his special qualification " English." It was proved to the satisfaction of the jury that he had at the dates alleged in the indictment broadcast propaganda on behalf of the enemy. He was found guilty accordingly.

From this verdict an appeal was brought to the Court of Criminal Appeal, and I think it right to set out the grounds of that appeal. They were as follows :

1. The court wrongly assumed jurisdiction to try an alien for an offence against British law committed in a foreign country.

2. The judge was wrong in law and misdirected the jury in directing them that the appellant owed allegiance to His Majesty the King during the period from Sept. 18, 1939, to July 2, 1940.

3. That there was no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection or that the appellant ever availed himself or had any intention of availing himself of any such protection.

4. If (contrary to the appellant's contention) there were any such evidence the issue was one for the jury and the judge failed to direct them thereon.

The Court of Criminal Appeal, as I have already said, dismissed the appeal and it will be convenient if I deal with the grounds of appeal in the same order as did that court, first considering the important question of law raised in the second ground. The House is called upon in 1945 to consider the scope an effect of a Statute of 1351, the 25th year of the reign of Edward III. Tha Statute, as has been commonly said and as appears from its terms, was itsel declaratory of the common law : its language differs little from the statemen in Bracton : see 2 Bracton 258, Stephen's History of the Criminal Law of England, Vol. II, 243. It is proper to set out the material parts. Thu it runs :

> Whereas divers opinions have been before this time [in what case treason shall b said and in what not ;] the King, at the request of the lords and commons, hath made declaration in the manner as hereafter followeth, that is to say ; if a man do levy wa against our lord the King in his realm, or be adherent to the King's enemies in hi realm, giving them aid and comfort in the realm or elsewhere . . .

then (I depart from the text and use modern terms) he shall be guilty of treason.

It is not denied that the appellant has adhered to the King's enemies giving them aid and comfort elsewhere than in the realm. Upon this part of the case the single question is whether, having done so, he can be and in the circumstances of the case is guilty of treason.

Your Lordships will observe that the statute is wide enough in its terms to cover any man anywhere, "if *a man* do levy war . . ." Yet it is clear that some limitation must be placed upon the generality of the language, for the context in the preamble poses the question "in what case treason shall be said and in what not." It is necessary then to prove not only that an act was done but that, being done, it was a treasonable act. This must depend upon one thing only, namely the relation in which the actor stands to the King to whose enemies he adheres. An act that is in one man treasonable, may not be so in another.

In the long discussion which your Lordships have heard upon this part of the case attention has necessarily been concentrated on the question of allegiance. The question whether a man can be guilty of treason to the King has been treated as identical with the question whether he owes allegiance to the King. An act, it is said, which is treasonable if the actor owes allegiance, is not treasonable if he does not. As a generalisation, this is undoubtedly true and is supported by the language of the indictment, but it leaves undecided the question by whom allegiance is owed and I shall ask your Lordships to look somewhat more deeply into the principle upon which this statement is founded, for it is by the application of principle to changing circumstances that our law has developed. It is not for His Majesty's judges to create new offences or to extend any penal law and particularly the law of high treason, but new conditions may demand a reconsideration of the scope of the principle. It is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language.

I have said, my Lords, that the question for consideration is bound up with the question of allegiance. Allegiance is owed to their Sovereign Lord the King by his natural-born subjects; so it is by those who, being aliens, become his subjects by denisation or naturalisation (I will call them all "naturalised subjects"); so it is by those who, being aliens, reside within the King's realm. Whether you look to the feudal law for the origin of this conception or find it in the elementary necessities of any political society, it is clear that fundamentally it recognises the need of the man for protection and of the Sovereign Lord for service. *Protectio trahit subjectionem et subjectio protectionem.* All who were brought within the King's protection were *ad fidem regis*: all owed him allegiance. The topic is discussed with much learning in *Calvin's Case* (1).

The natural-born subject owes allegiance from his birth, the naturalised subject from his naturalisation, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance? The natural-born subject cannot at common law at any time cast it off. *Nemo potest exuere patriam* is a fundamental maxim of the law from which relief was given only by recent statutes. Nor can the naturalised subjects at common law. It is in regard to the alien resident within the realm that the controversy in this case arises. Admittedly he owes allegiance while he is so resident, but it is argued that his allegiance extends no further. Numerous authorities were cited by counsel for the appellant in which it is stated without any qualification or extension that an alien owes allegiance so long as he is within the realm, and it has been argued with great force that the physical presence of the alien actor within the realm is necessary to make his act treasonable. It is implicit in this argument that during absence from the realm, however brief, an alien ordinarily resident within the realm cannot commit treason; he cannot under any circumstances by giving aid and comfort to the King's enemies outside the realm be guilty of a treasonable act.

My Lords, in my opinion this, which is the necessary and logical statement of the appellant's case, is not only at variance with the principle of the law, but is inconsistent with authority which your Lordships cannot disregard. I refer first to authority. It is said in FOSTER'S CROWN CASES (3rd Edn., p. 183):

> Local allegiance is founded in the protection a foreigner enjoyeth for his person, his family or effects, during his residence here; and it ceaseth whenever he withdraweth with his family and effects.

And then (*ibid.*, at p. 185) comes the statement of law upon which the passage I have cited is clearly founded :

> Sect. 4. And if such alien, seeking the protection of the Crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown ; and, though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the judges assembled at the Queen's Command Jan. 12, 1707.

The author has a side note against the last line of this passage "MSS. Tracy, Price, Dod and Denton." These manuscripts have not been traced but their authenticity is not questioned. It is indeed impossible to suppose that Sir Michael Foster could have incorporated such a statement except upon the surest grounds and it is to be noted that he accepts equally the fact of the judges' resolution and the validity of its content. This statement has been repeated without challenge by numerous authors of the highest authority—*e.g.*, Hawkins' Pleas of the Crown, 1795 Edn., East's Pleas of the Crown, 1803 Edn., Vol. I, p. 52, Chitty on Prerogatives of the Crown, 1820 Edn., pp. 12, 13. It may be said that the language of some of these writers is not that of enthusiastic support, but neither in the text books written by the great masters of this branch of the law nor in any judicial utterance has the statement been challenged. Moreover it has been repeated without any criticism in our own times by Sir William Holdsworth whose authority on such a matter is unequalled : see his article in Halsbury's Laws of England, Hailsham Edn., Vol. 6, p. 416, note (*t*).

Your Lordships can give no weight to the fact that in such cases as *Johnstone* v. *Pedlar* (2) the local allegiance of an alien is stated without qualification to be coterminous with his residence within the realm. The qualification that we are now discussing was not relevant to the issue nor brought to the mind of the court. Nor was the judges' resolution referred to nor the meaning of "residence" discussed. In my view, therefore, it is the law that in the case supposed in the resolution of 1707 an alien may be guilty of treason for an act committed outside the realm. The reason which appears in the resolution is illuminating. The principle governing the rule is established by the exception : "though his person was removed for a time his family and effects continued under the same protection," that is, the protection of the Crown. The vicarious protection still afforded to the family, which he had left behind in this country, required of him a continuance of his fidelity. It is thus not true to say that an alien can never in law be guilty of treason to the sovereign of this realm in respect of an act committed outside the realm.

My Lords, here no question arises of a vicarious protection. There is no evidence that the appellant left a family or effects behind him when he left this realm. I do not for this purpose regard parents or brothers or sisters as a family. But though there was no continuing protection for his family or effects, of him too it must be asked, whether there was not such protection still afforded by the sovereign as to require of him the continuance of his allegiance. The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity : a duty of the sovereign lord to protect, a duty of the liege or subject to be faithful. Treason, "trahison" is the betrayal of a trust : to be faithful to the trust is the counterpart of the duty to protect.

It serves to illustrate the principle which I have stated that an open enemy who is an alien, notwithstanding his presence in the realm, is not within the protection nor, therefore, within the allegiance of the Crown. He does not owe allegiance because although he is within the realm he is not under the sovereign's protection.

The question then is how is this principle to be applied to the circumstances of the present case. My Lords, I have already stated the material facts in regard to the appellant's residence in this country, his applications for a passport and the grant of such passport to him and I need not restate them. I do not think it necessary in this case to determine what for the purpose of the doctrine whether stated with or without qualification, constitutes for an alien "residence" within the realm. It would, I think, be strangely inconsistent with the robust and vigorous commonsense of the common law to suppose that an alien quitting his residence in this country and temporarily on the high seas beyond territorial waters or at some even distant spot now brought within speedy reach and there adhering and giving aid to the King's enemies could do so with impunity. In the present case the appellant had long resided here and appears to have had many ties with this country, but I make no assumption one way or another about his intention to return and I do not attach any importance to the fact that the original passport application and, therefore, presumably the renewals also, were for "holiday touring."

The material facts are these, that being for long resident here and owing allegiance he applied for and obtained a passport and leaving the realm adhered to the King's enemies. It does not matter that he made false representations as to his status, asserting that he was a British subject by birth, a statement that he was afterwards at pains to disprove. It may be that when he first made the statement, he thought it was true. Of this there is no evidence. The essential fact is that he got the passport and I now examine its effect. The actual passport issued to the appellant has not been produced, but its contents have been duly proved. The terms of a passport are familiar. It is thus described by LORD ALVERSTONE, L.C.J., in *Brailsford's* case (3) ([1905] 2 K.B. 730, at p. 745 :)

> It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries . . .

By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the Sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the Sovereign obligations which would otherwise not be given or imposed. It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his Sovereign. The question is not whether he obtained British citizenship by obtaining the passport, but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad.

Your Lordships were pressed by counsel for the appellant with a distinction between the protection of the law and the protection of the Sovereign, and he cited many passages from the books in which the protection of the law was referred to as the counterpart of the duty of allegiance. Upon this he based the argument that, since the protection of the law could not be given outside the realm to an ~~alien, he could not~~ outside the realm owe any duty. This argument in my opinion has no substance. In the first place reference is made as often to the protection of the Crown or Sovereign or Lord or Government as to the protection of the law, sometimes also to protection of the Crown and the law. In the second place it is historically false to suppose that in olden days the alien within the realm looked to the law for protection except in so far as it was part of the law that the King could by the exercise of his prerogative protect him. It was to the King that the alien looked and to his dispensing power under the prerogative. It is not necessary to trace the gradual process by which the civic rights and duties of a resident alien became assimilated to those of the natural-born subject ; they have in fact been assimilated, but to this day there will be found some difference. It is sufficient to say that at the time when the common law established between Sovereign Lord and resident alien the reciprocal duties of protection and allegiance it was to the personal power of the Sovereign rather than to the law of England that the alien looked. It is not, therefore, an answer to the Sovereign's claim to fidelity from an alien without the realm who holds a British passport that there cannot be extended to him the protection of the law.

What is this protection upon which the claim to fidelity is founded ? To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of a passport is acquiring substantial privileges. A well known writer on international law has said (see Oppenheim's International Law, 4th Edn., Vol. I, p. 556) that by a universally recognised customary rule of the law of nations every State holds the right of protection over its citizens abroad. This rule thus recognised may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in which the State will exercise its right lies in its discretion. But with the issue of the passport the first step is taken. Armed with that document the holder may demand from the State's representatives abroad and from the officials of foreign Governments that he be treated as a British subject, and even in the territory of a hostile State may claim the intervention of the protecting Power. I should make it clear that it is no part of the case for the Crown that the appellant is debarred from alleging that he is not a British subject. The contention is a different one : it is that by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity.

In these circumstances I am clearly of opinion that so long as he holds the passport he is within the meaning of the Statute a man who, if he is adherent to the King's enemies in the realm or elsewhere commits an act of treason.

There is one other aspect of this part of the case with which I must deal. It is said that there is nothing to prevent an alien from withdrawing from his allegiance when he leaves the realm. I do not dissent from this as a general proposition. It is possible that he may do so even though he has obtained a passport. But that is a hypothetical case. Here there was no suggestion that the appellant had surrendered his passport or taken any other overt step to withdraw from his allegiance, unless indeed reliance is placed on the act of treason itself as a withdrawal. That in my opinion he cannot do. For such an act is not inconsistent with his still availing himself of the passport in other countries than Germany and possibly even in Germany itself. It is not to be assumed that the British authorities could immediately advise their representatives abroad or other Foreign Governments that the appellant, though the holder of a British passport, was not entitled to the protection that it appeared to afford. Moreover the special value to the enemy of the appellant's services as a broadcaster was that he could be represented as speaking as a British subject and his German work book showed that it was in this character that he was employed, for which his passport was doubtless accepted as the voucher.

The second point of appeal (the first in formal order) was that in any case no English court has jurisdiction to try an alien for a crime committed abroad and your Lordships heard an exhaustive argument upon the construction of penal statutes. There is, I think, a short answer to this point. The Statute in question deals with the crime of treason committed within, or, as was held in *R.* v. *Casement* (4), without the realm : it is general in its terms and I see no reason for limiting its scope except in the way that I indicated earlier in this opinion, *viz.* : that, since it is declaratory of the crime of treason, it can apply only to those who are capable of committing that crime. No principle of comity demands that a State should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws. I share to the full the difficulty experienced by the Court of Criminal Appeal in understanding the grounds upon which this submission is based, so soon as it has been held that an alien can commit, and that the appellant did commit, a treasonable act outside the realm. I concur in the conclusion and reasons of that court upon this point.

Finally (and these are the third and fourth grounds of appeal to the Court of Criminal Appeal) it was urged on behalf of the appellant that there was no evidence that the renewal of his passport afforded him or was capable of affording him any protection or that he ever availed himself or had any intention of availing himself of any such protection, and if there was any such evidence the issue was one for the jury and the judge failed to direct them thereon.

Upon these points too, which are eminently matters for the Court of Criminal

Appeal, I agree with the observations of that court. The document speaks for itself. It was capable of affording the appellant protection. He applied for it and obtained it, and it was available for his use. Before this House the argument took a slightly different turn. For it was urged that there was no direct evidence that the passport at any material time remained in the physical possession of the appellant and that upon this matter the jury had not been properly directed by the judge in that he assumed to determine as a matter of law a question of fact which it was for them to determine. This point does not in this form at least appear to have been taken before the Court of Criminal Appeal and your Lordships have not the advantage of knowing the views of the experienced judges of that court upon it. Nor, though the importance of keeping separate the several functions of judge and jury in a criminal trial is unquestionable, can I think that this is a question with which your Lordships would have had to deal in this case, if no other issue had been involved. For it is clear that here no question of principle is involved. The narrow point appears to be whether in the course of this protracted and undeniably difficult case the judge removed from the jury and himself decided a question of fact which it was for them to decide. This is a matter which can only be determined by a close scrutiny of the whole of the proceedings.

My Lords, this is a task which in the circumstances of this case your Lordships have thought fit to undertake. I do not propose to examine in detail the course of the trial and the summing-up of the judge, though I may perhaps be permitted to say that it was distinguished by conspicuous care and ability on his part. But having read the whole of the proceedings I have come to the clear conclusion that the judge's summing-up is not open to the charge of misdirection. It may well be that there are passages in it which are open to criticism. But the summing-up must be viewed as a whole and upon this view of it I am satisfied that the jury cannot have failed to appreciate and did appreciate that it was for them to consider whether the passport remained at all material times in the possession of the appellant. Upon this question no evidence could be given by the Crown and for obvious reasons no evidence was given by the appellant. It has not been suggested that the inference could not fairly be drawn from the proved facts if the jury thought fit to draw it and I think that they understood this and did draw the inference when they returned the general verdict of "Guilty." This point, therefore, also fails.

My Lords, I am asked by Lord Simonds to say that he concurs in the opinion which I have just read.

Lord Macmillan: My Lords, I have had the advantage of reading in print the opinion which has just been delivered by Lord Jowitt, L.C. I am in entire agreement with it.

Lord Wright: My Lords, I also have had the same advantage. I fully agree with and concur in the opinion which has just been delivered by Lord Jowitt, L.C.

Lord Porter: My Lords, I have already stated that I agree with your Lordships in thinking that the renewal of William Joyce's passport, obtained on Aug. 24, 1939, was evidence from which a jury might have inferred that he retained that document for use on and after Sept. 18, 1939, when he was proved first to have adhered to the enemy, and, therefore, I can deal with this part of his appeal very shortly.

It is undisputed law that a British subject always, and an alien whilst resident in this country, owe allegiance to the British Crown and, therefore, can be guilty of treason. The question, however, remains whether an alien who has been resident here, but leaves this country, can, whilst abroad, commit an act of treason. The allegiance which he owes whilst resident in this country is recognised in authoritative text books and the relevant cases to be owed because, as Hale (Pleas of the Crown (1778), Vol. 1, p. 59) says, "the subject hath his protection from the King and his laws."

If then he has protection he owes allegiance, but the quality of the protection required has still to be determined. On behalf of the appellant it was strenuously contended that unless the alien was enjoying the protection of British law he owed no allegiance. My Lords, I think that this is to narrow the obligation too much. Historically the protection of the Crown through its dispensing power was afforded to the alien in this country earlier than the legal protection which came later. Therefore any protection, whether legal or administrative, would in my view be enough to require a corresponding duty of allegiance.

It was said in the second place, however, that in no case could an alien, however long he had been resident here, commit an act of treason whilst he was abroad. This argument again seems to me to limit unduly the extent of his obligation. It is in contradiction of the resolution of the judges in 1707, whereby it was declared that if an alien who has been resident here goes abroad himself but leaves his family and effects here under the same protection, the duty (*i.e.*, of allegiance) still continues. This resolution has been criticised as being merely the opinion of the judges in consultation with prosecuting counsel, and not given as a decision in any case. The criticism is true, but the resolution has been repeated in text book after text book of high authority, and though not authoritative as a legal decision, it still has the weight of its repetition by great lawyers and the fact that it is nowhere challenged. Foster, Hale, East, Hawkins, Chitty and Bacon all set it out. Blackstone alone omits it, but Blackstone was giving a general view of the laws of England, and an omission to set out a particular extension of the general rule is not necessarily a denial of its existence. Equally the fact that many cases also state only the general rule in cases where no more is required is not a denial of the existence of certain modifications or extensions of it.

It is true that even in the case with which the resolution deals the alien, though absent himself, is vicariously protected by the laws of this country in the person of his family and effects, but it is still no more than protection. Does then the possession of a passport afford any such protection as that contemplated by the rule ? I think it does. Even after war is declared, some protection could be afforded to holders of British passports through the protecting power, and, again, it would be useful and afford protection in neutral countries. In *R.* v. *Brailsford* (3), Lord Alverstone says ([1905] 2 K.B. 730, at p. 745) :

> It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries . . .

and the late Sir William Malkin in the Law Quarterly Review, Vol. 49, p. 493, speaks of :

> . . . The extensive, though perhaps somewhat ill-defined, branch of international law which may be called . . . " the diplomatic protection of citizens abroad."

It must be remembered that the matter to be determined is not whether the appellant took upon himself a new allegiance, but whether he continued an allegiance which he had owed for some 24 years, and a lesser amount of evidence may be required in the latter than in the former case. I cannot think that such a resident can in war time pass to and fro from this country to a foreign jurisdiction and be permitted by our laws to adhere to the enemy there without being amenable to the law of treason. I agree with your Lordships also in thinking that if an alien is under British protection he occupies the same position when abroad as he would occupy if he were a British subject. Each of them owes allegiance, and in so doing each is subject to the jurisdiction of the British Crown.

" The law of nations," says Oppenheim (International Law, 5th Edn., Vol. 1, p. 266), " does not prevent a State from exercising jurisdiction within its own territory over its subjects travelling or residing abroad, since they remain under its personal supremacy." Moreover, in *R.* v. *Casement* (4) the point was directly decided in the case of a British subject who committed the act of adhering to the King's enemies abroad, and the decision was not seriously controverted before your Lordships. But, my Lords, though the renewing of a passport might in a proper case lead to the conclusion that the possessor, though absent from the country, continued to owe allegiance to the British Crown, yet in my view the question whether that duty was still in existence depends upon the circumstances of the individual case and is a matter for the jury to determine. In the present case, as I understand him, the judge ruled that in law the duty of allegiance continued until the protection given by the passport came to an end—*i.e.*, in a year's time—or at any rate until after the first act of adhering to the enemy, which I take to be the date of the appellant's employment as broadcaster by the German State on Sept. 18, 1939.

The Court of Criminal Appeal take, I think, the same view, but since your Lordships, as I understand, think otherwise, I must set out the facts as I see them. The appellant, admittedly an American subject, but resident within this realm for some twenty-four years, applied for and obtained a passport, as a British subject, in 1933. This document continued to be effective for five years, and was renewed in 1938 and again on Aug. 24, 1939. Extensions are normally granted for one year, and that given to the appellant followed the normal course. It would, I think, not be an unnatural inference that he used it in leaving England and entering Germany, but in fact nothing further was proved as to the appellant's movements, save that his appointment as broadcaster by the German State, dated Sept. 18, 1939, was found in his possession when he was captured, and that at any rate by Dec. 10 he had given his first broadcast. Nothing is known as to the passport after its issue, and it has not since been found.

My Lords, for the purpose of establishing what the judge's ruling was, I think it necessary to quote his own words to the representatives of the Crown and of the prisoner before they addressed the jury. They are as follows:

> I shall direct the jury on count 3 [the only material count] that on Aug. 24, 1939, when the passport was applied for, the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country and that on the evidence given, if they accept it, nothing happened at the material time thereafter to put an end to the allegiance that he then owed. It will remain for the jury, and for the jury alone, as to whether or not at the relevant dates he adhered to the King's enemies with intent to assist the King's enemies. If both or either of you desire to address the jury on that issue, of course, now is your opportunity.

After that ruling both counsel proceeded to address the jury, the defence submitting that the appellant had not adhered to the King's enemies, the Attorney-General that he had. No other topic was touched upon by either of them, and in particular no argument was addressed to the question whether the appellant still had the passport in his possession and retained it for use or as to whether he still owed allegiance to the British Crown. After counsel's address to the jury the judge summed up, and again I think I must quote some passages from his observations.

One such is:

> Under that count [*i.e.*, count 3] there are two matters which have got to be established by the prosecution beyond all reasonable doubt . . . The first thing that the prosecution have to establish is that at the material time the prisoner, William Joyce, was a person owing allegiance to our Lord the King. . . . my view, I have already intimated . . . as a matter of law is, if you as a jury accept the facts which have been proved in this case beyond contradiction—of course you are entitled to disbelieve anything you wish—if you accept the facts which have been proved and not denied in this case, then at the time in question, as a matter of law, this man William Joyce did owe allegiance to our Lord the King, notwithstanding the fact that he was not a British subject at the material time. Now, members of the jury, although that is a matter for me entirely and not for you, I think it will be convenient if I explain quite shortly the reasons by which I have arrived at that view, partly for your assistance, explanation, and perhaps for consideration hereafter in the event of this case possibly going to a higher court.

Again he said:

> None the less I think it is the law that if a man who owes allegiance by having made his home here, having come to live here permanently, thereby acquiring allegiance, as he undoubtedly does, if he then steps out of his realm armed with the protection which is normally afforded to a British subject—improperly obtained, it may be, but none the less obtained . . . using and availing himself of the protection of the Crown in an executive capacity which covers him while he is abroad, then in my view he has not thereby divested himself of the allegiance which he already owed.

Later he says:

> So between Aug. 24, and Sept. 18, 1939, armed with a British passport, he had somehow entered Germany. Now members of the jury, thereafter up until July 2, 1940, when his passport ran out, he remained under such protection as that passport could afford him during his stay in Europe,

Once again he says:

> I do not think I am in any way extending the principles of the law in saying that a man who in this way adopts and uses the protection of the sovereign to whom he has already acquired an allegiance remains under that allegiance and is guilty of treason if he adheres to the King's enemies.
>
> Members of the jury, I accordingly pass from that aspect of the matter; that is my responsibility. I may be wrong; if I am I can be corrected. My duty is to tell you what I believe to be the law on the subject and that you have to accept from me, provided you believe those facts about the passport, going abroad and so forth. If you do not believe that you are entitled to reject it and say so, because you are not bound to believe everything, but if you accept the uncontradicted evidence that has been given, then in my view that shows that this man at the material time owed allegiance to the British Crown.
>
> Now if that is so, then the matter passes into your hands, and from now onwards I am dealing with matters which are your concern and your concern alone, with which I have got nothing to do; they are matters of fact, and the onus of proving those facts is upon the prosecution from first to last, and it never shifts.
>
> Now what have they got to prove? They have got to prove that during this period, as I have already indicated, this man adhered to the King's enemies without the realm, namely, in Germany.

The judge than refers to a broadcast, of which there was uncontradicted evidence that it had been made before Dec. 10, 1939, to the prisoner's engagement as a German broadcaster to Britain, and to the prisoner's statement, which was put in evidence by the Crown and from which I need only quote the words:

> Realising, however, that at this critical juncture I had declined to serve Britain, I drew the logical conclusion that I should have no moral right to return to that country of my own free will and that it would be best to apply for German citizenship and make my permanent home in Germany.

After reading the statement the judge added:

> I think that is the whole of the very short material upon which you have to come to the conclusion as to whether or not it is proved to your satisfaction beyond all reasonable doubt that during the period in question this man adhered to the King's enemies, comforted and aided them with intent to assist them, and that he did so voluntarily. Those are the matters which you have to consider.

My Lords, I have read and re-read the summing-up as a whole, and I think I have quoted all the material passages from it. Whether I pay regard to its general import or confine myself to the particular passages set out above, I cannot read the words of the judge as doing other than ruling that in law the appellant continued to owe allegiance to His Majesty on Sept. 18, 1939, on Dec. 10, 1939, and, indeed, until July 2, 1940, and leaving to the jury only the question whether during this period the appellant adhered to the King's enemies. The passage in the summing-up contained the words "provided you believe those facts about the passport, going abroad and so forth" in my opinion merely instructed the jury that they had to be satisfied that the accused man did obtain a renewal of his passport, did go abroad, and did make a statement, but that if they were so satisfied, then in law the prisoner continued to owe allegiance at all material times after he left this country. If it means more than this, I should regard it as a totally inadequate direction as to what must be proved in order to show that the allegiance continued after he left this country. But I do not think it does mean more than I have indicated.

As I have stated, the renewal of the passport on Aug. 24, 1939, was, in my view, evidence from which a jury might infer the continuance of the duty of allegiance. What the prosecution have to show is that that duty continued at least until Sept. 18. The judge, as I see it, regards the renewal as proving conclusively that the duty continued until the passport ceased to be valid, unless some action on the part of the Crown or the appellant was proved which would put an end to its protection. The Court of Criminal Appeal, in my opinion, took the same view. Their words are ([1945] 2 All E.R. 673, at p. 675):

> We have to look at the evidence in this case and upon that evidence to decide whether the trial judge was right or wrong in holding as a matter of law that on Sept. 18, 1939, and between that date and July 2, 1940, this appellant did owe allegiance to the King. We agree with Tucker, J., that the proper way of approaching that question is to see

whether anything had happened between Aug. 24, and Sept. 18, to divest the appellant of that duty of allegiance which he unquestionably owed at the earlier of those dates.

This ruling, as I see it, can only mean that the appellant's duty of allegiance remained in force until July 2, 1940, unless it was shown by him or on his behalf that something had occurred to put an end to that duty. It puts the onus on him to show some action terminating that obligation. The passport was never found again, and he may have used it only to gain admittance to Germany and may then have discarded it. Indeed, his statement, if believed, indicates that this was his object, and the mere fact that the renewal was for a year proves nothing, since, as was proved in evidence, that is the normal period of extension. There is no evidence that he kept it for use on or after Sept. 18. If I thought that the obtaining of the passport on July 24 proved in law that the appellant retained it for use at least until Sept. 18, unless he was shown to have withdrawn his allegiance, I should accept this ruling. But I do not think it correct. It could only be supported on the ground that allegiance continues until the appellant shows that it is terminated.

The Attorney-General supported this contention by a reference to Archbold's Criminal Pleading, Evidence and Practice, 31st Edn., at p. 330, where it is stated that if a matter be within the knowledge of the accused and unknown to the Crown the onus of proof is cast upon the former. For this proposition *R.* v. *Turner* (5) is said to be an authority. But that case has been explained as dependent upon the special provisions of the Game Laws, and as being, therefore, not of general application. The true principle is, I think, set out in Phipson on Evidence, 8th Edn., p. 34, and Best on Evidence, 12th Edn., p. 252, and is explained by Holroyd, J. (himself a party to the judgment in *R.* v. *Turner* (5)), in *R.* v. *Burdett* (6) ((1820), 4 B. & Ald. 95, at p. 140):

> [The rule in question] is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged, but when such proof has been given, it is a rule to be applied in considering the weight of evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were untrue.

It this be the true principle, the failure of the prisoner to give evidence as to his dealing with the passport goes to increase the weight of the evidence against him, but does not make the evidence of his applying for and receiving it proof conclusive in law that he continued to retain it for use or at all. That he received it may be some proof to go to the jury that he retained it, but it is no more ; it is not a matter upon which a court is entitled to rule that a jury must draw the inference that he retained his allegiance. Indeed at one point in his argument the Attorney-General used language which in my view,, accepted this as the true principle when he said :

> I put the passport merely as evidence of the existence of protection. If he [*i.e.*, the accused] discarded it on his return that might make a difference.

To this observation I would merely add that the renewal of the passport was at best but some evidence from which a jury might infer that the duty of allegiance was still in existence. Unless, however, the accused man continued to retain it for use as a potential protection, the duty of allegiance would cease, and it was for the jury to pronounce upon this matter.

I do not understand your Lordships to rely upon the proviso to sect. 4 of the Criminal Appeal Act, nor do I think it could be said that no substantial miscarriage of justice had occurred, if I am right in considering that the matter should have been left to the jury. The test has been laid down by your Lordships' House to be whether a reasonable jury properly directed must have come to the same conclusion. In the present case a reasonable jury properly directed might have considered that the allegiance had been terminated. Against the mere receipt of the passport there has to be set the fact that its possession was at least desirable if not necessary to enable the accused man to proceed to Germany from this country, the fact that it was not found in his possession again or anything further known of it, his statement as to his intention of becoming naturalised in Germany and his acceptance of a post from the German State. At any rate these were matters for a jury properly directed to consider. They were not directed on them and, as I have stated in my view, they were told that the matter was one of law and not for them.

My Lords, the question of the extent to which an alien long resident in this country continues to owe allegiance after he has left it and whether the request for and acceptance of a passport makes the duty of allegiance still due until the protection of that passport ceases by effluxion of time or at least for some period after its issue is, and has been certified to be, a point of law of exceptional public importance. One matter to be decided in solving that question is the boundary line between the functions of a judge and those of a jury. Apart from this the principle that questions which are rightly for the jury should be left to them and that a proper direction should be given is, as I think, also of great public importance. The one matter concerns this country only in the exigencies of war, though then no doubt it is of vital importance: the other is a necessary element in the true administration of the law in all times of peace and war. If the safety of the realm in war time requires action outside the ordinary rule of law, it can be secured by appropriate measures such as a Defence of the Realm Act, but the protection of subject or foreigner afforded through trial by jury and the due submission to the jury of matters proper for their consideration is important always, but never more important than when the charge of treason is in question.

For these reasons I would myself have allowed the appeal.

Appeal dismissed.

Solicitors: *Ludlow & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

NUGENT-HEAD *v.* JACOB (INSPECTOR OF TAXES).

[King's Bench Division (Macnaghten, J.), November 5, 1945.]

Income Tax—Sched. D—Income arising from foreign possessions—Married Woman—" Living with her husband "—" Living . . . separate from her husband "—Assessment on wife as feme sole—Husband on military service abroad—Wife entitled in her own right to income from abroad—Income Tax Act, 1918 (c. 40), *All Schedules Rules, r.* 16.

The appellant, an American citizen, married an Englishman in 1933. She lived with her husband in London until 1938, when he joined the army and was stationed at various places in the United Kingdom. In 1941 the husband was sent abroad for 3 years on military duty, but the appellant continued to reside in the marital home in London, which contained the husband's personal effects and which was at all times available to the husband should he be able to return to it. Under a settlement made on her, the appellant was entitled to a considerable income from property in America. Her income for the year 1941-42 amounted to £13,615 of which £7,082 was remitted to her in London and the balance retained to her credit in America. It was admitted that the whole of the income became assessable for the year 1942-43 under Case V of Sched. D to the Income Tax Act, 1918, as " income arising from possessions out of the United Kingdom." An assessment in the sum of £7,082 was made upon the appellant as a *feme sole* pursuant to the Income Tax Act, 1918, All Schedules Rules, r. 16, which provides that: " A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that (1) the profits of a married woman living with her husband shall be deemed the profits of the husband and shall be assessed and charged in his name, and not in her name or the name of her trustee; and (2) a married woman living in the United Kingdom separate from her husband; whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who received any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a *feme sole* if entitled thereto in her own right, and as the agent of her husband if she receives the same from or through him, or from his property, or on his credit." It was contended for the appellant that, as she was " a married woman living with her husband " within the meaning of the

Income Tax Act, 1918, All Schedules Rules, r. 16, proviso (1), her income must be deemed to be the income of her husband who must be assessed and charged for tax upon it. It was contended for the Crown that, although the appellant was "living with her husband" within the meaning of the Income Tax Act, 1918, All Schedules Rules, r. 16, proviso (1), she was also "living separate from her husband" within the meaning of the Income Tax Act, 1918, All Schedules Rules, r. 16, proviso (2), and should, therefore, be assessed to tax as a *feme sole* in respect of the remittance :—

HELD : (i) on the facts, the appellant did not live separate from her husband within the meaning of the Income Tax Act, 1918, All Schedules Rules, r. 16, proviso (2), and was, therefore, not assessable to tax on the remittance. The income remitted to this country must be assessed on the appellant's husband.

(ii) on a proper construction of the Income Tax Act, 1918, All Schedules Rules, r. 16, provisos (1) and (2), proviso (2) could not be treated as qualifying proviso (1), but as dealing with a case where the spouses have separated in the ordinary sense of the word.

[**EDITORIAL NOTE.** The provisions of General Rule 16, relating to the assessment of a married woman living separate from her husband, are ambiguous, but the better opinion seems to be that she is only to be separately assessed if the separation is due to judicial decree, mutual agreement, desertion or the like. It was held in *R.* v. *Creamer* ([1919] 1 K.B. 564) that a husband and wife do not cease to be "living together" within the meaning of the Larceny Act, 1916, s. 36, because the husband is, as in the case under consideration, on military service abroad, and ROWLATT, J., distinguishing this case in *Eadie* v. *I.R. Comrs.* ([1924] 2 K.B. 198), pointed out that the position was entirely different where the parties leave each other because they cannot tolerate being under the same roof. He adds that "in order to be properly understood the proviso in question must be construed with reference to the matter with which it was meant to deal. It is meant to define the circumstances in which a husband can be charged to income tax in respect of the income of his wife as being income accruing to her while she is living with him."

AS TO LIABILITY TO INCOME TAX OF MARRIED WOMEN WITH SEPARATE INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 373, 374, para. 767 ; and FOR CASES, see DIGEST, Vol. 28, p. 96, Nos. 570-573.]

Case referred to :

*(1) *Derry* v. *Inland Revenue* (1927), 13 Tax Cas. 30 ; Digest Supp. ; [1927] S.C. 714.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The taxpayer, a married woman, appealed against an assessment to income tax under Case V of Sched. D to the Income Tax Act, 1918, All Schedules Rules, r. 16, made upon her as a *feme sole* in the sum of £7,082 for the year 1942-43 in respect of income arising from foreign possessions. The following facts were found by the Commissioners :—

The appellant and her husband were married in 1933 and lived together in London. She was and is an American citizen and at all material times has been ordinarily resident in the United Kingdom. The appellant's husband, an Englishman, joined the Army in 1939. Until Nov., 1941, he was stationed at various places in this country, and his wife continued to live in London, but frequently went to stay at hotels near where her husband was from time to time stationed. The husband spent all his periods of leave with his wife. In Nov., 1941, he went on active service overseas . . . His wife continued to reside in London in a flat which she acquired in her own name in July, 1940, the husband's personal effects were left in her care and the flat constituted the marital home which was at all times available to the husband should he be able to return to it . . . It was admitted on behalf of the respondent that the appellant was living with her husband within the meaning of the Income Tax Act, 1918, All Schedules Rules, r. 16, proviso (1).

The appellant was entitled in her own right to a life interest in certain income arising abroad under . . . dispositions which were all governed by American law.

Some of the income arising under these dispositions was remitted from America to the appellant in the United Kingdom, and in 1941-1942, the year preceding the year of the assessment under appeal, the amount of such remittances was £7,082 . . . By the Finance Act, 1940, s. 19, the appellant's income arising under the said dispositions has been chargeable to income tax on the basis of the full amount arising abroad (whether remitted to the United Kingdom or not) during the year preceding the year of assessment.

The full amount of such income arising abroad during the year preceding the year of assessment under appeal was agreed to be £13,615.

The Special Commissioners accepted as correct the Crown's contention :

> . . . and that the Income Tax Act, 1918, All Schedules Rules, r. 16, proviso (2), should be treated as a qualification of the Income Tax Act, 1918, All Schedules Rules, r. 16, proviso (1), *i.e.*, as dealing with the particular case of a married couple who, although living together, are temporarily in different places and then only as regards a specified portion of the wife's income, *i.e.*, remittances.

They accordingly assessed the appellant's husband in the sum of £6,533 and the appellant in the amount of the remittances, namely, £7,082.

The appellant's husband accepted the decision of the Special Commissioners but the appellant appealed on the ground that the whole of her income, £13,615 should be assessed and charged on her husband.

F. Grant, K.C., and *Terence Donovan, K.C.*, for the appellant.

The Solicitor-General (*Sir Frank Soskice, K.C.*), and *Reginald P. Hills* for the respondent (Inspector of Taxes).

MACNAGHTEN, J. : This is an appeal by Mrs. Nugent-Head, the wife of Col. Nugent-Head, against an assessment to income tax under Case V of Sched. D, for the year 1942-43, in the sum of £7,082, made upon her as a *feme sole*, pursuant to the Income Tax Act, 1918, All Schedules Rules, r. 16. Her case is that she is not assessable to tax under that rule or at all.

The appellant, an American citizen, married her husband, an Englishman, in 1933. It was a very happy marriage, and they lived together in London until on the outbreak of war with Germany in 1939, her husband joined the Army. For the next two years he was stationed at various places in the United Kingdom, but in Nov., 1941, he was sent abroad, and he remained abroad throughout the next three years. During the whole of the year of the assessment, the appellant was living in a flat in London, and her husband was living overseas in discharge of his military duties.

Under a settlement made by her grandfather and the testamentary dispositions of her parents, the appellant enjoys a considerable income from property in America. During the year 1941-42, her income from that source amounted to £13,615, and of that sum £7,082 was remitted to her in London, and the balance, £6,533, was retained in America. It is admitted that the whole of the income became assessable for the year 1942-43 under Case V of Sched. D, as "income arising from possessions out of the United Kingdom."

The question at issue is whether the assessment should be made on the appellant, or on her husband. The answer to that question depends upon the meaning and effect of the Income Tax Act, 1918, All Schedules Rules, r. 16, which runs thus :

> A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried : Provided that (1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee ; and (2) a married woman living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise, who receives any allowance or remittance from property out of the United Kingdom, shall be assessed and charged as a *feme sole* if entitled thereto in her own right, and as the agent of the husband if she receives the same from or through him, or from his property, or on his credit.

This rule reproduces the provisions of the Income Tax Act, 1842, s. 45. That section was based on provisions to be found in the Income Tax Acts, 1803, 1805 and 1806.

In view of the changes in the law relating to the property of married women which have taken place in the last 100 years, it is not surprising that provisions with regard to the taxation of their income, which were apt and intelligible in the beginning of the 19th century have become inapt and ambiguous when re-enacted in the Income Tax Act, 1918. The present case illustrates the urgent need for the simplification and clarification of the law relating to income tax, which the present Chancellor of the Exchequer and his predecessors have all recognised.

R. 16, apart from its provisos, itself is plain and simple. A married woman who has an income of her own is to be assessed and charged to tax like any spinster. The difficulty in construing the rule is caused by the two provisos. The first proviso deals with the case of a married woman "living with her husband,"

and the second deals with the case of a married woman "living in the United Kingdom separate from her husband, whether the husband be temporarily absent from her or from the United Kingdom or otherwise." Both these provisos are ambiguous. Does the first proviso include such a case as the present one where the spouses would be living together, if they could, but the force of circumstances compels them to live apart? Does the second proviso refer to the case where the spouses are separated by a judicial decree, or by mutual
A agreement, or by the desertion of one or other of them? If that is the meaning of the word "separate" in the second proviso, the words "whether the husband be temporarily absent from her or from the United Kingdom or otherwise" seem inappropriate. On the other hand, if the second proviso only refers to cases where the spouses happen for the time to be living in different places, it seems to follow that the words "living with her husband" in the first proviso must mean living together at the same place.

B Before the Special Commissioners, and in this court, the Crown contended that, although the appellant and her husband were in fact living far apart, she was, nevertheless, during all the time of their separation "living with her husband" in the sense in which those words are used in the first proviso. The appellant accepted this contention as well founded, and maintained that, since she was living with her husband within the meaning of the first proviso, it followed that her income must be deemed to be the income of her husband, and that it
C must be assessed and charged in his name and not in her name, since that is what the first proviso says quite clearly. To that the Crown made answer that, although the appellant was "living with her husband" within the meaning of the first proviso, she was also "living separate from her husband" within the meaning of the second proviso, and, therefore, as to the remittance of £7,082, to which she was entitled in her own right, she should be assessed and charged
D as a *feme sole.*

The Special Commissioners accepted the view put forward by the Crown as correct, and they accordingly assessed the appellant's husband in the sum of £6,533, on the ground that the appellant was living with her husband within the meaning of the first proviso, and they assessed the appellant in the sum of £7,082 on the ground that she was living separate from her husband within the meaning of the second proviso. The appellant's husband accepts the
E decision of the Special Commissioners, but the appellant brings this appeal: she maintains that the whole of her income, £13,615, ought to be assessed and charged on her husband.

The argument which leads to the curious conclusion that the appellant was living with her husband, and at the same time was living separate from him, is, as I understand it, this: that, although the two provisos are separate and purport to deal with two different cases, the first with the case of a wife living with her
F husband, and the second with the case of a wife living separate from her husband, the second proviso should be read, not as a separate proviso, but as a qualification of the first proviso, because, it is said, the rule itself provides for the case of a married woman living separate from her husband, and the second proviso would be unnecessary, unless it be read as a qualification of the first.

If the second proviso merely said that in the case supposed, namely, that a
G married woman, receiving a remittance from foreign property while living in the United Kingdom separate from her husband, should be assessed and charged as a *feme sole,* there would no doubt be some force in that argument. But the proviso does not say that. It says that she is only to be assessed as a *feme sole* if she is entitled to the remittance in her own right. If she receives it from her husband, or through him, or from his property, or on his credit, she is not to be assessed as a *feme sole*; in that case she is to be assessed as the agent of her
H husband.

Reference was made to the Scottish case of *Derry* v. *Comrs. of Inland Revenue* (1) as giving some support to the decision of the Special Commissioners. In that case Mrs. Derry, the wife of Dr. Douglas Derry, was in receipt of income assessable under Case V of Sched. D as income arising from possessions out of the United Kingdom. Owing to a nervous breakdown, she was living in a nursing home in England, and there was little hope that she would ever recover sufficiently to be able to leave the nursing home. Her husband was Professor of Anatomy at the University of Cairo, and he lived there throughout the year, except when he came on leave to England for a period of less than three months. He was never able to live with his wife at the nursing home. The question submitted to the court was whether Mrs. Derry was assessable under r. 16. The court consisted of Lord Sands, Lord Blackburn and Lord Ashmore, and they all agreed that the answer to that question was in the affirmative; but each gave a different reason for that decision. Lord Blackburn thought that Mrs. Derry was not living with her husband within the meaning of the first proviso and, therefore, came within the general rule that all married women, other than married women living with their husbands, were to be assessed as spinsters. Lord Ashmore considered that, on the facts stated by the Commissioners, Mrs. Derry was living separate from her husband, and that she therefore came within the second proviso. He did not express any opinion as to whether she was living with her husband within the meaning of the first proviso. Lord Sands, however, was of opinion that she was "living with her husband" within the meaning of the first proviso, and also living "separate from her husband" within the meaning of the second proviso. The argument was put very clearly by Lord Sands in these words (13 Tax Cas. 30, at p. 37):

> The opening enactment of r. 16 deals with all married women. Proviso (1) deals with married women living with their husbands. A married woman not living with her husband is covered by the opening clause; a married woman living with her husband by the proviso. But these two classes include all married women . . . A married woman not living with her husband falls under the opening clause. Under that clause her separate estate is assessable. She obtains no relief from direct assessment under proviso (1), which deals only with married women living with their husbands. Proviso (2) would, therefore, be unnecessary and meaningless if regarded simply as a qualification of the provision of the opening clause as regards the wife's separate income.

As I have said, that argument would have some force but for the fact that Parliament has thought fit to provide that a married woman living separate from her husband, if entitled to the remittance in her own right, is to be assessed as a *feme sole*, but that, if she receives it from or through her husband, or from his property, or on his credit, she is not to be assessed as a *feme sole*, but as the agent of her husband. Therefore, I venture, with all respect, to think that it is not necessary to do violence to the rule by treating the second proviso as if it was a part of the first, and then, having done that, to treat it as an exception from the case provided for by the first proviso. In my opinion, if the first proviso is to be construed as covering a case such as this, where the husband and the wife have been living far apart—(and both the appellant and the respondent are agreed that the first proviso should be so construed)—then the second proviso must be read in its natural sense as applying to the case where the spouses have separated in the ordinary sense of that word. In these circumstances, I think the appeal must be allowed, and the assessment quashed.

Appeal allowed with costs. Assessment quashed. Order for return of tax paid with interest at 3 per cent.

Solicitors: *Gordon, Dadds & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

TWINE *v.* BEAN'S EXPRESS, LTD.

[King's Bench Division (Uthwatt, J., sitting as an additional judge of the King's Bench Division), December 6, 11, 1945.]

Negligence—Duty to take care—Negligent driving of commercial van—Fatal accident to unauthorised passenger—Trespasser—Duty of driver's employers.

Master and Servant—Liability of master for negligence of servant—Fatal accident to unauthorised passenger in commercial van—Trespasser—Extent of duty to take care.

Under an agreement between B., Ltd., and the Post Office Savings Bank, B., Ltd., provided a commercial van and driver for use by the Bank, the driver remaining the servant of B., Ltd. It was further agreed that B., Ltd., accepted no responsibility for injury suffered by persons riding in the van who were not in their employment. They expressly instructed their driver that no one was to be allowed to travel on the van. Owing to the driver's negligent driving, an accident occurred and T. was fatally injured. It was contended by T.'s personal representative that, since the accident happened while the driver was engaged on an authorised job, the acts of the driver were done in the course of his employment notwithstanding that T. was an unauthorised passenger, and therefore B., Ltd., as the driver's employers, were liable to T. for the driver's negligence :—

HELD : (i) the duty of B., Ltd., as the driver's employers, to take care in the driving of the van, was only to persons who might reasonably be anticipated by B., Ltd., as likely to be injured by negligent driving of the van at the time and place in question. A

(ii) in the circumstances of the case, T. was a trespasser in the van in relation to B., Ltd. B., Ltd., therefore, owed no duty to T. to take care in the driving of the van, because they could not reasonably anticipate that he would be a passenger in the van at the time and place of the accident.

B [**EDITORIAL NOTE.** The duty owed by an employer to persons who may be injured by the negligent driving of his servant is limited to those who can reasonably be anticipated as being possible subjects of injury. In the circumstances considered in this case the servant, having express orders not to take passengers, was acting outside the scope of his authority. The employer could not, therefore, anticipate the presence of any passenger and he is held not liable for the injury. Reference may be made to *Lewys* v. *Burnett* ([1945] 2 All E.R. 555), on the question of liability to gratuitous passengers, but this case is argued only upon the liability of the employer. *Lewys'* C case may well be distinguishable in view of the fact that the plaintiff was there an invitee, while in the case under consideration he was, by reason of the instructions given to the driver, a trespasser.

AS TO THE DUTY TO TAKE CARE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 571, 572, para. 825 ; and FOR CASES, see DIGEST, Vol. 36, pp. 12-16, Nos. 33-60.]

Cases referred to :

(1) *Tolhausen* v. *Davies* (1888), 58 L.J.Q.B. 98 ; 36 Digest 14, 47.

(2) *Walker* v. *Midland Ry. Co.* (1886), 55 L.T. 489 ; 29 Digest 9, *118*.

D

ACTION for damages for negligence brought under the Fatal Accidents Acts 1846-1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff was suing as legal personal representative of her husband, who was fatally injured owing to the negligent driving of a van driver employed by the defendants. The facts are fully stated in the judgment.

Sir Charles Doughty, K.C., and *R. T. Monier-Williams* for the plaintiff.

E *Serjeant Sullivan, K.C.*, and *Valentine Holmes, K.C.*, for the defendants.

Cur. adv. vult.

UTHWATT, J. : Under an arrangement between Bean's Express Ltd., and the Post Office Savings Bank, Bean's provided for use by the bank a commercial van and a driver—Harrison—on terms under which the driver of the van remained the servant of Bean's, it being part of the bargain between Bean's F and the bank that Bean's accepted no responsibility for injury suffered by persons riding in the van who were not in the employment of Bean's. The standing instructions to Bean's drivers, which had been duly brought to the attention of Harrison, provided that no persons (with certain exceptions not applicable in this case) were allowed to travel on the company's commercial vehicles. On Apr. 6, 1944, Twine, a mail porter employed by the bank, who had occasion in the course of his duties to go from the bank's headquarters at G Hammersmith to a branch office in Kensington, took a lift back from the branch office in the van which was duly engaged on an authorised journey. Twine did so with the assent of the driver, but Twine was not authorised by the bank to travel on the van. He had, in fact, drawn 3*d.* to cover his bus fare to the branch and back. Twine had travelled on the van on several prior occasions. There was, at all material times, on the dashboard of the van a notice :

H No unauthorised person is allowed on this vehicle. By order. Bean's Express, Ltd.

On the roof of the van, above the driver's seat, was another notice stating that drivers had instructions not to allow unauthorised travellers on the van, and that in no event would Bean's be responsible for damage happening to them. The driver had, on the occasion of a former ride in the van by Twine, told him, in substance, that he travelled at his own risk. He probably put his point more crisply. His description to the court was that he was not going to take any blame home with him. Unfortunately, owing to the negligent driving of the driver, an accident occurred resulting in Twine's death.

Those are the facts as I find them. The plaintiff is the widow and legal personal representative of Twine and brings the action against Bean's, claiming damages for the benefit of herself and her two infant children under the Fatal Accidents Act, 1846 to 1908, and damages for the benefit of Twine's estate under the Law Reform (Miscellaneous Provisions) Act, 1934. The argument for the plaintiff was put on the following lines. It was said that the driver was negligent and owed to Twine a duty to take care, that the accident happened while the driver was engaged on a duly authorised job in the course of his employment, and that the acts of the driver were done in the course of his employment, notwithstanding the unauthorised presence in the van of the passenger: the employer, therefore, was liable.

The complete accuracy of the second limb of the first proposition may well be questioned in light of the driver's warning to the passenger and the surrounding circumstances, but the defendants were content to fight the case on the lines that the question to be decided was not whether the driver owed a duty to the passenger to take care, but whether the employers owed that duty. In this, I think, the defendants are right. The law attributes to the employer the acts of a servant done in the course of his employment and fastens upon him responsibility for those acts. In determining the duty of the employer and the duty of the servant on any occasion, all the circumstances have to be considered. In the general run of cases, the duty of both is the same; but that is a coincidence, not a rule of law. The general question in an action against the employer, such as the present, is technically: "Did the employer in the circumstances which affected him owe a duty?"—for the law does not attribute to the employer the liability which attaches to the servant. To accord with my view of the law, the first proposition, to be relevant, should be stated thus: "The driver was negligent and the employers owed to Twine a duty (in this case to be performed by the driver) to take care."

On the facts as I have stated them, it was outside the scope of the driver's employment for him to bring within the class of persons to whom a duty to take care was owed by the employer, a man to whom, contrary to his instructions, he gave a lift on a commercial van. On this basis, Twine, *vis-a-vis* Bean's, remained simply a trespasser on the van, who came there in particular circumstances, and the question is whether Bean's, in the circumstances in which Twine was a passenger, owed to him any duty to take care as to the proper driving of the van. In my opinion, they did not.

Bean's did not owe a duty to the world at large to take care, but they did owe that duty to all persons who might reasonably be anticipated by them as likely to be injured by negligent driving of the van at the time and place in question, and no others. It is unnecessary here to consider the general question whether a stray passenger, picked up by a driver to whom no contrary instructions had been given, falls within that class of person. The particular facts must be considered, and I do not propose to travel outside them. Here, a commercial vehicle was concerned, and by the instructions to the driver, the provision and fixing of the notices, and the terms of their contract with the bank, Bean's had taken every step reasonably practicable to secure that there should be none but duly authorised persons on their van. Bean's could not reasonably anticipate that there would be this passenger in the van at the time and place of the accident, and, in my view, therefore, they owed to the passenger no duty to take care in the driving of the van. My conclusion upon this is, I think, supported by *Tolhausen* v. *Davies* (1), and *Walker* v. *Midland Ry. Co.* (2).

It is unnecessary for me to consider whether or not the effect of the notices and the driver's warning operated, as a matter of bargain, to deprive the passenger of any right of action against the employers. On the pleadings this point was not open to the defendants, and, indeed, was not argued by them.

There will, therefore, be judgment for the defendants.

Judgment for the defendants. No order as to costs.

Solicitors: *Simpson, Palmer & Winder* (for the plaintiff); *A. E. Wyeth & Co.* (for the defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* THE NATIONAL ANTI-VIVISECTION SOCIETY.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Tucker, L.JJ.), November 20, 21, 22, December 20, 1945.]

Income Tax—Exemption—Charity—Anti-Vivisection Society—Whether established for charitable purposes only—Admissibility of evidence as to detrimental effect of society's object—Income Tax Act, 1918 (*c.* 40), *ss.* 37 (1) (*b*), 40.

The appellant society claimed exemption from income tax on their investment income, under the Income Tax Act, 1918, s. 37 (1) (*b*), on the ground that it was " a body of persons established for charitable purposes only." In allowing the claim, the Special Commissioners found that they were bound by authority so to hold, in spite of their view that the objects of the appellant society were, on balance, not for the public benefit. Part of the evidence received by the Special Commissioners showed that, although suppression of cruelty to animals as such was to the public benefit, the full attainment of the appellant society's objects would be injurious to the community. On appeal, the question for the determination of the court was whether there was any evidence before the Special Commissioners on which they could find that the society was established for charitable purposes only :—

HELD : (i) [*per* TUCKER, L.J.] : although the appellant society had established by evidence that its objects were for the benefit of animals, the court was not precluded from receiving evidence as to the corresponding detriment to the community.

Re Grove-Grady, Plowden v. *Lawrence* (6) *applied.*

(ii) [LORD GREENE, M.R., dissenting] : on the facts here, therefore, the appellant society was not a body established for charitable purposes only.

Re Foveaux, Cross v. *London Anti-Vivisection Society* (1) *overruled.*

Decision of MACNAGHTEN, J. ([1945] 2 All E.R. 529) *affirmed.*

[**EDITORIAL NOTE.** In his dissenting judgment LORD GREENE, M.R., holds that, from the strictly ethical standpoint, the moral benefit to man resulting from a trust to suppress cruelty to animals is not to be regarded as offset by the material benefits due to the increased knowledge of remedial medicine imparted by vivisection. In any event, prevention of cruelty to animals has already been held to be a good charitable object within the fourth class of *Pemsel's* case (3) and cannot now be altered. The majority of the court, however, hold that there is no presumption that a society for the suppression of cruelty to animals is necessarily a charity. It is a question of fact and the duty of the court is to decide upon the evidence whether the public benefit will be promoted by the existence of the society. The attitude of CHITTY, J., in *Re Foveaux* (1) that the court must " stand neutral " and pronounce no opinion upon the controversy between the promoters and the opposers of vivisection cannot be supported, since this is the very issue of fact which the court exists to determine.

AS TO MEANING OF CHARITIES FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-317, paras. 617-624 ; and FOR CASES, see DIGEST, Vol. 28, pp. 82-84, Nos. 469-483.

AS TO CHARITABLE PURPOSES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 125, 126, para. 166 ; and FOR CASES, see DIGEST Supp., Charities, Nos. 4a, 208a.]

Cases referred to :

*(1) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501 ; 8 Digest 259, *206* ; 64 L.J.Ch. 856 ; 73 L.T. 202.

*(2) *Re Wedgwood, Allen* v. *Wedgwood*, [1915] 1 Ch. 113 ; 8 Digest 259, *208* ; 84 L.J.Ch. 107 ; 112 L.T. 66.

*(3) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531 ; 8 Digest 241, *1* ; 61 L.J.Q.B. 265 ; 65 L.T. 621 ; 3 Tax Cas. 53.

*(4) *Re Cranston, Webb* v. *Oldfield*, [1898] 1 I.R. 431 ; 8 Digest 259, *214i.*

*(5) *Re Hummeltenberg, Beatty* v. *London Spiritualistic Alliance*, [1923] 1 Ch. 237 ; Digest Supp. ; 92 L.J.Ch. 326 ; 129 L.T. 124.

*(6) *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] 1 Ch. 557 ; Digest Supp. ; 98 L.J.Ch. 261 ; 140 L.T. 659 ; *varied on appeal, sub nom. A.-G.* v. *Plowden*, [1931] W.N. 89.

(7) *Armstrong* v. *Reeves* (1890), 25 L.R.Ir. 325 ; 8 Digest 258, *205i.*

(8) *Marsh* v. *Means* (1857), 3 Jur. N.S. 790 ; 8 Digest 312, *933* ; 30 L.T.O.S. 89.

(9) *A.-G.* v. *Marchant* (1866), L.R. 3 Eq. 424 ; 8 Digest 330, *1128* ; 36 L.J.Ch. 47.

(10) *Re Campden Charities* (1881), 18 Ch.D. 310 ; 8 Digest 343, 1359 ; 50 L.J.Ch. 646 ; 45 L.T. 152.

*(11) *Lewis* v. *Fermor* (1887), 18 Q.B.D. 532 ; 2 Digest 289, *595* ; 56 L.J.M.C. 45 ; 56 L.T. 236.

*(12) *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406 ; 8 Digest 265, *270* ; 86 L.J.Ch. 568 ; 117 L.T. 161.

*(13) *A.-G.* v. *National Provincial & Union Bank of England*, [1914] A.C. 262 ; Digest Supp. ; *sub nom. Re Tetley, A.-G.* v. *National Provincial & Union Bank of England*, 93 L.J.Ch. 231 ; 131 L.T. 34 ; *affg.* S.C. *sub nom. Re Tetley, National Provincial & Union Bank of England, Ltd.* v. *Tetley*, [1923] 1 Ch. 258.

APPEAL by the taxpayer from a decision of MACNAGHTEN, J., dated July 27, 1945, and reported ([1945] 2 All E.R. 529). The facts are fully set out in the judgment of LORD GREENE, M.R.

Frederick Grant, K.C., Valentine Holmes, K.C., and *John Senter* for the appellants.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp*, and *Reginald P. Hills* for the respondents.

Cur. adv. vult.

LORD GREENE, M.R. : The National Anti-Vivisection Society claim exemption from income tax on their investment income on the ground that they are a body of persons established for charitable purposes only. The claim was admitted by the Special Commissioners in spite of their view that the objects of the society, so far from being for the public benefit, were gravely injurious thereto. On this ground they would have held that the society could not be regarded as a charity had they not considered themselves bound to hold otherwise by the authority of *Re Foveaux* (1) decided by CHITTY, J., and approved by this court in *Re Wedgwood* (2). MACNAGHTEN, J., held, on appeal, that he ought not to follow *Re Foveaux* (1) in view of certain observations upon the decision which I shall presently discuss, and that, as the attainment of the society's object would be gravely injurious to the community, it was impossible to regard that object as charitable. From that decision the society appeals.

It will be convenient at the outset to summarise certain findings of fact of the Commissioners. The Society is the same body as one of the three bodies concerned in *Re Foveaux* (1) under its then name of " The Victoria Street Society for the Protection of Animals from Vivisection united with the International Association for the total suppression of Vivisection." Its main object is still :

> . . . the total abolition of vivisection including in that term all experiments on living animals whether calculated to inflict pain or not, and (for that purpose) the repeal of the Cruelty to Animals Act, 1876, and the substitution of a new enactment prohibiting vivisection altogether . . . The work of the society is to a large extent directed towards the prevention of cruelty to animals.

The Commissioners held it to have been proved conclusively that :

> (*a*) a large amount of present day medical and scientific knowledge is due to experiments on living animals ; (*b*) many valuable cures for and preventatives of disease have been discovered and perfected by means of experiments on living animals, and much suffering both to human beings and to animals has been either prevented or alleviated thereby. We are satisfied that if experiments on living animals were to be forbidden (*i.e.*, if vivisection were abolished) a very serious obstacle would be placed in the way of obtaining further medical and scientific knowledge calculated to be of benefit to the public.

The weight of the evidence called on behalf of the Crown, and accepted by the Commissioners, dealt with the advances in medical knowledge made by means of experiments on animals in regard to the prevention or cure of various diseases, such as malaria, typhus and typhoid and yellow fever, diphtheria, tetanus, smallpox and diabetes. The treatment of such diseases by inoculation, vaccines or drugs, as the case may be, has been rendered possible by means of experiments on animals, whether for the purpose of ascertaining the causes of the disease, of testing the efficacy of suggested remedial treatment, or of testing the purity of drugs or vaccines. Valuable knowledge has also been gained with regard to the treatment of burns, wound infections and gas gangrene. To all such experiments on animals the society is opposed and (as a logical consequence) it is opposed to immunisation of human beings against typhoid and diphtheria.

On the question of the extent to which cruelty or the infliction of pain or suffering is involved in experiments on animals, the matter stands as follows. The Cruelty to Animals Act, 1876, was passed as a result of the report of the Royal Commission on the practice of subjecting live animals to experiments for scientific purposes which was appointed in 1875 and reported on Jan. 8, 1876. The preamble recited that it was expedient to amend the law relating to cruelty to animals by extending it to the cases of animals subjected when alive to experiments calculated to inflict pain. Sect. 2 prohibited the performance of any such experiment except subject to the restrictions mentioned in the Act and imposed penalties. Sect. 3 gave a list of the restrictions. It will be noticed that the Act, so far from prohibiting experiments calculated to give pain, in fact recognised that such experiments could lawfully be carried out provided that the statutory restrictions were complied with. The restrictions limited the permitted experiments to those performed with a view to the specified advancement of knowledge (para. (1)) or for the testing of a former discovery (proviso (4)) by a person duly licensed (para. (2)). The subject of pain is dealt with in paras. (3) and (4) and provisos (2) and (3). Para. (3) provides that the animal must during the whole of the experiment be under the influence of an anaesthetic of sufficient power to prevent it feeling pain, but this is subject to proviso (2) which permits the performance of experiments without anaesthetics on a certificate being given that insensibility would frustrate the object of the experiment. Para. (4) requires that the animal be killed before it recovers from the anaesthetic in cases where pain is likely to continue after the effect of the anaesthetic has ceased or if serious injury has been inflicted; but this is subject to an exception (proviso (3)) where a certificate is given that the killing of the animal would necessarily frustrate the object of the experiment; in such case the animal must be killed as soon as that object has been attained. I need not take up time by referring to other provisions of the Act which (sect. 22) does not apply to invertebrate animals. The object of the Act therefore was to limit and regulate experiments calculated to give pain, to provide (save in exceptional cases) that such experiments should only be carried out under an anaesthetic and that (save in exceptional cases) the animal should be destroyed while still under the anaesthetic. It is apparently contemplated that, save in exceptional cases, pain will be eliminated by the use of anaesthetic coupled with the destruction of the animal.

One aspect of the practical operation of the Act is to be found in an extract from the Home Secretary's return for 1938. It appears that in that year 908,846 experiments were performed without anaesthetics, mostly inoculations and feeding experiments with a certain number of oral administrations, inhalations, external applications, and the abstraction of body fluids. Experiments so performed, it is said, are "such as are attended by no considerable, if appreciable, pain." Further facts bearing on the question of pain are to be found in the evidence accepted by the Commissioners and set out in the case. In para. 9 (*b*) Major-General Poole's views are given. He said that "it was inevitable that they must suffer some pain." This pain was "pure physical pain," and if the animals were properly treated, they did not suffer any "mental pain." He then said that:

> . . . a certain portion of the experiments involved no pain. In addition to the tests there was the preparation of anti-serum. There was practically no pain attached to that; just the prick of a needle.

I read this as meaning that the only experiments involving no pain beyond the prick of a needle are the preparation of anti-serum. No other such "painless" experiments are referred to. The "tests" mentioned in this passage are described in para. 9 (*a*) of the case and involve infecting animals with the disease. The meaning attributed by the profession to such a phrase as a "painless" experiment is illustrated in a statement at the end of para. 9 of the case. The witness pointed out that in the case of an experiment which would otherwise cause severe pain "such as the burning of a guinea pig," the animal would be anaesthetised and killed before it recovered consciousness and would, therefore, suffer no pain at all. The word "severe" is worth noting.

In para. 12 of the case there is set out a statement by Dr. Trevan with regard to 277,565 experiments conducted in the course of a year at the Wellcome Physiological Research Laboratories. He said that:

> . . . although there were grounds for thinking that in the great majority of cases the animal suffered no pain it was not always possible to be certain that some pain might not be involved. In some cases pain was inevitable.

In para. 15 it appears that Professor Burn:

> . . . did not think it possible to distinguish between experiments on animals which caused pain and those which did not cause pain.

He took the example of Neoaraphenamine injections. What had to be determined was:

> . . . the dose with which only 50 per cent. of the animals developed symptoms terminating in death. It was quite impossible to know beforehand which of those animals was going to suffer pain and which was not. It was very difficult to say how much pain they would suffer, and there would be no possible means of administering an Act which said that painless experiments need not be reported to the Home Office, but those which caused pain must be reported. Therefore any Act of Parliament which attempted to lay down that there must be controlled experiments which caused pain, or that experiments which caused pain must not be allowed, would in fact prevent all experiments on animals. For example, feeding experiments, when the deficiency in diet was a deficiency of Vitamin D1, caused convulsions in pigeons. He could not say that pigeons which had these convulsions suffered very much pain, but it would be impossible for anyone to say that they suffered none.

The whole of the evidence to which I have referred was accepted by the Commissioners, and must, therefore, be regarded as establishing the facts stated by the witnesses. With the possible exception of the preparation of anti-serum referred to by Major-General Poole, who says nothing about consequential illness as distinct from pain, the facts appear to me to show beyond question that, while in the majority of cases pain, illness or, at best, the destruction of the animal is involved, it is quite impossible to say that in any other case pain or illness is not involved. In other words, the experimenters have to take the chance without having any means of knowing whether the animal suffers or not. This examination of the facts satisfies me that the practice, the suppression of which the society wishes to bring about, is one which involves the ill-treatment (to use a less extreme word than "cruelty") of animals in a manner which leads to pain and suffering, or at the best death, after experiment under an anaesthetic. The best that can be said of it from that point of view is that in some cases there may be no pain or suffering, but whether or not this is the case no one can tell. The controversy in the present case is whether in view of the admittedly great—and indeed overwhelming—advantages derived from the practice of vivisection, the object of totally suppressing the practice is a good charitable object. Nothing is to be gained by pretending that the practice does not involve ill-treatment of the animals subjected to it; and to say that it does not involve cruelty because the end at which it aims is justifiable, and that, therefore, its suppression cannot be a good charitable object, in truth begs the very question which we have to decide.

It is claimed by the society, and Chitty, J., in *Re Foveaux* (1) so decided, that its objects fall within the fourth of Lord Macnaghten's classes, in *Income Tax Special Purposes Comrs.* v. *Pemsel* (3) ([1891] A.C. 531, at p. 583), namely, "other purposes beneficial to the community" not falling under any of the three preceding heads. The Crown relies on the findings of the Commissioners that the objects of the society, so far from being beneficial to the community, are positively harmful. The society replies that this conclusion can only be reached by adopting an illegitimate method of reasoning. It is said that the objects of the society being to suppress a practice which involves cruelty to, or at least ill-treatment of, animals fall within a well-established category o charity, and that the charitable character of those objects cannot be altered by pointing to the consequential disadvantages which would flow from the achievement of them. In particular it is said that in the present case thi process of reasoning would involve the weighing of the moral benefits accruing to the community by the suppression of cruelty and the inculcation of a love of animals against the material benefits derived from the improvement in medica knowledge. The court, it is said, has no scales in which to weigh materia against moral benefits.

If, in the present state of knowledge, it were possible to achieve, by som other method, the results obtained by means of vivi-section so that it wa merely an alternative which could be dispensed with, I entertain no doub whatever that the total suppression of vivisection would be a good charitabl object. I adopt, with respect, the elevated view of such matters expresse by SWINFEN-EADY, L.J., in *Re Wedgwood* (2) ([1915] 1 Ch. 113, at p. 122) :

> A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.

I accept without hesitation the view that the objects of the society, considered by themselves and without reference to the benefits derived from vivisection are good charitable objects and fall within a well established category. Are those objects prevented from being good charitable objects by reason of the fact that the acts to the suppression of which they are directed produce benefits of a very high order to the human race and, indeed, to the animal kingdom itself ?

It is, I think, the better view that gifts for the benefit of animals derive their charitable status not from the fact that they are for the benefit of animals, but from the fact that the community is benefited. Animals as such cannot, I think, be the beneficiaries under a charitable trust. Apart from the material benefits to be derived from the proper treatment of animals useful to man, the benefit to the community which is derived from the proper treatment of animals is a purely moral one. As CHITTY, J., said in *Re Foveaux* (1) ([1895] 2 Ch. 501, at p. 507) :

> Cruelty is degrading to man ; and a society for the suppression of cruelty to the lower animals, . . . has for its object . . . the advancement of morals and education among men.

The same view appears in the passage quoted above from the judgment of SWINFEN-EADY, L.J., in *Re Wedgwood* (2). The benefit, therefore, to the community at which the society aims is a moral benefit, emphatically not a material one, and it is on that ground alone that the claim that its objects are charitable must be rested.

I will now turn to the authorities. The leading case on the topic of anti-vivisection is *Re Foveaux* (1). The Crown argues that this case was wrongly decided and should be overruled. Alternatively, the Crown says that the facts as they exist to-day are substantially different from what they were when CHITTY J., decided *Re Foveaux* (1), and that, even if that case was rightly decided, it does not govern the present case. This latter argument (which I do not accept) I will deal with later in this judgment. In *Re Foveaux* (1) the objects of the present appellants were found to be the total abolition of the practice of vivisection as defined in the report of the Royal Commission. This phrase, which refers to the 1876 report, appears to mean " the practice of subjecting live animals to experiments for scientific purposes " which was the matter upon which the Commission was required to report. It was suggested that the decision of CHITTY, J., was based on the view that the purpose of the maker of an alleged charitable gift was what determined whether or not it was in the eyes of the law charitable. This view cannot to-day be regarded as correct. But I do not think that CHITTY, J., based his opinion upon it, and it is clear that this court in *Re Wedgwood* (2) did not think so either. The real ground of his decision is, I think, that the prevention of cruelty to animals is a charitable object, and that the society existed for the purpose of preventing a particular form of cruelty, namely, vivisection. This view he formed some 19 years after the passing of the Cruelty to Animals Act, 1876, and with the report of the Royal Commission of 1876 before him, as appears from the record of *Re Foveaux* (1) which we obtained from the Public Record Office.

Assuming no relevant difference in the existing circumstances is established, the decision in *Re Foveaux* (1) appears to me to be conclusive of this appeal unless we are prepared to overrule it. It has stood for fifty years, and has been approved on numerous occasions. The authorities earlier in date than *Re Foveaux* (1) are examined in the judgment itself. It was approved in the Irish Court of Appeal in *Re Cranston* (4), and in 1914 it was emphatically approved in this court in *Re Wedgwood* (2). There are, however, certain observations in later cases which MACNAGHTEN, J., held to justify him in declining to follow *Re Foveaux* (1). The first is *Re Hummeltenberg* (5) in which RUSSELL, J. (as he then was), negatived, and, in my view, correctly negatived, the view ([1923] 1 Ch. 237, at p. 242), that it was for the donor and not for the court to judge whether a gift was charitable as being for the benefit of the public. He added that the question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it. The gift there in question was for training mediums and did not fall within any established category of charity. In order, therefore, to decide whether or not it could be classed as charitable, RUSSELL J., held that it was necessary to examine the evidence and see whether the object of the gift was beneficial to the community. He rejected the argument that this question fell to be decided by the intention of the testator. I do not think that the words of RUSSELL J., are, or were, intended to be applicable to the case of a gift whose objects fall within an established category of charity. If he so intended, I must respectfully disagree.

But the case principally relied on by the Crown is that of *Re Grove-Grady* (6), a decision of this court. The gift there was a peculiar one. The branch of it relevant for present purposes had for its object the acquisition of land for the provision of refuges for the preservation of " all animals, birds or other creatures not human." All such creatures were to be preserved from molestation or destruction by man. ROMER, J., held the gift to be a good charitable gift. In the Court of Appeal, LORD HANWORTH, M.R., stated ([1929] 1 Ch. 557, at p. 570) that societies for the abolition of vivisection are charities within the legal definition and cited *Re Foveaux* (1). He referred to other authorities, and went on to say (*ibid.*) :

> From these authorities it seems clear that if the object be to enhance the condition of animals that are useful to mankind, or to secure good treatment for animals, whether those animals are useful to mankind or not (see *per* the VICE-CHANCELLOR in *Armstrong* v. *Reeves* (7) (25 L.R. Ir. 325, at p. 341), and see *per* WOOD, V.-C., in *Marsh* v. *Means* (8) or to insure humane conduct towards and treatment of them whether in respect of a particular subjection of them to the use of mankind, as for food (*In Re Cranston* (4)), or in what is called vivisection, such objects are to be deemed charitable.

He quoted with approval the passage from the judgment of RUSSELL, J., in *Re Hummeltenberg* (5) referred to above, and proceeded to examine the facts of the case before him. He pointed out that all animals *ferea naturae*, including noxious and predatory animals, were included and that the struggle for existence was to be given free play so that the animals living in the sanctuary would be free to molest and harry one another. Such a purpose he considered was not beneficial to animals, and did not denote any elevating lesson to mankind. On these findings the question which arises in this case or anything approaching it did not, of course, arise.

LAWRENCE, L.J., dissented, and held, that the trust was a valid trust for the protection of animals, and came within the principle of *Re Wedgwood* (2). RUSSELL, L.J., (as he then was) began his judgment as follows ([1929] 1 Ch. 557, at p. 582) :

> There can be no doubt that upon the authorities as they stand a trust in perpetuity for the benefit of animals may be a valid charitable trust if in the execution of the trust there is necessarily involved benefit to the public ; for if this be a necessary result of the execution of the trust, the trust will fall within LORD MACNAGHTEN'S fourth class in *Pemsel's* case (3), namely, " trusts for other purposes beneficial to the community." So far as I know there is no decision which upholds a trust in perpetuity in favour of animals upon any other ground than this, that the execution of the trust in the manner defined by the creator of the trust must produce some benefit to mankind. I cannot help feeling that in some instances matters have been stretched in favour of charities almost to bursting point ; and that a decision benevolent to one doubtful charity has too often been the basis of a subsequent decision still more benevolent in favour of another. The cases have accordingly run to fine distinctions, and speaking for myself I doubt whether some dispositions in favour of animals held to be charitable under former decisions would be held charitable to-day. For instance, anti-vivisection societies, which were held to be charities by CHITTY, J., in *Re Foveaux* (1) and were described by him as near the border line, might possibly in the light of later knowledge in regard to the benefits accruing to mankind from vivisection be held not to be charities.

The trust in question he held not to be a good charitable trust for reasons which may be summarised thus : it was not a trust directed to insure absence or diminution of pain or cruelty in the destruction of animal life ; it would not permit the destruction, however painless, of any animal noxious to mankind or to the other animals or even its destruction in its own interest. The carrying out of such a trust could not benefit the public. He then examined the decision in *Re Wedgwood* (2) and pointed out correctly, if I may respectfully say so, that that case did not decide that any trust for the protection and benefit of animals necessarily involves a benefit to the community. This proposition appears to me to be beyond argument. A trust, for example, which has as its object, or included among its objects, the preservation of animals noxious to man, such as rats or mosquitoes, could not, I venture to think, be a good charitable trust. Such a trust could not be said to " promote feelings of humanity and morality," to quote SWINFEN-EADY, L.J., again. No question of moral benefit to the human race would be involved since man is entitled to protect himself as such against noxious animals as against his fellow men if they attack him. In the case of noxious animals, the suppression of cruelty in dealing with them would, however, surely be a good charitable object. RUSSELL, L.J., thought that the benefit to humanity to be derived from the gift in *Re Wedgwood* (2) lay in the suppression of cruelty to animals. I do not myself think, if I may respectfully say so, that the decision was based on so narrow a ground ; and the weight of authority appears to me to support the proposition that, subject to what I have said with regard to noxious animals, a trust which is really and truly for the benefit of animals (which the trust in *Re Grove-Grady* (6) was not) is a good charitable trust, quite apart from the question of the suppression of cruelty, not because animals themselves are the beneficiaries, but because kindness and love towards animals are virtues, the cultivation of which is conducive to the moral advancement of humanity. I should be ashamed to hold otherwise. The proposition is not made untrue by the fact that human weakness or urgent need persuades or compels individuals or the community at large to sacrifice the moral benefit. When this happens it merely means that a moral problem has been solved in a particular way, and that the end is thought to justify the means. It does not mean that the moral problem does not exist, or that the means are in themselves free from evil. I should not care to find myself having to argue with anyone who regarded the practice of operations on living animals as anything better than a lamentable necessity.

The decision in *Re Grove-Grady* (6) was to the effect that the trust was not for the benefit of animals and that no benefit to the community could flow from such a trust. These conclusions were arrived at upon a consideration of the facts, in accordance with the principle stated by RUSSELL, J., in *Re Hummeltenberg* (5). But if upon the facts the court had come to the conclusion that the benefit of animals (excluding animals noxious to man) was the real object of the gift, I venture to think that the decision would have been different. In any case the decision in no way approaches the present case, and the comments of RUSSELL, L.J., on *Re Foveaux* (1), though deserving the utmost respect, were *dicta* only. Also his proposition that the question of benefit to humanity must be decided on the evidence although, if I may say so, indisputably correct in relation to the questions which were before him in *Re Hummeltenberg* (5) and *Re Grove-Grady* (6) is liable to serious misconstruction if applied to such a problem as the present. To say that the question is whether the facts bring a gift within a category of charitable gifts is undoubtedly true : it was so laid down by RUSSELL, J., in *Re Hummeltenberg* (5) in opposition to the view that the intention of the donor is the decisive factor. But to say that a gift, the purpose of which is in itself charitable as falling under an established head of charity, can be taken out of that category by proof that the achievement of its purpose would bring in its train countervailing disadvantages is, as it appears to me, a different proposition altogether ; and, apart from the *dicta* of RUSSELL, J. (if indeed this is what they mean), I know of no authority which supports it.

It is important to follow the reasoning of RUSSELL, J., on this matter. In *Re Hummeltenberg* (5) he said this ([1923] 1 Ch. 237, at p. 240) :

> But no matter under which of the four classes a gift may *prima facie* fall, it is still, in my opinion, necessary (in order to establish that it is charitable in the legal sense) to show (1) that the gift will or may be operative for the public benefit, and (2) that the trust is one the administration of which the court itself could if necessary undertake and control.

It is quite clear that in referring to " public benefit " the emphasis is on the word " benefit," that is, the statement is not merely asserting that in all charitable gifts the necessary element of publicity must be present. This proposition cannot, I think, mean that a gift which *prima facie* falls under one of the first three of Lord Macnaghten's classes in *Income Tax Special Purposes Comrs.* v. *Pemsel* (3), for example, a gift for the relief of poverty, or a gift for the advancement of religion, can fail to be regarded as charitable on the ground that it may be thought to be in fact, on balance, calculated to injure rather than to benefit the community. No attempt of the kind, so far as I have been able to discover, has ever been made, much less succeeded. Cases have, of course, occurred in which a question has arisen whether the object of a gift is truly the advancement of religion or education or the relief of poverty. But I know of no case in which this question having been answered in the affirmative, the gift was nevertheless held not to be a charitable gift.

The case of "dole" charities is a good example. These have always been regarded as good charities; but in directing schemes the court has refused to sanction the augmentation of the doles or to increase their number, not because they were not charitable, but because the court in its discretion has regarded them as mischievous in their results. This was strongly put by Sir R. T. Kindersley, V.-C., in *A.-G.* v. *Marchant* (9) (L.R. 3 Eq. 424, at p. 431):

> I think, by common consent it is established at the present day that there is nothing more detrimental to a parish, and especially to the poor inhabitants of it, than having stated sums periodically payable to the poor of that parish by way of charity . . . The only effect of such gifts is to pauperise the parish . . . I think it would be detrimental to the poor of these parishes to increase what has already been dedicated to them by the testator.

In *Re Campden Charities* (10) Sir George Jessel, M.R., said of such a gift (18 Ch.D. 310, at p. 327):

> There is no doubt that it tends to demoralise the poor and benefit no one.

In *Pemsel's* case (3) itself Lord Herschell said this ([1891] A.C. 531, at p. 572):

> It is a mistake to suppose that men limit their use of the word "charity" to those forms of benevolent assistance which they deem to be wise, expedient, and for the public good. There is no common consent in this country as to the kind of assistance which it is to the public advantage that men should render to their fellows, or as to the relative importance of the different forms which this assistance takes. There are some who hold that even hospitals and almshouses, which are specially mentioned by the legislature, discourage thrift, and do upon the whole harm, rather than good. This may be an extreme view entertained by few, but there are many who are strongly convinced that doles, and other forms of beneficence, which must undoubtedly be included, however narrow the definition given to the term "charitable purpose," are contrary to the public interest; that they tend to pauperise and thus to perpetuate the evil they are intended to cure, and ought to be discouraged rather than stimulated. It is common enough to hear it said of a particular form of almsgiving that it is no real charity, or even that it is a mischievous form of charity. I think, then, that a purpose may be regarded by common understanding as a charitable purpose, and so described in popular phraseology even though opinions differ widely as to its expediency or utility.

The existing categories of objects regarded by the law as charitable have been fixed by judicial decision. Lord Macnaghten, in *Income Tax Special Purposes Comrs.* v. *Pemsel* (3), summarised and classified those categories. A gift which is shown in fact to be for the advancement of education or of religion, or for the relief of poverty, must, in my opinion, be treated by the courts as a good charitable gift, just as if a statute had laid it down that a gift of such a description was a good charitable gift. Once the fact is established, any inquiry into consequence appears to me to be irrelevant. But it is argued that, however true this may be of Lord Macnaghten's first three classes, it cannot be true of the fourth which actually speaks of objects "beneficial to the community." But this is to misunderstand Lord Macnaghten's language. His fourth class sweeps up a variety of objects which had been, or might in the future be, held to be beneficial to the community. In the present case, if my view of the authorities is correct, the prevention of cruelty to, or the infliction of pain upon, animals, and the benefit of animals not noxious to man are good charitable objects which have been held to be beneficial to the public, and I do not see how at this time of day it can be asserted that a particular exemplification of those objects is not beneficial merely because in that particular case the achievement of those objects would deprive mankind of certain consequential benefits, however important those benefits may be. If this were not so, it would always be possible, by adducing evidence which was not before the court on the original occasion, to attack the status of an established charitable object to the great confusion of trustees and all others concerned. Many existing charities would no doubt fall if such a criterion were to be adopted. It is to be noticed that Russell, L.J., himself, in speaking of *Re Foveaux* (1), went no further than to say ([1929] 1 Ch. 557, at p. 582), that anti-vivisection societies " might possibly in the light of later knowledge in regard to the benefits accruing to mankind from vivisection be held not to be charities." This is far from suggesting that *Re Foveaux* (1) was wrongly decided as the Crown now asserts. It appears to mean that an object which was originally charitable may subsequently become non-charitable because of an increase in the benefits derived from the practice at the suppression of which it is aimed. This, if I may say so, with the utmost respect, is to me a novel conception, and, in the absence of authority binding upon me, I am unable to accept it.

The alternative argument of the Crown, namely, that in the light of the facts as known to-day the objects of the society, however charitable they were at the date of *Re Foveaux* (1) cannot be regarded as charitable to-day because of the increase of the benefits derived from vivisection, is based on this interpretation of the words of Russell, L.J. But, apart from the objections which, for my part, I see to the proposition of law involved, the argument appears to me to break down on the facts. The benefits derived from vivisection were in 1895 very great indeed, as appears from the report of the Royal Commission which, as I have said, was in evidence before Chitty, J., a fact which can only be ascertained by an examination of the record. Russell, L.J., does not appear to have been aware of this. It is true that a large field of benefit to humanity has since been opened up, particularly in regard to the treatment of disease. But if these benefits are now to be regarded as sufficient to deprive a gift aimed at the suppression of the ill-treatment of animals of its charitable character, I cannot see why the known benefits were not sufficient in 1895. But Chitty, J., did not even inquire into that matter.

In the present case an additional argument is available which I find convincing, that an object which falls within an established category of charity, if its qualification for holding that status consists in a moral benefit to the community, cannot be taken out of that category by proving that great material benefits are derived from the practice which the gift aims at suppressing. I cannot see how any court can be asked to weigh material against moral benefit, however easy a particular judge, speaking as an individual, may find it to solve the problem involved in a manner satisfactory to his own conscience.

Counsel for the Crown [Mr. Stamp] argued that *Re Foveaux* (1) was wrongly decided because, as he said, Chitty, J., had misused the word " cruelty." That word, he said, could not properly be used to describe the justifiable infliction of pain, and he quoted *Lewis* v. *Fermor* (11). That case was decided upon the special language of a criminal statute and has not, in my opinion, any general application. In 1895, as in 1945, the supporters of vivisection were maintaining that the infliction of pain was justifiable ; but as Chitty, J., said ([1895] 2 Ch. 501, at p. 507) :

> The question of what is and what is not justifiable is a question of morals, on which men's minds may reasonably differ and do in fact differ.

In any case, the view that the suppression of cruelty is a necessary factor in a charitable gift for the benefit of animals is not, as I have already indicated, one to which I can subscribe.

The last argument on which I must say a word is to the effect that the objects of the society are in part at any rate non-charitable, in that they comprise the repeal of the Cruelty to Animals Act, 1876, and the promotion of legislation forbidding experiments on living animals. These objects, it is said, are " political " and " political " objects are not charitable. Lord Parker of Waddington, in *Bowman* v. *Secular Society, Ltd.* (12), referred to the objects of the Secular Society which comprised matters of acute political controversy. It is, I think, in reference to matters of that kind that the language of Lord Parker of Waddington must be interpreted when he says ([1917] A.C. 406, at p. 442) :

> . . . a trust for the attainment of political objects has always been held invalid, not because it is illegal . . . but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit . . .

I feel difficulty in applying these words to a change in the law which is, in common parlance, a "non-political" question. I do not in any case think that they can apply when the desired legislation is merely ancillary to the attainment of what is, *ex hypothesi*, a good charitable object. If before the passing of the various statutes relating to cruelty to animals a society having as its object the suppression of cruelty to animals had included, as a means of attaining its main object, the ancillary object of obtaining the enactment of that very legislation, it could scarcely have been said that it thereby lost its status as a society established for charitable purposes only. A charitable institution must surely be at liberty to achieve its object by the most efficient and practical means which may well be legislation. Some of the difficulties arising from the language of LORD PARKER OF WADDINGTON are discussed in TUDOR ON CHARITIES, 5th Edn., p. 41.

I would allow the appeal.

MACKINNON, L.J.: The appellant society made a claim in Dec., 1943, before the Special Commissioners of Income Tax to be exempt from income tax on its income from investments amounting to £2,876 15*s.* 7*d.* That claim was based on the Income Tax Act, 1918, s. 37, which provides for such exemption for the income from investments "of any body of persons or trust established for charitable purposes only." If this society is established "for charitable purposes only," those purposes must be within the fourth category in LORD MACNAGHTEN's famous definition in *Comrs. of Inland Revenue* v. *Pemsel* (3) ([1891] A.C. 531, at p. 583), namely, as being "a trust for other purposes beneficial to the community not falling under any of the preceding heads."

Whether this society is "established for charitable purposes only" that is, "for purposes beneficial to the community," is clearly a question of fact to be decided upon evidence. The Commissioners heard a considerable amount of evidence, and its details are clearly stated in the special case. Having read that account of the evidence, I am abundantly satisfied that the avowed purposes of this society are not beneficial to the community. Indeed, I am equally satisfied that the successful achievement of those purposes would inflict incalculable injury on the community and on all mankind. The primary avowed purpose of the society is to induce the Legislature "totally to suppress the practice of vivisection." Other avowed objects are (1) "opposition to the immunisation (by innoculation) of the members of the armed forces against typhoid," and (2) "opposition to the immunisation of the civil population against diphtheria." Of the immense benefits to mankind which medical research has conferred by means of what is summarily called vivisection there was an imposing body of testimony. This evidence, say the Commissioners in the special case, "we accepted in its entirety." It is probably not too much to say that those benefits equal, if the sum of them does not exceed, the blessings on mankind bestowed earlier by the labours of Jenner, Simpson and Lister.

The main purpose of this society is to put an end to all further medical research of this character. And its avowed aim of preventing inoculation against typhoid and diphtheria is to deprive mankind of some of the benefits that such medical research has already conferred upon it. In short, the purposes of this society, so far from being "beneficial to the community," might, with reason, be stigmatized as malignantly designed for the injury of the community. It is not surprising that the Commissioners in the special case state as their own conclusion of fact upon the evidence that "the object of the society, so far from being for the public benefit, is gravely injurious thereto, with the result that the society cannot be regarded as a charity." I cannot imagine that any body of sensible men, upon the evidence produced to them, could arrive at any other conclusion.

But though this was their conclusion as sensible men upon the facts, the Commissioners were unhappily persuaded that, as a matter of law, by reason of a reported case, they were constrained to hold that this society is established for purposes beneficial to the community. That case is *Re Foveaux* (1), and was decided by CHITTY, J., as he then was, fifty years ago. It concerned bequests to two anti-vivisection societies, and the question was whether these were good charitable bequests. That question, as I conceive, involved the determination of an issue of fact. Chitty, J., says ([1895] 2 Ch. 501, at p. 504):

> To be a charity there must be some public purpose—something tending to the benefit of the community.

As it appears to me, the issue which the judge was called upon to decide was: "Has it been proved to me, by the evidence to which I have listened, that the purposes of these societies are beneficial to the community?" Inci-
A dentally, I may remark, it is not possible to discover from the report what was the evidence called at the hearing. The judge makes no reference to it in his judgment. At the hearing of this appeal Lord Greene, M.R., sent to the Record Office for the file of *Re Foveaux* (1). From that it appeared that the material before the court by way of evidence was the report of the Royal Commission on Vivisection of 1876. I have not had an opportunity of looking at that
B weighty volume, and I do not think it was necessary for me to do so. I expect that the Royal Commissioners referred to, and possibly quoted, the evidence of witnesses before them, and that there was sharp conflict of opinion between such witnesses.

If, however, I am right in thinking that the issue to be determined by the judge was: "Has it been proved to me, by the evidence adduced before me, that the purposes of these societies are beneficial to the community?", he in
C terms declined to fulfil that task, giving as his reason that on this disputed issue it was the duty of the court to "stand neutral." He says ([1895] 2 Ch. 501, at p. 503:

> . . . the court does not enter into, or pronounce any opinion on, the merits of the controversy which subsists between the supporters and opponents of the practice of vivisection. It stands neutral.

D He goes on to say later (*ibid.*, at p. 507):

> The intention [of these societies] is to benefit the community; whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the court is not required to express an opinion.

I do not understand this reasoning. Surely "the controversy between the supporters and opponents of the principle of vivisection" is simply whether
E the practice of that principle is or is not of benefit to the community? And that was the issue which the court was called upon to determine. In deciding any issue of fact a tribunal cannot "stand neutral." It must decide that one party to the dispute is right and the other party wrong. As it seems to me, the judge was declining to decide the very issue that was raised before him. In finding, as he does, that "the intention of these societies is to benefit the community," the judge did not, so far as I know, rely upon evidence he had
F heard or read, but rather upon the fact that societies for the prevention of cruelty to animals had, in previous cases, been held to be charitable, and upon an assumption that the purpose of these societies was to prevent cruelty to animals. For, after referring to the cases about societies for the prevention of such cruelty, he adds (*ibid.*, at p. 507):

> . . . it would seem to follow that an institution for the prevention of a particular
> G form of cruelty to animals is also charitable . . . Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men.

This seems to me to confuse the motives of those who support such a society as this with their money with the purposes of the society that receives and uses that money. But the motive of those who provide the money is immaterial.
H So, I think, it was rightly held by Russell, J., as he then was, in *Re Hummeltenberg* (5). The head-note seems properly to summarise his judgment:

> The opinion of the donor of a gift or the creator of a trust that the gift or trust is for the public benefit does not make it so, the matter is one to be determined by the court on the evidence before it.

And he disagrees with "a sentence in the judgment . . . in *Re Foveaux* (1) to the contrary."

Upon the reasoning and assumption of Chitty, J., I conceive that a society, whose object was to secure legislation making illegal the manufacture and sale of rat-traps and rat poisons, would have to be held established for charitable purposes; and that the more readily if the tribunal insisted on "standing neutral" upon the question whether rats are, or are not, vermin that are a menace to mankind. Indeed, if it be true, as some may think, that:

> . . . the poor beetle, that we tread upon,
> In corporal sufferance finds a pang as great
> As when a giant dies . . .

a society to promote legislation to prohibit the manufacture and sale of all A
insecticides would seem to have good ground for a like claim.

For these reasons, I cannot think that the case of *Re Foveaux* (1) constrains me, as the Commissioners thought it constrained them, to hold that the appellant society is "established for charitable purposes only." It was said in argument that that case has been referred to without disapproval, or even with approval, in this court. That may be so; but the references were only to incidental matters. The main ground of the decision has never been the subject of dis- B
cussion and review. And a serious doubt as to its correctness was voiced by RUSSELL, L.J., in *Re Grove-Grady* (6). In this appeal its correctness is directly involved, and for my part I think it should be overruled. In truth that phrase need not be used, and is perhaps inaccurate. CHITTY, J., in *Re Foveaux* (1) had to decide a question of fact, though, as I think, he declined to decide it. The question to be decided here is one of fact, and it would be more correct C
to say that some of the considerations stated by the judge in *Re Foveaux* (1) as relevant to his conclusion cannot be regarded as admissible.

In the result my conclusion is that the decision of MACNAGHTEN, J., allowing the appeal from the Commissioners was right, and that this appeal from his judgment should be dismissed with costs.

TUCKER, L.J. [read by MACKINNON, L.J.]: Approaching, as I do for the
first time, the question of the application of LORD MACNAGHTEN'S fourth division D
in his definition of charitable trusts in *Pemsel's* case (3), namely, "trusts for other purposes beneficial to the community not falling under any of the preceding heads," and experiencing some difficulty in ascertaining from the authorities the principles that have been applied, I am relieved to find that others more familiar with the subject have not met with any greater measure of success.

In TYSSEN'S "LAW OF CHARITABLE BEQUESTS," 2nd Edn., the authors write: E

> There remains the fourth of LORD MACNAGHTEN'S heads, namely, "other purposes beneficial to the community not falling under any of the preceding heads." These purposes cannot be classified or reduced to any principle. All we can do is to look at the cases and see what has been decided.

More recently in an article in the LAW QUARTERLY REVIEW, July, 1945,
Vol. 61, from which I have derived much assistance, it is said (at p. 279): F

> . . . The fourth head, gifts for the benefit of the community, is a collection of disjointed decisions, for which no complete definition or connecting principle has ever been enunciated.

If these statements are correct, as I am inclined to think they are, the Court of Appeal is, at any rate, left with a considerable measure of freedom in deciding any particular case that comes before it. Although no complete or satisfactory G
connecting principle may be discernible, certain propositions are, I think, established which afford some guidance to the correct approach to the problem. Two of the propositions are as follows: (1) Not all trusts beneficial to the community are charitable. Benefit to the community is an essential requisite, but there is a further necessary, if somewhat elusive, element, namely, that the trust should be analogous to trusts for purposes enumerated in or within the spirit of the Statute of Elizabeth: see *A.-G.* v. *National Provincial Bank* (13). H
(2) The question whether a gift is or may be operative for the public benefit is a question to be answered by the court by forming an opinion upon the evidence before it. It does not depend upon the intention of the donor: see *Re Hummeltenberg* (5), and *Re Grove-Grady* (6).

No. 2 is, in my view, vital to the decision of the present case, which raises the question of the admissibility of certain evidence led for the purpose of negativing any presumption there might otherwise have been that the objects of this society were or might be beneficial to the community. If this is a matter for the court to decide, and if communal benefit is essential, upon what evidence is the court to act ? Upon what principle can it be said that the court must arrive at its decision without hearing evidence as to the inestimable benefits or incalculable harm that may result to the community in any particular case ? If it be said that the court is being called upon to perform an impossible task, or one better suited to the Legislature, I would answer that this might be a good reason for removing such matters from the purview of the courts, but that it can be no justification for requiring the courts to adjudicate blindfold. No authority has been cited for the proposition that such evidence is inadmissible save the statements of Chitty, J., in *Re Foveaux* (1), where he says ([1895] 2 Ch. 501, at p. 503), referring to this particular society :

> In determining this question of charity the court does not enter into, or pronounce any opinion on, the merits of the controversy which subsists between the supporters and opponents of the practice of vivisection. It stands neutral.

And later (*ibid.*, at p. 507) :

> The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community ; whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the court is not required to express an opinion.

With great respect, this seems to me to conflict with the later decisions in *Re Hummeltenberg* (5), and *Re Grove-Grady* (6), to the effect that it is the function of the court to decide the question of benefit to the community on the evidence before it, and appears to be an abdication by the court of its functions in favour of the intention of the donor based on some supposed irrebuttable presumption of moral benefit to the community resulting from a movement directed to the alleviation or prevention of suffering amongst animals. In this connection I would observe that in the case of societies for the prevention of cruelty to animals one would not normally expect to find any conflict between the moral benefit and the material disadvantages to man resulting from the diminution of cruelty. We are, as a race, peculiarly solicitous for the welfare of animals, but, none the less, both the law and the practice of society recognise that animals may be used for the service and benefit of man, even at the expense of the infliction of some suffering. The offence of "cruelty," broadly speaking, involves an element of wantonness or the causing of unnecessary suffering, and, in considering what is necessary or justifiable, the requirements of man are to some extent taken into consideration. If, however, in the case of a trust for the benefit of animals, such a conflict does arise, it is, in my view, the duty of the court to decide, and to decide on the evidence adduced with reference to the resulting benefit or detriment to the community.

Counsel for the appellants relied on the passage in *Re Cranston* (4) in the judgment of FitzGibbon, L.J., quoted with approval in *Re Wedgwood* (2) by Lord Cozens-Hardy, M.R. ([1915] 1 Ch. 113, at p. 117), in which it was said ([1898] 1 I.R. 431, at p. 446) :

> . . . Any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow-creatures (including, under decided cases, animals), and which will confer the supposed benefit without contravening law or morals, will be charitable." "

Here I would emphasise the words "and which will confer the supposed benefit" as indicating the duty of the court to inquire whether the benefit will in fact result. These words were again quoted with approval by Lord Hanworth, M.R., in *Re Grove-Grady* (6) ([1929] 1 Ch. 557, at p. 572), but as it is clear from the judgments in that case that the court considered that benefit to the community, and not merely to the animals, was necessary, I doubt whether it was intended to endorse the view, if, indeed, FitzGibbon, L.J., ever held it, that benefit to the animal world alone, irrespective of any resulting moral or material benefit to mankind, would suffice to satisfy the requirements of Lord Macnaghten's classification under the fourth head in *Income Tax Special Purposes Comrs.* v. *Pemsel* (3). But however this may be, I know of no English authority for the proposition that, once some benefit to animals is established, the court is precluded from receiving evidence as to the corresponding detriment to mankind. Such a proposition appears to me to be negatived by the whole trend and reasoning of the judgment of Russell, L.J., in *Re Grove-Grady* (6).

If such evidence is admissible, as, in my opinion, it is, this case is concluded in favour of the Crown, since the evidence given before, and accepted by, the Special Commissioners was all one way and stood uncontradicted and unchallenged. I am in complete agreement with the judgment of Macnaghten, J., and consider that this appeal should be dismissed, and that *Re Foveaux* (1) must be overruled.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Shield & Son* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

SOMERSHIELD *v.* ROBIN.

[Court of Appeal (Lord Greene, M.R., du Parcq and Tucker, L.JJ.), January 16, 17, 1946.]

County Courts—Jurisdiction—Action for recovery of possession—Limit of jurisdiction—Furnished house—Whether apportionment provisions of Rent Restrictions Acts apply—County Courts Act, 1934 (*c.* 53), *s.* 48 (1)—*Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (*c.* 17), *s.* 12 (2), *proviso* (i) —*Rent and Mortgage Interest Restrictions Act,* 1923 (*c.* 32), *s.* 10.

Statutes—Construction—With reference to other statutes alio intuitu.

An action was brought by the respondent in the county court for possession of a furnished house let at a rent of £272 a year. The judge, having deducted a sum of £150 in respect of the use of the furniture and a further sum of £45 in respect of rates which were payable by the landlord, held that the action being one in which neither the value of the land in question nor the rent payable in respect thereof exceeded £100 a year, was within the jurisdiction of the court under the County Courts Act, 1934, s. 48 (1) and made an order for possession. It was contended on behalf of the appellant tenant that the contractual sum of £272 was rent issuing out of the land demised and, therefore, payable in respect of the land and that there was nothing in the County Courts Act which justified the process adopted by the judge. On behalf of the respondent it was contended that in construing the County Courts Act, 1934, s. 48 (1), and determining what rent was payable in respect of the land in question, the court should, in so far as the use of the furniture was concerned, apply the apportionment provisions of the Rent Restrictions Act, 1920, s. 12 (2), proviso (i), as amended by the Rent Restrictions Act, 1923, s. 10, and that a similar dissection of the contractual figure should be made in respect of the rates. Alternatively it was contended that the contractual figure was rent payable in respect of the premises and the furniture and not in respect of the land, and that, therefore, the only matter to be taken into account was the value of the land which was below £100:—

Held: the County Courts Act, 1934, s. 48 (1) should be interpreted in its obvious and *prima facie* meaning and the contractual sum of £272 being rent issuing out of the land, for non-payment of which there was a right to distrain, was "payable in respect of the land in question." The county court judge had, therefore, no jurisdiction to try the action and make an order for possession.

Per cur: An Act of Parliament should not be construed by having regard to the special, obscure and artificial language of an Act directed to a totally different subject-matter and actuated and governed by a completely different policy.

[**EDITORIAL NOTE.** This case decides an interesting point in connection with the jurisdiction of the county court. It is argued that in proceedings for possession of a furnished house the judge, in order to ascertain the "rent payable in respect thereof" is entitled to deduct from the contractual payment a sum attributable to the use of the furniture, on analogy with the apportionment made in cases under the Rent Restrictions Acts. It is held, however, that "rent" means a sum issuing out of land for which distraint may be levied. The apportionment which takes place under the Rent Restrictions Acts is necessary to make the Acts work, but there is no justification for applying the principle to an entirely different statute where it is unnecessary. A contrary conclusion would involve the proposition that, wherever a tenant obtained additional or collateral benefit, such as the use of furniture, or the giving of a restrictive covenant by the landlord, the contractual sum could not be regarded as "payable in respect of land."

As to Limit of Jurisdiction of County Courts in Actions for Recovery of Possession, see HALSBURY, Hailsham Edn., Vol. 8, p. 174, para. 271; and for Cases, see DIGEST, Vol. 13, pp. 469, 470, Nos. 190-192.

As to Construction of Statutes by Reference to Statutes Alio Intuitu, see HALSBURY, Hailsham Edn., Vol. 31, p. 489, para. 618; and for Cases, see DIGEST, Vol. 42, p. 662, Nos. 708-713.]

Case referred to:

(1) *Mackworth* v. *Hellard*, [1921] 2 K.B. 755; 31 Digest 563, *7111*; 90 L.J.K.B. 693; 125 L.T. 451.

Appeal by the defendant from an order of His Honour Judge Burgis, made at Altrincham County Court, on Oct. 17, 1945. The facts are fully set out in the judgment of Lord Greene, M.R.

G. G. Honeyman for the appellant.

Redmond Barry, K.C., and *J. S. R. Abdela* for the respondent.

Lord Greene, M.R.: This appeal raises a simple point which is not without importance; but I have come to a clear conclusion as to the proper answer to the question. The action was an action to recover possession of a house which was held on a monthly tenancy. The tenancy having been determined by notice to quit the tenant failed to deliver possession and this action was commenced in the Altrincham County Court. The only question which arises is whether the county court judge had jurisdiction to entertain the action. The county court judge held that he had jurisdiction and made an order in favour of the plaintiff. Against that order the defendant appeals.

The house was what is commonly called a furnished house, and the rent payable was £272 a year. By the County Courts Act, 1934, s. 48 (1), the jurisdiction of the county court is defined as follows:

> A county court shall have jurisdiction to hear and determine any action for the recovery of land where neither the value of the land in question nor the rent payable in respect thereof exceeds the sum of one hundred pounds by the year.

The county court judge was apparently satisfied that the value of the land did not exceed the sum of £100 a year, but that was not sufficient to establish his jurisdiction because it had to be shown that the rent payable in respect of the land did not exceed the sum of £100 a year. The judge was confronted by the fact that the rent payable was £272 a year and, therefore, in order to obtain jurisdiction he had in some manner to get that figure down to a figure not exceeding £100 a year. He did that in this way. He accepted evidence in relation to the furniture which satisfied him that the furniture was worth a sum of £150 a year; he, therefore, deducted £150. He also inquired into the question of rates and water rate, which under the lease were payable by the landlord and he ascertained that the rates and the water rate amounted to £31 for rates and £4 odd for water rate; he, therefore, deducted those figures. He also appears to have made a deduction of about £10 in respect of chief rent; but that is rather obscure, and it does not matter for the purposes of this appeal, whether he was or was not making that deduction, because the total of the amount he deducted in respect of furniture and the amount deducted in respect of rates and water rate gave him a figure below £100.

It is argued by the appellant that there is nothing in the County Courts Act which justifies any such process. The words of the subsection which are crucial in this case are these: "the rent payable in respect thereof"; that is to say, in respect of the land in question. It is pointed out that the sum of £272 which is referred to in the lease is unquestionably rent. It is pointed out that it issues out of the land demised. There can be no question about that; it is a point which has been settled for very many years. It is truly rent because it can be distrained for, and rent in the definition of Coke upon Littleton—I read the citation from Foa on Landlord and Tenant, 6th Edn., at p. 123—is:

> A certain profit reserved or arising out of lands or tenements, whereunto the lessor may have recourse to distrain.

The £272 in this case unquestionably satisfies that definition. It is argued by counsel for the respondent that even accepting that definition it cannot be said that the rent is payable in respect of the land in question and he says that the only way in which you can discover how much rent is payable in respect of the land in question is by dissecting the figure of £272 and making a notional apportionment of part of it to rent in respect of the land and part of it to payment for use of the furniture.

It cannot be doubted that in certain Acts of Parliament, in order to make them work and to achieve their obvious purpose, an apportionment of what is one integral sum is often necessary. It is extremely familiar in the law relating to income tax and an example of it, germane to the present type of question is, of course, to be found in the Rent Restrictions Acts. Sect. 12 (2), proviso (i), of the Act of 1920, enacts that the Act is not to apply to :

> . . . a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture.

What that section, having regard to the manifest purposes of the Act, means is that in order to make it work you must examine an integral rent and attribute part of it to the furniture. You cannot make sense of it unless that purely artificial process is gone through. It is necessary in order to make the Act work, and that that is the intention of Parliament is made manifest when the amending sect. 10 of the Act of 1923, is looked at, because that uses this expression :

> . . . a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

Even there, it seems to me, an inaccuracy has not been avoided because it would not be true to say that an amount of rent is attributable to the use of the furniture. What might be true to say would be that it would be right to attribute part of the figure of rent to the fact that the use of the furniture is included in the contract. It is perfectly true that in the normal case in arriving at the figure of rent of a furnished house the figure is loaded by reason of the fact that under the contract the tenant is going to have something more than the mere occupation of the house, namely, he is going to have the use of the furniture. That does not mean that the figure arrived at is any the less rent, nor does it become true to say that part of the rent must be treated as rent for furniture. It is entirely artificial. In the Rent Restrictions Act that artificiality must be made use of in order to make the provision work at all and it is perfectly clear that that was the intention of Parliament. But in the County Courts Act we are not assisted by considerations of that kind. There is nothing in the Act to suggest that any artificial meaning is to be put on the words or that some artificial process is to be gone through for the purpose of arriving at a result which has no reality at all. When this process of dissection has taken place it is quite untrue to say that that portion of the contractual sum which is attributed by the court to the rent is the rent payable in respect of the land. It is not. It is an entirely artificial figure which cannot be said to be rent payable in respect of the land. The rent payable in respect of the land is the contractual figure which issues out of the land and for which distraint may be levied. It seems to me quite untrue to say that because historically the figure of rent was arrived at by taking into consideration the fact that use of the premises was to include furniture, because historically that is the way in which the figure was built up by negotiation between the parties, that means that the figure when arrived at and inserted in the rent is any the less rent in respect of the land. If the legislature had meant that in such cases apportionment was to take place it could quite easily have said so ; it could quite easily have used the appropriate language. In the Rent Restrictions Act, 1923, s. 10, it used language which, though, as I have said, not strictly accurate, at any rate made it quite clear that such an apportionment was to take place and it could quite easily have used language of that kind in this section if it had so intended.

It is to be observed that this suggestion that the dissection is to take place would apply in every case, it seems to me, if it were well founded, where under a lease the tenant obtains some additional advantage. I put a case to counsel for the respondent, in argument, which is not uncommon, a case where a landlord lets a shop to a tenant and undertakes not to carry on a competing business in some neighbouring shop of his own. The rent payable in such a case is obviously, as a matter of business and figures, arrived at by taking into consideration the fact that the landlord is binding himself by this covenant and the tenant is getting that additional advantage. It seems to me that in that case it would be perfectly impossible to say that the figure of rent in the lease must, in order to determine the question of county court jurisdiction, be dissected and some part of it attributed to the value of the covenant and the residue only to the value of the right of occupation under the lease. After all, cases where the tenant gets something over and above the mere tenancy of the land are legion and of infinite variety and, in every case, according to this argument, you would have to split up the amount, and take an artificial figure as being the rent in respect of the land and treat the balance as a payment in respect of the collateral or additional advantage. I can find nothing in the subsection to justify any such process.

Counsel for the respondent placed reliance on the provisions of the Rent Restrictions Act, which I have quoted, and he said that this can be and should be looked at for the purpose of assisting the court in construing the County Courts Act, s. 48 (1). I cannot accept that proposition. I cannot imagine anything more dangerous than to attempt to construe an Act of Parliament directed to a totally different subject-matter by having regard to the very special, very obscure and artificial language of such an Act as the Rent Act, which is directed to a totally different subject-matter and actuated and governed by a completely different policy. I can find no assistance whatever in referring to the provisions of the Rent Act. Counsel submits that, if, for the purposes of the Rent Act, a rent includes payment in respect of furniture, it is possible to say, for the purposes of the County Courts Act, what rent is payable in respect of the house. That is, I think, quite illegitimate and I must decline to accept that argument.

So far, therefore, as furniture is concerned, I think that the section must be interpreted in accordance with its obvious and *prima facie* meaning and that the rent payable is rent payable in respect of the land in question and that it is impossible to dissect the rent and say that part is payable in respect of the land and part in respect of the furniture.

That is sufficient to dispose of this case because unless the £150 is deducted the necessary figure of £100 is not reached. But the county court judge deducted the figures for rates and water rate and it would be right for me to say something about that. It seems to me that it was just as illegitimate to dissect the contractual figure by deducting those sums as it was in the case of furniture; but the answer is perhaps even simpler because I can see no justification whatever for suggesting that when, under the tenancy agreement or the lease, the landlord takes the burden of the rates the figure of rent which the tenant covenants to pay is anything at all except rent in respect of the premises. What else is it? You cannot dissect that figure and say that part of it is paid in respect of the premises and part of it is in the nature of an indemnity to the landlord for the obligation which he is taking off the tenant's shoulders. Historically no doubt that is how the figure of rent is built up, for rates are a thing which any intending landlord or tenant and any house agent will take into consideration when discussing and arriving at an agreed figure for the rent. But that is all history. When the rent is agreed it is rent and nothing else, and the fact that the landlord has insisted on that particular figure because he is taking on the duty of paying the rates seems to me to have nothing whatever to do with the case.

I am averse to referring to authorities on one Act of Parliament for the purpose of construing another and quite different Act, but, as it was referred to, I will say that the reasoning in the case of *Mackworth* v. *Hellard* (1) is entirely consistent with the view that I have just expressed. I have reached that view not because I rely on that authority or regard it as in any way governing the decision in this case: I merely mention it by way of showing that I have not forgotten it and to give myself such satisfaction as may be gained from the fact that it seems to me to be quite consistent with the view that I take myself; but I take that view quite independently of that case.

Counsel for the respondent tries to meet these arguments in an ingenious way. He says, on the assumption that he is right on the question of the furniture, which I have held he is not : " Once you deduct for the furniture then there is no figure which you can describe as rent payable in respect of the land." That seems to me to be getting the best of both worlds. He takes what is the rent and says : " Part of this is payable in respect of the furniture and I have, therefore, deducted that." Then when it is said against him : " That which is left is rent payable in respect of the land," he says : " Nothing of the kind ; there is no figure of rent payable in respect of the land." It seems to me that he is bound to say that what is left is payable in respect of the land. I need not go into that further.

There is one concluding argument I should mention. It was to this effect : The sum of £272 was not rent payable in respect of the land and if, contrary to the first submission, no apportionment is permissible, then it still remains the fact that it is impossible to say of these premises that there is any rent payable in respect of them because the sum of £272, if not apportionable, is a rent payable in respect of two things, namely, the premises and the furniture ; therefore, counsel says, the only matter which has to be taken into account is the value of the land and that is below £100 per annum. I cannot take that view. I have already said that in my opinion the £272 is payable in respect of the land and it cannot be said that under this contract no rent is payable in respect of the land. If counsel's argument was right, I am bound to confess that I can see no reason whatsoever for excluding from this application all sorts of cases, such as the one I have mentioned, where the landlord gives the restrictive covenant and numbers of other quite common cases of tenancies and leases. The only matter which the county court judge would have to consider would be the value and he would never have to consider rent because if counsel's argument were accepted it would mean that wherever the tenant was getting an additional or collateral benefit it would be impossible to say that the contractual figure was payable in respect of the land because the tenant was getting something in addition.

It seems to me that all these highly artificial ideas are not to be extracted from the simple language of the subsection which has, in my opinion, the meaning I have attributed to it. In the result the appeal must be allowed and the judgment of the county court judge reversed with costs here and below.

du Parcq, L.J. : Lord Greene, M.R., has dealt fully with the point raised in this case in a judgment with which I agree. I only desire to add a few words. I agree, as I have said, with the whole of the judgment and particularly with my Lord's observations as to the point raised which depended on the construction of the Rent Restrictions Act. The Rent Restrictions Acts are difficult enough to construe and it would be indeed a misfortune if one had to construe earlier Acts in the light of them and put the work of draftsmen who are no longer with us to the severe test of seeing how far they can be reconciled and made to fit in the framework in which the Rent Restrictions Act forms a principal part. It is quite unnecessary and it would be quite wrong to attempt to do anything of the kind. The County Courts Act with which we are dealing was enacted as recently as 1934, but it was an Act to consolidate certain enactments relating to county courts. The first County Courts Act was passed in 1849, and as to this particular section we have not traced it to its source, perhaps, but at any rate we know that it was in existence in the enactment of 1867. It may have been earlier. The result is that we must assume that when this section and subsection were enacted Parliament did not concern itself at all about the Rent Restrictions Acts because it was merely repeating legislation framed a very long time before the Rent Restrictions Acts were thought of. Certainly the draftsman of 1867 may be supposed to have had in mind the old and, one may say, elementary learning which is to be found in the passage in Foa on Landlord and Tenant, 6th Edn., p. 123, which was read by Lord Greene, M.R. When the draftsman talked of rent he meant what lawyers mean by rent and when that is understood the section becomes perfectly clear. I doubt very much if the judge would have attempted to embark on this apportionment if he had not perhaps, rather become accustomed to the apportionment of rent as between house and furniture owing to the duty which he has to perform under the Rent Restrictions Acts. I doubt if before those Acts it would have occurred to a judge that he was bound or empowered to embark on such apportionment. The Act, I think, construed according to the ordinary language of lawyers, is plain enough, and, if so, we know what the rent is. The parties call it rent. The plaintiff's witness says the rent included the use of the furniture also rates and water rate. It was an oral agreement and that, I think, is the end of the matter.

I agree, further, that it is impossible to say that because furniture has been taken into account in a total sum agreed which includes the use of furniture, therefore, one cannot regard the total sum as rent; if that argument prevailed, it would mean that the landlord letting a house with furniture was receiving no rent and, therefore, I presume, would lose the right to distrain for rent.

I agree that the appeal must be allowed.

TUCKER, L.J.: I agree and I think the case is really quite clear. Counsel for the respondent had to rely on the words of sect. 48, "payable in respect thereof." It seems to me that once it is conceded that the money payment is properly described as rent, that is to say that it is a payment which issues out of the land and for the non-payment of which the right to distrain exists, that is really an end of the matter. Anything which answers that description is in my opinion properly described as "payable in respect of the land." and that is the very essence of rent.

In this case it is to be observed that the County Court Rules, Ord. 7, r. 3, provides that in an action for the recovery of land the particulars shall contain a full description of the land sought to be recovered and the annual value thereof and the rent, if any, and shall state the ground on which possession is claimed. In this case that rule was not complied with, as it should have been, by the plaintiff, whose duty it was, under the rule, it is to be observed, to state the rent. I am not attempting to construe sect. 48 of the Act by reference to the language of the rule made under the Act, but it is to be observed that the draftsman of the rule did not think it necessary to say anything about rent payable in respect thereof, which fortifies my view that the fact that it was rent shows that there was no need to use such language as "payable in respect thereof."

What I have said applies to an Act which is not dealing with the question of apportioning the rent or apportioning the rent as between furniture and other matters. Where you have an Act like the Rent Restrictions Act, which provides for apportioning the rent as between the different benefits received by the tenant, other considerations arise altogether and it seems to me quite impossible to read into sect. 48—which I think counsel for the respondent has to do—after the words "rent payable in respect thereof" the words "or such proportion thereof as the county court judge shall determine to be fairly attributable to the enjoyment of the land."

I would only add that counsel for the respondent did not seek to rely upon the provisions of sect. 49 (3), which the county court judge thought in some degree supported the view at which he had arrived.

Appeal allowed with costs.

Solicitors: *Maude & Tunnicliffe*, agents for *Jackson Barrett & Gass*, Stockport (for the appellant); *Barlow, Lyde & Gilbert*, for *L. G. Ruddin & Co.*, Manchester (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NEALE *v.* JENNINGS.

[Court of Appeal (Scott, MacKinnon and Morton, L.JJ.), January 18, 1946.]

Ecclesiastical Law—Cottage in rectory grounds—Whether necessary for convenient occupation of rectory—Whether Rent Restriction Acts applicable— Pluralities Act, 1838 (*c.* 106), *s.* 59.

Landlord and Tenant—Rent restriction—Cottage in rectory grounds—Claim for possession by rector—Whether necessary for convenient occupation of rectory —Question of fact—Pluralities Act, 1838 (*c.* 106), *s.* 59.

The appellant, the rector of a parish in Westmorland since 1938, occupied the large rectory, which contained in all 22 rooms. He was a bachelor, but shared the house with an army officer and his wife and their 2 children, and there were also living in the house a man and wife who rendered certain domestic services. The respondent had for many years been the tenant, at a rent of 2*s.* 6*d.* a week, of a cottage in the grounds of the rectory, which were 3½ acres in extent. The occupants of the cottage, which was situated about 20 yards from the house, were the respondent, his wife, 3 children and a brother-in-law. The appellant gave notice, expiring on July 14, 1945, to terminate the tenancy, on the ground that he required the cottage for a man and wife, whom he intended to employ as gardener-handyman and domestic servant respectively. In an action for possession the appellant relied on the provisions of the Pluralities Act, 1838, s. 59. The county court judge refused an order for possession, holding that the cottage was not necessary for the convenient occupation of the rectory within the meaning of that section :—

Held : whether or not possession of the cottage was necessary for the convenient occupation of the rectory was a question of fact, and, as the county court judge had properly directed himself to the determination of this fact, his finding in favour of the respondent should not be disturbed.

[**EDITORIAL NOTE.** The social conditions in which large country rectories exist today differ materially from those which obtained at the date of the Pluralities Act, 1838, and the question of what buildings are necessary to their enjoyment must be decided as a question of fact at the present time.

As to Premises Within the Rent Restriction Acts, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369 ; and for Cases, see DIGEST, Vol. 31, pp. 557, 558, Nos. 7042-7053.

Case referred to :

*(1) *The Bishop of Gloucester* v. *Cunnington*, [1943] 1 All E.R. 61 ; [1943] 1 K.B. 101 ; 112 L.J.K.B. 151 ; 168 L.T. 68.

Appeal by the plaintiff from a decision of His Honour Judge Allsebrook given at Appleby County Court, on Oct. 22, 1945. The facts are sufficiently set out in the judgment of Scott, L.J.

Malcolm Wright for the appellant.

G. P. Glanfield for the respondent.

Scott, L.J. : The question is whether the Rent Restriction Acts apply to a cottage in the grounds of the rectory of Longmarton, in Westmorland. That turns on the principle laid down by this court in *Bishop of Gloucester* v. *Cunnington* (1). The decision there was that in a case where the Pluralities Act, 1838, s. 59, applies the Rent Restriction Acts are not applicable. The question is whether the cottage is within the principle so laid down by this court because it is covered by the wording of the Pluralities Act. That particular question and the form in which it arises in this case has not come before the court before.

Sect. 59 enacts that :

> Any agreement made for the letting of the house of residence, or the buildings, gardens, orchards, or appurtenances necsssary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop . . . to proceed and to reside therein . . .

shall be subject to special legislation as to the right of letting and so on.

If this cottage in the grounds of the rectory building is a building or appurtenance necessary for the convenient occupation of the house of residence, then this cottage is within the provisions of that special legislation, but if it does not come within that category it is not and the Rent Act applies.

In this case the rector wanted the cottage for use by himself for the purpose of having a man and his wife whom he proposed to employ in and about the rectory, and the question arises whether the rector was entitled to get possession on a notice to quit. The judge held that he was not entitled, because, in the circumstances of the case, he took the view that the cottage was not necessary for the convenient occupation of the house.

In my view the question whether a particular building is or is not necessary A is a question of fact. The judge found the fact in favour of the tenant and against the rector. *Prima facie* that finding of fact is conclusive and if it is a finding of fact without any misdirection on law by the judge this court cannot interfere with it. In my view it was a finding of that kind.

What counsel has urged on us is that the reason given by the judge shows that he was misinterpreting sect. 59. The judge held that in the circumstances of the case it was not necessary for the convenient occupation of the rectory B because the rector could quite easily have used rooms in the rectory for the purpose of housing the married couple he wanted to employ. The rectory was a very large house of 22 rooms of which 19 were furnished, and the county court judge thought that in so large a house it was not possible to say that the inconvenience of having the couple in the house was such as to compel him to hold that the cottage was necessary for the convenient occupation by the rector C of his own house. In taking that view I think he was not in any way misdirecting himself. If he was not, the finding is conclusive on this court.

The Act of 1838 was passed at a time when many rectories were very large buildings but at a time when rectors were expected to give great hospitality and have many people staying with them from time to time in the house. But *tempora mutantur*. To-day these large houses are not a convenience to the rectors for the purpose of hospitality, but a very great burden, because of the D changed financial position of many rectors. That aspect cannot be forgotten in considering the proper meaning of the word "necessary." I think "necessary" must be read according to the particular circumstances of the time and the rectory to be considered.

The appeal must be dismissed with costs.

MACKINNON and MORTON, L.JJ., agreed.

Appeal dismissed with costs.

E Solicitors: *Beachcroft & Co.*, agents for *William Scorer*, Appleby (for the appellant); *Bell, Brodrick & Gray*, agents for *Hewitson & Harker*, Appleby (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

F

EYRE *v.* HAYNES.

[COURT OF APPEAL (Scott, MacKinnon and Tucker, L.JJ.), November 5, 1945.]

Landlord and Tenant—Rent restriction—House originally not within 1939 *Act—Subsequent damage by enemy action—Rateable value reduced—Whether brought within the protection of the Act—New house—Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 17), *ss.* 3 (1), 7 (1). G

A London house, which had been let for a number of years at a rent beyond the limit of the Rent Restriction Acts, was seriously damaged by enemy action in 1940, and the immediate neighbourhood practically devastated. On Mar. 8, 1943, on the expiration of the previous tenancy, H the tenant entered into a fresh agreement with the landlords at a lower rent, and later in the same year the rateable value was reduced to £76 *per annum*. On appeal from an order for possession made by a county court judge it was contended that, by reason of the damage and reduction in value, the house was a new house within the Rent and Mortgage Interest Restrictions Act, 1939, let for the first time on Mar. 8, 1943:—

HELD: the question whether it was or was not the same house was a question of fact, and the county court judge was entitled to hold, on the evidence before him, that, in spite of the extensive damage, the house remained the same house as it was at the date when the 1939 Act came into force, at which date it was let at a rent which put it outside the protection of the Rent Restriction Acts. The appeal therefore failed.

[**EDITORIAL NOTE.** This is a point of some importance in connection with bombed property. It is held to be a question of fact whether the damage by enemy action is sufficient to destroy the identity of the premises, so as to make a fresh lease entered into between the same parties a lease of a new house within the Rent Restriction Act.

For Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), see HALSBURY'S STATUTES, Vol. 32, p. 971.]

Appeal from the judgment of His Honour Judge Collingwood sitting at Bloomsbury County Court, given on Oct. 10, 1945, whereby he adjudged that the plaintiff should recover from the defendant possession of a dwelling house known as 38, St. John's Wood Park, London. The facts are sufficiently set out in the judgment of Scott, L.J.

Cecil Binney for the appellant.

F. W. Beney, K.C., and *R. E. L. Parry* for the respondent.

Scott, L.J.: This is an appeal from an order for possession of a house. At the date the Rent and Mortgage Interest Restrictions Act, 1939, came into force the house was rated at £113 *per annum* and was, therefore, outside the Act. On Mar. 8, 1943, the tenant made a new agreement with the landlord at a reduced rent and in August of that year the rateable value was reduced to £76 *per annum.* It was contended that the house was no longer the same house by reason of war damage and that the judge should have treated it as within the protection of the Rent and Mortgage Interest Restrictions Acts. The question is whether the house can be said to be a new house let for the first time, or is the same as before the war damage.

There was no evidence as to the cause of the reduction in the rateable value, which might have been due to the deterioration of the neighbourhood, and not to the damage to the house.

The county court judge held that the damage was not enough to prevent the house remaining the same house as before the damage. Whether it was or not is a question of fact. I am of the opinion that on the evidence before him the judge was entitled to hold as he did, and that the appeal should be dismissed.

MacKinnon and Tucker, L.JJ., agreed.

Appeal dismissed.

Solicitors: *Hancock and Scott* (for the appellant); *Lee and Pembertons* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

DEYONG *v.* SHENBURN.

[Court of Appeal (Lord Greene, M.R., du Parcq and Tucker, L.JJ.), January 14, 15, 16, 1946.]

Master and Servant—Duty of master—Proper system of working—Failure to take reasonable care to prevent theft of servant's property—Whether breach of duty—Actor's clothing stolen from dressing room.

Negligence—Theatrical producer—Failure to take reasonable care to prevent theft—Actor's clothing stolen from dressing room—Liability of producer.

Theatres—Failure of producer to take reasonable care to prevent theft—Actor's clothing stolen from dressing room—Liability of producer.

By an agreement in writing the respondent, a theatrical producer, agreed to engage the appellant in a pantomime, and the appellant undertook, free of salary, to rehearse at any place decided upon by the management, for one week before production. During a rehearsal the appellant's overcoat, together with some articles he was to wear in the pantomime, were stolen from his dressing room. In dismissing an action by the appellant for damages for loss of his property, the county court judge found, as a fact, that the respondent had not taken reasonable care for the safety of the property of the appellant, but held that the respondent was under no duty to exercise such care. It was contended on behalf of the appellant (i) that it was an implied term of the agreement that the respondent should use all reasonable care in the safeguarding of the appellant's property and (ii) in the alternative, that there was an obligation at common law on the respondent, as employer, to take reasonable care to provide a proper system of working which, it was contended, applied not only to the physical safety of the appellant but also to the safeguarding of his property :—

Held : (i) no implied term could be imported into the agreement which imposed on the respondent a duty to exercise reasonable care in the safeguarding of the appellant's property.

(ii) the respondent was under no duty to the appellant, at common law, by reason of the relationship of master and servant, to take reasonable steps to protect his property from theft.

[**EDITORIAL NOTE**. The main point decided in this case is that the common law duty of an employer to provide a safe system of working does not extend to liability for loss of or damage to goods of the workman caused by third parties. The implications of " safe system of working " were fully analysed by the Court of Appeal in *Speed* v. *Thomas Swift & Co.*, ([1943] 1 All E.R. 539), and, as Viscount Simon, L.C., observed in *Colfar* v. *Coggins & Griffith* (*Liverpool*), *Ltd.* (6), the employer's liability at common law cannot be further extended.

The case is of considerable interest to members of the theatrical profession. du Parcq, L.J., holds that, in a contract to perform, a dressing room must be provided, reasonably suitable for the purpose, but that this liability does not extend to taking steps to prevent theft. Tucker, L.J., points out that in the case under consideration the performer was under no obligation to bring the goods stolen into the theatre on the day in question, and he suggests that the position might be different in regard to tools of the trade. This question might well arise for decision where goods stolen from a dressing room consist of properties which the performer is under an obligation to use, *e.g.*, a conjurer's equipment or a performing animal.

As to Proper System of Working, see HALSBURY, Hailsham Edn., Vol. 22, p. 188, para. 314 (3) ; and for Cases, see DIGEST, Vol. 34, p. 199, Nos. 1624-1626.]

Cases referred to :

(1) *Cole* v. *De Trafford* (*No.* 2), [1918] 2 K.B. 523 ; 34 Digest 198, *1621* ; 87 L.J.K.B. 1254 ; 119 L.T. 476.

*(2) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E.R. 628 ; [1938] A.C. 57 ; Digest Supp. ; 106 L.J.P.C. 117 ; 157 L.T. 406.

(3) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503 ; 34 Digest 192, *1570* ; 52 L.J.Q.B. 702 ; 49 L.T. 357.

*(4) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.

(5) *Priestly* v. *Fowler* (1837), 3 M. & W. 1 ; 34 Digest 202, *1647* ; Murp. & H. 305 ; 7 L.J.Ex. 42.

*(6) *Colfar* v. *Coggins & Griffith* (*Liverpool*), *Ltd.*, [1945] 1 All E.R. 326 ; [1945] A.C. 197 ; 114 L.J.K.B. 148 ; 172 L.T. 205.

Appeal by the plaintiff from a decision of His Honour Judge Davies, given at Westminster County Court, on Oct. 11, 1945. The facts are fully set out in the judgment of du Parcq, L.J.

Gilbert Beyfus, K.C., and *T. Elder Jones* for the appellant.

R. F. Levy, K.C., and *M. Levene* for the respondent.

du Parcq, L.J. : This is an appeal from a decision of His Honour Judge Davies, at the Westminster County Court. The claim was made by an actor. The facts have been found very clearly and very carefully by the county court judge and it is unnecessary to do more than state them quite shortly.

There was a contract between the plaintiff and the defendant, who is a theatrical producer, which is set out in a short document to be found in the correspondence. It was in the form of a letter. By it the defendant agreed to engage the plaintiff to play dame or any similar part in a pantomime at Camberwell, commencing on Dec. 25, 1944. The only other material words in it are these:

> The management reserves the right to produce and present any pantomime they wish, and the management reserves the right to transfer the pantomime to any theatre on their circuit or any other theatre, but under the same terms and conditions.

The artists undertook to rehearse for one week at any place decided upon by the management, free of salary. The rehearsals duly took place. They were to take place at the theatre at Camberwell, at which the pantomime was to be performed from Dec. 25, onwards. On Dec. 18 the plaintiff took with him to the theatre a small part of the costume which he was to wear as the dame in the pantomime, some shawls and some shoes, and he also had his overcoat. He complains by his particulars of claim, and so far as the facts are concerned his claim was fully established, that on the following day, when again he went in his overcoat and when the articles to which I have referred were remaining in his dressing room, those things were all stolen from his dressing room and, he says, they were stolen through the negligence of the defendant, his servants or agents.

The claim, as pleaded, was based on these grounds: first of all, it was said that it was an implied term of the contract, the material parts of which I have read, that the defendant should use all reasonable care in the safeguarding of the plaintiff's clothing. Then it was said, as an alternative plea, that it was necessary for the plaintiff to leave his clothing and other goods upon the defendant's premises so that the defendant, as was alleged, became bailee of the clothing and goods and, further—and this, I suppose, must be regarded as a separate allegation—was under a duty towards the plaintiff to use all reasonable care in the safeguarding of the clothing and goods. The judge has found that reasonable care was not taken by the defendant. There was at part of the material time no one present to look after the stage door. I think it is unnecessary to go into the details, but it is enough to say that there was no satisfactory lock on the door of the dressing room. There was some preparation made in the way of screw eyes for putting in a padlock, and it was said that sometimes actors preferred to provide padlocks of their own. There was a Yale lock on the door, but unfortunately it was so ineffective that any pressure against the door would open it. There was some other lock, I think, which did not work. Altogether it is true to say that there was no means by which the door could be effectively locked. The plaintiff shared the dressing room with another actor and it may be that it would have been very inconvenient, in the circumstances, if the door had had to be frequently locked and unlocked as they left or returned to the dressing room. That, however, is not a point that need be further considered. The judge has found that, assuming that it had been necessary for the defendant to take reasonable care for the safety of the goods of the plaintiff, such reasonable care was not in fact taken. The judge, having found the facts, considered the law and came to the conclusion that there was no duty of the nature pleaded upon the defendant at all, and it is against that finding of law that the plaintiff now appeals.

The judge held, and it was not disputed that he was right, that the contract was one of service. He went on to say that the authorities, in his view, made it plain that there was no implied obligation on a master to take care of the safety of his servants, except as to certain matters which are specified in the decisions or may be prescribed under statute or by custom. He referred to some observations of Bankes, L.J., in *Cole* v. *De Trafford* (*No.* 2) (1), and he pointed out that there was no hint in the text books of any such obligation as was here alleged. He also held that, if he were free to consider that matter, there was no ground for implying such a term as the plaintiff, in the course of the argument before him, sought to imply in the contract as being necessary in order to give business efficacy to it.

I have come to the conclusion that the judge's judgment was right and that the plaintiff has not established any claim which can be recognised according to the law of this country. One matter may be cleared out of the way at once. The allegation of a bailment was abandoned very early; it was abandoned before the judge and now nobody suggests that the defendant was a bailee.

Counsel for the appellant began his argument by relying on the well known proposition that there is an obligation upon an employer to take reasonable care to provide, among other things, a proper system of working. That, no doubt, is correct, but it must be understood with due regard to the decisions and to the subject-matter of those decisions. There are many cases in which the matter is dealt with and I do not propose to go through them. Some were referred to in argument. There is, I think, a convenient summary of the law in the speech of Lord Maugham, in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (2) ([1937] 3 All E.R. 628, at p. 645). The House was there dealing with a case of personal injury, and Lord Maugham says, firstly, that an employer is responsible to an employee for an accident caused by the negligence of another employee; secondly, he deals with the well known limitation on that proposition resting on the doctrine of common employment, and, thirdly, he says that in the case of employments involving risk the rule as to common employment only applies when the maxim *volenti non fit injuria* can fairly be invoked. " In such employments "—that is employments involving risk—" it was held that there was a duty on the employer "—I leave out the first two duties—" to provide a proper system of working."

Counsel's argument was really this : First, he said that an employer must provide a proper system of working. I think he would concede, and I think one is bound to say that it must be conceded looking at the authorities, that that is in order to secure the personal safety of the workman. Then counsel said that if, through a breach of the obligation to provide a proper system of working, the workman not only receives personal injury but suffers damage to his clothing, he will be entitled, and no doubt has often been held to be entitled, to damages in respect of the damage to his clothing. Therefore, he said, it is plain that the master has a duty of some kind in respect of the clothing. He must prevent it from being damaged, and if he must prevent it from being damaged it is a legitimate if not a necessary extension of the principle of the decisions to say that he must take reasonable steps also to prevent it from being lost or stolen—taken away by the felonious act of some other person.

That may be a specious argument, but in my opinion it is quite unsound. I am not deciding that it is so, but it may well be that if, through a breach of the duty to provide a proper system of working, a workman is not only injured in his person but also suffers damage to his clothing, the damage to the clothing can properly be included in the damages. It may be that if, through such a breach, his clothes are torn off his back and he suffers no personal injury he may be entitled to recover damages, but it does not in the least follow from that that there is a duty upon the employer, which would be quite a different duty from that which I have mentioned, to take steps to safeguard the workman while in his employ against loss through the wrongful act of a third person. That conclusion does not follow, as it seems to me, in the least, and cannot be made to follow by any process of reasoning that is not plainly fallacious, so that that line of argument, in my judgment, does not assist counsel at all.

Now where do we get the obligation ? There is no bailment and the case does not fall under the general proposition to which I have referred. It is said that this is a case of tort, and we were reminded of observations which are very familiar to lawyers in *Heaven* v. *Pender* (3) and in *Donoghue* v. *Stevenson* (4). I do not think I need cite them in terms. There are well known words of LORD ATKIN in *Donoghue* v. *Stevenson* (4) ([1923] A.C. 562, at p. 580), as to the duty towards one's neighbour and the method of ascertaining who is one's neighbour. It has been pointed out (and this only shows the difficulty of stating a general proposition which is not too wide) that unless one somewhat narrows the term of the proposition as it has been stated one would be including in it something which the law cannot support. It is not true to say that wherever a man finds himself in such a position that unless he does a certain act another person may suffer, or that if he does something another person will suffer, then it is his duty in the one case to be careful to do the act and in the other case to be careful not to do the act. Any such proposition is much too wide. One has to find that there has been a breach of a duty which the law recognises, and to see what the law recognises one can only look at the decisions of the courts. There has never been a decision that a master must, merely because of the relationship which exists between a master and servant, take reasonable care for the safety of his servant's belongings in the sense that he must take steps to insure, so far as he can, that no wicked person shall have an opportunity of stealing the servant's goods. That duty is the duty which is contended for here, and there is not a shred of authority which suggests that any such duty exists or ever has existed. Probably the case in which one would have expected to find decisions on the point is that of the domestic servant and his or her master. Nobody has ever suggested, and in my opinion it is clearly not the law, that if the master of the house leaves the house unattended and empty, or if he forgets to shut a window at night or properly to secure it or if the locks on the door have ceased to be secure, by reason of which lack of care a housebreaker enters and steals, among other things, the goods of a domestic servant living in the house, then the master is liable to his servant for negligence. Certainly if one looks at the older cases, such as *Priestly* v. *Fowler* (5), and others to which reference was made in the course of the argument, it is quite plain that in earlier days, at any rate, the courts would have thought such a claim to border on the ridiculous, and in my judgment the law on this particular matter is no different today.

There are many obligations which necessarily arise from the relationship A of master and servant and, so far as personal safety goes, they are now, I think, pretty clearly defined, and so far as the principle of the safe system of working is concerned the latest decision in the House of Lords [*Colfar* v. *Coggins & Griffiths* (*Liverpool*), *Ltd.* (6)] has told us—and again I need not cite the actual words of it as they are so familiar—that the principle has been extended as far as it properly can be. There is no support to be found anywhere for the proposition that the relationship of master and servant of itself imports any such B duty as is here suggested.

Now can it be put in any other way ? I entirely agree with the county court judge that if one looks at this contract it would be impossible to say that such a term was implied in it. The theft took place during rehearsals. The only thing said about rehearsals in the contract is that the rehearsals are to take place at any place decided upon by the management. Of course one would have to imply something there. No doubt places might be found by the manage- C ment in which an actor might refuse to rehearse. Of course the place chosen must be a reasonable place. Apart from rehearsals, when it comes to the performance of the pantomime it may take place not only at any theatre on the circuit of the management (that, I presume, would refer to circuits over which the defendant would have that degree of control which a lessee at any rate has) but at any other theatre, that is, I suppose, any theatre in the United Kingdom. D This term might well include theatres of which the defendant was not the lessee, where he merely went with his company to act and where, as the plaintiff would know, he could have very little control over the arrangements as to dressing rooms, and so forth.

It was said by counsel for the appellant that clearly a dressing room must be provided. There I agree. Certainly a dressing room is necessary during performances, because the actor who is playing the dame could not be expected E to wear the appropriate oriental costume in the pantomime Aladdin without a place in which he could dress himself. No doubt it must be a dressing room reasonably suitable for the purpose, though I dare say dressing rooms in different theatres vary very much. It does not in the least follow from that that it is upon the defendant to see that every reasonable step is taken to prevent a thief from entering the dressing room. There were in this particular case many people behind the scenes, some of them not actors at all, some of them workmen F from outside, some of them described by a police witness as being what he called casual persons, and obviously it would be a very serious obligation to have to take steps which would really effectively prevent the dangers of theft. Many people might legitimately pass the stage doorkeeper who might still not be beyond suspicion. It is unnecessary, however, to consider how onerous the duty would be if indeed the duty does not exist, and I think it does not. It certainly cannot be implied in this contract. The defendant's omission to guard G against theft was not, in my opinion, for the reasons I have given, a tort for which an action can be brought. Failure to provide against theft of the servant's goods is not a breach of any general obligation. No contractual liability exists. I think I have exhausted all the possibilities on which counsel for the appellant sought to rely.

Something was said by counsel for the respondent as to the judge's finding H that a thief had come in from outside. It is unnecessary to deal with that, because assuming that to have been a definite finding—and I am not at all sure that it was—it is unnecessary in the circumstances to consider whether the evidence supported it or not. Certainly no complaint can be made, as it seems to me, of the judgment. I think that the legal submissions of the appellant all fail, and in my judgment this appeal should be dismissed with costs.

TUCKER, L.J.: I agree. This case raises a question as to whether the defendant was under any duty to the plaintiff to take reasonable steps to protect the property of the plaintiff from theft. I think it is important to emphasise in this case first of all that the relationship of the parties was regulated by an agreement in writing dated Dec. 2, 1944. It is quite impossible to imply any additional term into that agreement imposing any duty upon the defendant directly to take such care. The plaintiff must, therefore, look elsewhere for the foundation of the liability of the defendant, if it exists.

Eventually counsel for the appellant founded himself upon the proposition that the duty was a common law duty to provide a proper system of working which he says applies not only to the physical safety of the workman but also to the safeguarding of his property. I suppose there is no relationship which has been considered in courts of law more often than that of master and servant, and nowhere in the whole course of the law is any authority for such a proposition forthcoming.

There are one or two facts which I think deserve to be emphasised in this case. The county court judge draws the inference with regard to the property which was stolen that the thief came in from outside and stole it, but I agree that that finding was not perhaps essential to his decision. The property which was stolen consisted of the plaintiff's overcoat, which was a necessary adjunct to the fulfilment of the part of the Widow Twankey which he was going to play in the pantomime, and two shawls and a pair of shoes, which the evidence indicated were garments and footwear which would have been appropriate to the part of Widow Twankey and which he might reasonably have brought to the theatre in case they were needed. But there was no evidence that he was under any obligation to produce this clothing and footwear at the theatre on this particular day, and in fact the rehearsals which were going on do not appear to have been dress rehearsals. I mention that to distinguish this case from any other case which may some day arise perhaps where a workman suffers damage to or the loss of the tools of his trade which he may be under an obligation to bring and use at his work. The county court judge came to the conclusion that there was no such duty owed in law, and I agree with the decision at which he arrived.

The class of obligation which counsel for the appellant relied upon is that which was finally expounded in the House of Lords in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (2), and I merely refer to the often quoted language of LORD WRIGHT, where he says ([1937] 3 All E.R. 628, at p. 640) :

> The obligation is threefold, "the provision of a competent staff of men, adequate material, and a proper system and effective supervision."

Then he goes on (*ibid.*, p. 644) :

> I think the whole course of authority consistently recognises a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained. The obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not, however, broken by a mere misuse of, or failure to use, proper plant and appliances, due to the negligence of a fellow servant, or a merely temporary failure to keep in order or adjust plant and appliances, or a casual departure from the system of working, . . .

There is no hint in that case, or in any other case, that the proper system of working includes the proper provision of safeguards protecting the workmen's property from theft.

It is to be observed that in the section of HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, pp. 174-183, paras. 292-306, which deals with the duty of the master to the servant there are four separate headings. One is "the physical well being of the servant" dealing with the duty or extent of the duty of the master to his domestic servant or his apprentice. The second division is "safety of the employment." The third division is "the character of the servant" and the fourth is the "duty to indemnify." Under none of these headings is there to be found any suggestion of a duty owed by the master to his servant, merely by reason of the relationship of master and servant, to safeguard the property of the servant which the servant for his own convenience brings upon the premises of his master. I think that is really sufficient to dispose of this case, but I should desire to add, so far as I am concerned, that our decision in this case does not, of course, mean that under no circumstances is a master ever under any liability with regard to the property of his servant. He may be under such a liability arising out of the day to day relationship of one man to another which does not rest solely on the relationship of master and servant. If a man, knowing that his servants have placed their property at a certain place at his works, bicycles or clothing or what not, gives to one of his servants an order the carrying out of which will be likely to damage or imperil the safety of the servants' goods, he may well be liable, not by reason of the relationship of master and servant but by reason of the fact that he is to that extent the servants' neighbour. He may owe a duty to his servant with regard to his servant's property very similar to that which is owed by one user of the highway to another. I agree that this appeal fails and should be dismissed.

Lord Greene, M.R., agreed.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Clare & Clare* (for the appellant); *Hart Leverton & Co.* (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

AMALGAMATED ANTHRACITE COLLIERIES, LTD. *v.* CORY BROTHERS AND CO., LTD.

[Court of Appeal (Scott, du Parcq and Morton, L.JJ.), December 10, 11, 20, 1945.]

Workmen's Compensation—Industrial disease—Pneumoconiosis—Suspension due to pneumoconiosis—Compensation—Contribution by previous employer to compensation payable by last employer—Recorded agreement by last employer to pay lump sum in lieu of weekly payment payable under Scheme—Liability of previous employer to contribute to lump sum payment—"Compensation"—Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, *(S.R. & O.,* 1943, *No.* 885), *paras.* 8, 9 (2) (*a*).

Until Jan., 1944, P. was employed underground in the coal mining industry. On Jan. 28, 1944, a medical board certified that he was suffering from pneumoconiosis, that his general physical capacity for employment had been impaired by the disease, although he was not fully disabled, and that he was suspended from employment in his former work as from Oct. 15, 1943. P. thereupon became entitled to compensation under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943. Under para. 9 (2) (*a*) of the Scheme, the compensation was to be in the form of a weekly payment, and under para. 8 (1) it was recoverable from A. Co., who were P.'s last employers. Under para. 8 (2), however, C. Bros. were liable to make contributions to A. Co., in regard to the compensation payable, because P. had been employed by C. Bros. for a certain proportion of the 5 years preceding the date of the injury. On Apr. 21, 1944, A. Co., without consulting C. Bros., entered into a recorded agreement with P. to pay him £750 in full satisfaction of his claims for compensation. While admitting their liability to pay a fixed proportion of any weekly sums paid to P., as compensation, by A. Co., C. Bros. contended that they were not liable to make any contribution to the sum of £750, because it was not "compensation" within the meaning of the 1943 Scheme, and under para. 8 (2) they were only liable to contribute to "compensation" paid by the last employer. They further contended that the sum represented an improvident bargain by A. Co.:—

Held: (i) the £750 paid to P. by A. Co. under the recorded agreement, in substitution for the weekly payments to which he was entitled by way of compensation under para. 9 (2) (*a*) of the 1943 Scheme, was "compensation" within the meaning of the Scheme. C. Bros. were, therefore, liable under para. 8 (2) of the Scheme to contribute to the £750.

Dictum of Lord Tomlin ([1935] A.C. 1, at p. 10), in *M'Gillivray* v. *Hope* (1) *applied.*

(ii) the amount of C. Bros.' contribution to the £750 should be, *prima facie*, the same proportion as in the case of the weekly payments, but the sum to be contributed by them should be reduced if it were found, in the arbitration proceedings, that A. Co. had made an improvident agreement with P.

Bolsover Colliery Co., Ltd. v. *Oxcroft Colliery Co., Ltd.* (2) *applied.*

[**EDITORIAL NOTE.** It is held in this case that a former employee is liable to contribute towards a lump sum payment made by a later employer, in lieu of weekly compensation, to a workman suffering from an industrial disease. Such a lump sum payment is "compensation" in the sense of the word used by LORD TOMLIN in *M'Gillivray's* case (1). The amount of the contribution payable is a matter for the county court judge, who, in deciding whether the agreement made by the later employer was improvident, must have regard to the circumstances at the time of the agreement, ignoring what may have happened subsequently.

AS TO CONTRIBUTION BETWEEN EMPLOYERS IN THE CASE OF INDUSTRIAL DISEASES, see HALSBURY, Hailsham, Edn., Vol. 34, pp. 980, 981, para. 1338; and FOR CASES, see DIGEST, Vol. 34, pp. 471, 472, Nos. 3847-3849, and Supplement.

FOR THE COAL MINING INDUSTRY (PNEUMOCONIOSIS) COMPENSATION SCHEME, 1943, see HALSBURY'S STATUTES, Vol. 36, pp. 198-203. See also WILLIS'S WORKMEN'S COMPENSATION, 37th Edn.]

Cases referred to:

*(1) *M'Gillivray* v. *Hope*, [1935] A.C. 1; Digest Supp.; 104 L.J.P.C. 11; 151 L.T. 482; 27 B.W.C.C. 348.

*(2) *Bolsover Colliery Co., Ltd.* v. *Oxcroft Colliery Co., Ltd.*, [1933] 2 K.B. 429; Digest Supp.; 102 L.J.K.B. 617; 149 L.T. 391; 26 B.W.C.C. 340.

APPEAL by the respondents and cross-appeal by the applicants from an award of His Honour JUDGE CLARK WILLIAMS, K.C., sitting as arbitrator under the Workmen's Compensation Acts, 1925-1943, at the Aberdare County Court on May 25, 1945. The facts are fully set out in the judgment of MORTON, L.J.

Valentine Holmes, K.C., and *R. Gwyn Rees* for the appellants, Cory Brothers & Co., Ltd.

F. W. Beney, K.C., and *G. Owen George* for the respondents, Amalgamated Anthracite Collieries, Ltd.

Cur. adv. vult.

DU PARCQ, L.J.: In this case SCOTT, L.J., and I have had the opportunity of reading in advance the judgment which is about to be delivered by MORTON, L.J. SCOTT, L.J., authorises me to say that he is in complete agreement with it. I also agree with it entirely and have nothing to add to it.

I will ask MORTON, L.J., now to read his judgment.

MORTON, L.J.: Up to Jan., 1944, one Emrys Richard Price was employed underground in a colliery belonging to Amalgamated Anthracite Collieries, Ltd. (hereinafter called the Anthracite Co.). On Jan. 28, 1944, the medical board appointed by the Secretary of State under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931 (as amended), certified (i) that Price, though not totally disabled, was suffering from pneumoconiosis to such a degree as to make it dangerous for him to continue the work which he had been doing, and (ii) that the board had for that reason suspended him from employment in such work as from Oct. 15, 1943. The board further certified that Price's general physical capacity for employment was impaired by reason of that disease.

The result of the certificate was that Price became entitled to compensation, in the form of a weekly payment, under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, para. 9 (2) (*a*). Para. 8 (1) of the same Scheme provides:

> The compensation shall be claimed and recoverable from the employer who last employed the workman in the industry . . .

Therefore the Anthracite Co. was liable to pay the compensation in the first instance. Para. 8 (2), however, provides:

> Any other employers who employed the workman in the industry during the 5 years preceding the date of the injury shall, unless they had at the commencement of this Scheme ceased to carry on the undertaking of a coal mine, be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined by arbitration under this Scheme.

Price had been employed by Cory Brothers & Co., Ltd. (hereinafter called Cory Bros.) for 127/252 of the period during which he had been employed in the coal mining industry during the preceding five years.

Cory Bros. were willing to contribute 127/252 of any weekly sums paid by the Anthracite Co., by way of compensation to Price, but on Apr. 21, 1944, the Anthracite Co. agreed with Price that he should be paid £750 " in full satisfaction redemption and discharge " of his claims for compensation. This agreement was duly recorded in the Aberdare County Court, pursuant to the Workmen's Compensation Act, 1925, s. 23, but it was arrived at by the Anthracite Co. without consulting Cory Bros. The latter immediately objected on being told of the agreement, and refused to make any contribution to the sum of £750 paid by the Anthracite Co. to Price. On Sept. 20, 1944, the Anthracite Co. made an application in the Aberdare County Court for arbitration, to which Cory Bros. were made respondents. In its request for arbitration the Anthracite Co. claimed that Cory Bros. should pay by way of contribution a sum of £407 3*s.* 1*d.* This sum represented 127/252 of three sums, *viz.*: (i) certain weekly payments totalling £47 17*s.* 11*d.* which had been made to Price before he received the £750 payable under the agreement of Apr. 21, 1944; (ii) the lump sum payment of £750; (iii) certain fees amounting to £10 10*s.* paid by the Anthracite Co. in connection with the agreement. By amendment the Anthracite Co. added the following words to their claim: " or alternatively such contribution or contributions in respect of the liability of the applicants to the workman as may be just."

Only one of these three sums is in question on the present appeal, as Cory Bros. do not now dispute their liability to pay 127/252 of the £47 17*s.* 11*d.*, and the Anthracite Co. does not now claim to be paid any contribution towards the sum of £10 10*s.* Cory Bros., however, contended before the county court judge, and contend here, that they are not liable to make any contribution towards the sum of £750. The county court judge thought that Cory Bros. were not liable to make any lump sum contribution towards the £750, and he thought it unnecessary for him to consider an alternative contention of Cory Bros. that that sum represented an improvident bargain by the Anthracite Co. His award was in the following terms:

> (1) I order that the respondents do forthwith pay to the applicants the sum of £23 17*s.* 9*d.*, by way of contribution to the sum of £47 17*s.* 11*d.*, being the amount of the weekly payments made by the applicants to their workman Emrys Richard Price as compensation for pneumoconiosis in respect of the period from Oct. 15, 1943, to May 12, 1944. [As to that portion of the award no question arises.] And the further liability of the applicants to the said Emrys Richard Price in respect of the said disease having been redeemed by the applicants by payment of the lump sum of £750 in accordance with a memorandum of agreement registered in this court on Apr. 25, 1944, and recorded on May 5, 1944, (2) I order that the respondents do pay to the applicants the weekly sum of 16*s.* 3*d.*, by way of contribution to the liability of the applicants so redeemed, such weekly payment to commence as from May 13, 1944, and to continue (subject to review and subject also as hereinafter stated) until the same shall be ended or varied in accordance with the provisions of the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, or other the law applicable thereto but so that such weekly payment shall cease in any event (if not sooner ended) when the total sum of such weekly payments shall have amounted to £377 19*s.* 6*d.*

Then there followed in para. 3 an order that the respondents should pay to the applicants a sum of £40 17*s.* 11*d.*, being the amount of the weekly payments referred to, from May 13, 1944, until May 1, 1945, and that they should thereafter pay 16*s.* 3*d.* to the applicants on Saturday in every week. Para. 4 was as follows:

> I make no order as to the costs of or incident to this arbitration.

I think it is plain that the county court judge was seeking, by paras. (2) and (3) of his award, to put Cory Bros. into the same position as they would have occupied if the agreement of Apr. 21, 1944, had never been made.

Cory Bros. appeal, and there is a cross-appeal by the Anthracite Co. The arguments of counsel for Cory Bros. may be summarised as follows. (i) There is no privity between the workman and his former employers; it is only the last employers who are liable to the workman and the former employers have no right to intervene between the last employers and the workman. (ii) The

former employers cannot be called upon to contribute to anything except sums which have actually been paid by the last employers. (iii) The £750 which has been paid to Price by the Anthracite Co. is not "compensation" within the meaning of the 1943 scheme and the former employers are only liable to contribute to "compensation" paid by the last employers. Thus they are not required to contribute anything towards the £750. Counsel further submitted that in any event paras. (2) and (3) of the award of the county court
A judge could not stand, even although they were intended to give some relief to Cory Bros.

The first and second contentions of counsel for Cory Bros. can at once be accepted. The first contention is in accordance with the wording of para. 8 of the 1943 Scheme and the second is in accordance with the decision in *M'Gillivray* v. *Hope* (1). In my view, however, his third contention is ill-founded. In *M'Gillivray's* case (1) the House of Lords had to consider a Scheme
B which did not materially differ from the Scheme which this court is now considering, and LORD TOMLIN said ([1935] A.C. 1, at p. 10):

> I am also of opinion that the words "such contributions as in default of agreement may be determined by arbitration" do not mean "contributions" in the strict sense of that word, that is to say "sums provided to make up the amount payable to the workman," but mean such sums by way *pro tanto* of indemnity to the last employer for what he has paid for compensation as in default of agreement may be determined
> C by arbitration.

In the present case the Anthracite Co. has paid £750 in satisfaction of Price's claim for compensation and in discharge of the company's liability to pay compensation. I think they may fairly be said to have paid it "for compensation" in the sense in which LORD TOMLIN used the words. It is agreed by counsel on both sides that the Anthracite Co. was free to enter into the
D agreement with Price and that such agreement, being recorded, was binding on both parties. It would be a strange result if Cory Bros., having admittedly been liable to contribute 127/252 of each weekly payment, were to be completely freed from liability because the Anthracite Co. had paid £750 to Price in satisfaction of all future weekly payments, and I do not think that the language of the Scheme leads to that result. Counsel for Cory Bros. contends that the Anthracite Co. has chosen to pay something which is not "compensation,"
E so as to avoid paying compensation under the Scheme. I appreciate the ingenuity of this argument, but, in my view, this court would be taking too narrow a view of the Scheme if it excluded from the meaning of the word "compensation," as used in the Scheme, a lump sum payment made to the workman, by means of a lawful agreement, in substitution for the weekly payment to which he was entitled by way of compensation. I feel no doubt that the liability
F of Cory Bros. under para. 8 (2) to "make . . . contributions" includes a liability to contribute to this sum of £750.

In my view, however, it by no means follows that Cory Bros. are liable to contribute 127/252 of that sum. It may be that the Anthracite Co. has made an improvident bargain, and if Cory Bros. could establish this at the arbitration it would be right for the county court judge to reduce the amount of the contribution to 127/252 of the sum which would represent a reasonable settlement
G of Price's claims at the time when this agreement was made: see *Bolsover Colliery Co., Ltd.* v. *Oxcroft Colliery Co., Ltd.* (2), *per* LORD HANWORTH, M.R. ([1933] 2 K.B. 429, at pp. 433, 434), and *per* LAWRENCE, L.J. ([1933] 2 K.B. 429, at p. 435). That case was decided on sect. 43 (1) (*c*) (iii) of the Act of 1925, but I think the reasoning of LORD HANWORTH, M.R., and of LAWRENCE, L.J., is applicable to the present case. This right of the former employers does much to remove any hardship on the former employers resulting from an
H agreement between two other parties on which the former employers were not consulted.

The result is that the county court judge ought to have held that Cory Bros. were liable to contribute to the lump sum of £750, and he ought to have decided the amount of their contribution on the footing that *prima facie* they were liable to contribute 127/252 of the total amount, the sum to be contributed being reduced if he was satisfied that the Anthracite Co. had made an improvident agreement with Price. I would add, however, that it would not be right to decide whether or not the sum paid to Price was excessive in the light of facts occurring after the agreement was made. A bargain may be fair and reasonable at the time when it is made, and yet after events may prove it to be a most unprofitable bargain for one party or the other. A familiar example is the grant of an annuity by an insurance company in consideration of a lump sum payment. The annuitant may be knocked down and killed next day, or may live twice as long as was anticipated; but neither of these happenings proves that the bargain was improvident on one side or the other.

In my view, the award of the county court judge must be varied by striking out the whole of it except para. (1). Unless the parties can agree a sum, the case must be remitted to him to fix, as arbitrator, the amount of Cory Bros.' contribution to the sum of £750, in accordance with the principles already stated. Either party should be at liberty to call further evidence on the question whether the sum of £750 was excessive or improvident. It is unnecessary to decide whether it would be open to the county court judge to direct that the sum fixed as Cory Bros.' contribution may be paid by instalments, since Cory Bros. do not ask for this concession. I see no reason why such a direction should not be given in a suitable case, but paras. (2) and (3) of the order of the county court judge cannot be sustained. The agreement for payment of £750 having been made and recorded, there cannot be any "review," nor is there any weekly payment which can be "ended or varied in accordance with the provisions of the Scheme." Nothing that might happen to the workman after the recording of the agreement could affect the amount of compensation payable to him under the agreement and I can see no reason why it should affect the amount of Cory Bros.' contribution to that compensation.

In substance, the Anthracite Co. have succeeded on the appeal and cross-appeal, and Cory Bros. must pay their costs. The costs of the further hearing before the county court judge will be in his discretion.

Award varied. Case remitted to the county court judge to fix, as arbitrator, the amount of Cory Bros.' contribution to the sum of £750, *in accordance with the principles stated in the judgment. Leave to appeal to the House of Lords granted.*

Solicitors: *William A. Crump & Son*, agents for *A. J. Prosser & Co.*, Cardiff (for the appellants); *Botterell & Roche*, agents for *Llewellyn & Hann*, Cardiff (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Macnaghten, J.), October 1, November 1, 2, 5, 26, 1945.]

Income Tax—Provident society—Non-resident—Head office in Australia, branch office in London—Income from investments of life assurance fund—Taxation of income from business carried on by London branch—Basis for ascertaining income so chargeable—Income from certain investments exempted from United Kingdom tax by statutory provision—Relief from United Kingdom tax of balance of income already charged with Dominion tax—Assessments to tax excessive by reason of error in returns—Relief—Method of computation to be followed in respect of portion of income specifically exempted from tax but included in income from investments chargeable to United Kingdom tax—Income Tax Act, 1918 (c. 40), *s.* 46, *Sched. C, r.* 2 *(d), Sched. D, Case III r.* 3 (1), (2), (4), *Miscellaneous Rules, r.* 7—*Finance Act,* 1920 (c. 18), *s.* 27—*Finance Act,* 1923 (c. 14), *s.* 24.

(I) The respondent society, the Australian Mutual Provident Society, was established in 1849, under the law of New South Wales, for carrying on the business of life assurance, with its head office in Sydney and a branch office in London. For United Kingdom tax purposes it was "non-resident," but, because it carried on business through its London branch, a portion of its income from the investments of life assurance funds was chargeable to tax under the Income Tax Act, 1918, Sched. D, Case III, r. 3 (1). R. 3 (2) prescribed the basis for ascertaining the portion of the income to be so charged, and also contained a proviso which authorised the Commissioners of Inland Revenue to substitute, by regulation, some other basis. Upon the application of the respondent society, the Commissioners of Inland Revenue made a regulation which substituted a ratio of United Kingdom "liability" to total "liability" in respect of life assurance policies for the ratio provided under r. 3 (2), namely the ratio which premiums received from policy holders resident in the United Kingdom, and from policy holders whose proposals were made to the society at or through its office or agency in the United Kingdom bore to the total amount of the premiums received by the society. In 1929-30 the respondent society was charged to United Kingdom income tax in the sum of £184,858, ascertained under the regulation. For the same year the actual income of the respondent society from investments in the United Kingdom forming part of the life assurance fund amounted to £73,265, upon which tax had been paid by deduction and, by the Income Tax Act, 1918, Sched. D, Case III, r. 3 (4), the sum of £184,858 was reduced to £111,593 upon which United Kingdom income tax had been paid. The Special Commissioners found that the respondent society had paid Dominion income tax on a part of £111,593 for the year 1929-30 and decided that the society was entitled to relief under the Finance Act, 1920, s. 27. The Crown appealed from this decision. It was agreed that according to Australian income tax law any income derived from a source outside Australia, including a business in the United Kingdom was exempt from Australian tax to the extent to which it was proved to be chargeable to United Kingdom income tax. The Crown, therefore, contended that the sum of £111,593, on which income tax had been paid in the United Kingdom as income derived from the life assurance business carried on by the society in London was exempt from Dominion tax, and, further, that the respondent society could not identify any part of the £111,593 with any income on which the society had paid Dominion income tax:—

HELD: although the sum of £111,593 was deemed to be income from business carried on by the respondent society at its London branch, it was in fact made up of fractions or portions of the total income from investments of the society's life assurance fund, such fraction having been ascertained by the regulation made by the Commissioners of Inland Revenue. Since the respondent society had also paid Dominion income tax on part of that income it was entitled to the relief claimed under the Finance Act 1920, s. 27.

(II) The appellant society, the Australian Mutual Provident Society, claimed relief under the Finance Act, 1923, s. 24, on the ground that the assessments to tax made upon it for the years 1937, 1938, 1939, and 1940 were excessive by reason of an error or mistake in the returns made by it for the purposes of those assessments. The income from the investments of the society's life assurance fund included interest and dividends which by the provisions of the Income Tax Act, 1918, namely, (i) sect. 46, (ii) Sched. C, r. 2 (*d*), (iii) Sched. D, Miscellaneous Rules, r. 7, were exempt from income tax in the United Kingdom because the society was not resident here. In 1937 the total income from the investments of the appellant society's life assurance fund was £4,145,067, of which £72,354 was income exempted from tax in the United Kingdom. The fraction of the total income, in accordance with the Income Tax Act, 1918, Sched. D, Case III, r. 3, and the regulation made by the Commissioners of Inland Revenue thereunder, was .05565268 and it amounted to £230,684, which, by r. 3 (1) was to be deemed to be "profits" chargeable to tax under Sched. D, Case III. But since the total income included £72,354 the appellant society claimed relief in respect of that sum which was not by law chargeable. The Commissioners of Inland Revenue recognised the validity of the claim by deducting from the total income £72,354, thereby reducing the total income from £4,145,067 to £4,072,713, with the result that the fraction chargeable to income tax under the Income Tax Act, 1918, Sched. D, Case III, r. 3, was £226,646. The appellant society contended that the

Income Tax Act, 1918, Sched. D, Case III, r. 3, afforded no warrant for making any reduction of the total income from the investments of the life assurance fund since the rule provided that the income chargeable to tax under Sched. D should be a portion of any income of the society from the investments of its life assurance fund wherever received. Further the appellant society contended that the sum of £72,354 ought to be deducted, not from the total income of £4,145,067 but from £230,684, which was deemed to be " profits comprised within Sched. D," with the result that the chargeable income would become £158,330. The appellant society based this contention on the Income Tax Act, 1918, Sched. D, Case III, r. 3 (4), which provides that : " Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced."

Held : (i) the fraction of the total income deemed to be profits comprised in Sched. D, for the four years in question, amounted to £230,684 which was the aggregate of the like fraction of the incomes of each of the investments of the society's life assurance fund. Since the sum of £230,684 contained that fraction of the £72,354 which was exempt from tax, no tax could be exacted on so much of the £230,684 as consisted of that fraction of the £72,354, not by reason of any express or implied provision under the Income Tax Act, 1918, Sched. D, Case III, r. 3, but because no tax may be exacted, either directly or indirectly, on income exempt by law.

Hughes v. *Bank of New Zealand* (1) and *Cadbury Bros., Ltd.* v. *Sinclair* (2) *not applied.*

(ii) the assessments were, therefore, correctly made on the appellant society.

[**EDITORIAL NOTE.** The basis of the decision in both these appeals is the same, namely, that the proportion of the Society's profits which is " deemed " to be profits comprised in Sched. D is in fact made up of fractions of the income derived from each of the investments of the Society's life assurance fund. In view of this, both the claim to relief, and the method of calculation adopted by the Commissioners are justified.

As to Investment Income of Foreign Assurance Companies, see HALSBURY, Hailsham Edn., Vol. 17, p. 185, para. 383 ; and for Cases, see DIGEST, Vol. 28, pp. 57-61, Nos. 293-309.]

Cases referred to :

*(1) *Hughes* v. *Bank of New Zealand*, [1938] 1 All E.R. 778 ; [1938] A.C. 366 ; Digest Supp. ; 107 L.J.K.B. 306 ; 158 L.T. 463 ; 21 Tax Cas. 472.

*(2) *Cadbury Bros., Ltd.* v. *Sinclair*, [1933] 103 L.J.K.B. 29 ; Digest Supp. ; 149 L.T. 412 ; 18 Tax Cas. 157.

(1) Case Stated under the Finance Act, 1920, s. 27, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The respondent society, the Australian Mutual Provident Society, appealed against a determination of the Inland Revenue Commissioners refusing a claim for relief in respect of Dominion income tax for the year ended Apr. 5, 1930. The Commissioners found the following facts :

The respondent society carries on mutual life assurance business, having its head office in New South Wales and a branch in London. It was established in 1849 and for the year in question was governed by the Australian Mutual Provident Society Act, 1910, an Act of New South Wales Legislature. The respondent society is non-resident for the purposes of United Kingdom income tax. It carries on business at the London branch and is chargeable to United Kingdom income tax under the Income Tax Act, 1918, Sched. D, Case III, r. 3. The liability is computed by reference to a proportion of the respondent society's total income from the investments of the Life Assurance Fund (excluding the annuity fund). Some of the investments of the Life Assurance Fund are Australian investments which under Australian Federal income tax law are sources of income in Australia. Some of the Australian investments are likewise sources of income within New South Wales and Western Australia respectively under the provisions of the income tax laws of those States. The respondent society is thus chargeable to Federal and State income taxes in Australia.

In 1929-30, the respondent society was charged to United Kingdom income tax on a on a sum of £184,858 deemed to be the United Kingdom income as calculated under the

Income Tax Act, 1918, Sched. D, Case III, r. 3. For the same year the actual income of the respondent society from investments in the United Kingdom forming part of the Life Assurance Fund amounted to £73,265 upon which United Kingdom income tax had been paid by deduction or otherwise. As a result the United Kingdom income of £184,858 calculated under Case III fell to be reduced for the purposes of assessment by such £73,265, leaving a sum of £111,593 upon which the respondent society paid United Kingdom income tax under the Income Tax Act, 1918, Sched. D, Case III, r. 3. The respondent society was also charged to State and Federal income tax in Australia.

The Special Commissioners held that the respondent society was entitled to the relief claimed by them under the Finance Act, 1930, s. 27.

The Crown appealed.

The Solicitor-General (*Sir Frank Soskice, K.C.*), and *Reginald P. Hills* for the appellants (Commissioners of Inland Revenue).

J. Millard Tucker, K.C., and *J. S. Scrimgeour, K.C.*, for the respondents.

(II) CASE STATED under the Finance Act, 1923, s. 24, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The appellant society, the Australian Mutual Provident Society, appealed against a determination of the Commissioners of Inland Revenue limiting the amount of relief which the society claimed in respect of an error or mistake in its returns in computing the assessable income of its London branch for the years ending Apr. 5, 1937, 1938, 1939 and 1940, respectively. The Commissioners found the following facts :

The appellant society carries on mutual life assurance business, having its head office in New South Wales and a branch in London. It was established in 1849 and . . . governed by the Australian Mutual Provident Society Act, 1910, an Act of the New South Wales Legislature. The appellant society is non-resident in the United Kingdom for the purpose of the United Kingdom income tax and for the years in question is entitled to exemption from United Kingdom income tax in respect of interest and dividends on securities and investments falling within the Income Tax Act, 1918, s. 46, the Income Tax Act, 1918, Sched. C, r. 2 (*d*), the Income Tax Act, 1918, Sched. D, Miscellaneous Rules, r. 7.

As the society carries on business at its London branch it is assessable to income tax under the provisions of the Income Tax Act, 1918, Sched. D, Case III, r. 3, and the . . . regulation . . . made thereunder by the Commissioners of Inland Revenue . . . .

The regulation . . . substituted a ratio of United Kingdom "liability" to total "liability" for the ratio provided by the . . . rule itself, namely the ratio which premiums received from policy holders resident in the United Kingdom, and from policy holders whose proposals were made to the society at or through its office or agency in the United Kingdom bear to the total amount of the premiums received by the society . . .

Taking the year ended Dec. 31, 1935, as an example (year of assessment 1936-37) the following figures . . . entering into the calculation emerge :

Reserves :	
Whole society	£93,799,810
London branch	£5,220,211
Ratio	.05,565,268
Interest on assurance fund :	
Whole society	£4,145,067
London branch	£230,684
(£4,145,067 x .05,565,268)	

The word "reserves" means liability in respect of life assurance policies . . .

Taking the year ended Dec. 31, 1935 . . . as an example (year of assessment 1936-37), the . . . exempted income amounted to £72,354.

For the year ended Dec. 31, 1935, therefore, the total income from the investments of the society's life assurance fund was £4,145,067, of which £72,354 was income exempted from tax in the United Kingdom. The fraction of the total income was .05565268 and it amounted to £230,684, which was deemed to be "profits" and as such chargeable under the Income Tax Act, 1918, Sched. D, Case III, r. 3 (1). But since the total income included £72,354 which was exempt from tax, the appellant society claimed that it was entitled to relief in respect of that sum. The Commissioners of Inland Revenue recognised the validity of the society's complaint and deducted £72,354 from the total income, thereby reducing the total income from £4,145,067 to £4,072,713, with the result that the fraction chargeable to income tax was £226,646.

The Special Commissioners held that the Commissioners of Inland Revenue were right in excluding the exempted income from the computation of the appellant society's liability.

The appellant society appealed.

J. Millard Tucker, K.C., and *J. S. Scrimgeour, K.C.*, for the appellants.

The Solicitor-General (*Sir Frank Soskice, K.C.*), and *Reginald P. Hills* for the respondents (Commissioners of Inland Revenue).

Cur. adv. vult.

Macnaghten, J.: These are appeals from decisions of the Special Commissioners with regard to the liability of the Australian Mutual Provident Society to income tax for the year 1930 in the first case, and for the years 1937, 1938, 1939 and 1940 in the second. The Crown is appellant in the first appeal: the society is appellant in the second appeal. The Australian Mutual Provident Society, established in 1849 under the laws of New South Wales, carries on the business of mutual life assurance; the head office of the society is situate in Sydney. For the purposes of United Kingdom income tax the society is not resident in the United Kingdom, but it has a branch office in London, and it is, therefore, chargeable to income tax under the Income Tax Act, 1918, Sched. D, Case III.

The Income Tax Act, 1918, Sched. D, Case III, r. 3 (1) provides that, in the case of an assurance company with its head office situate—as the head office of the society is situate—out of the United Kingdom, which carries on life assurance business through any branch or agency in the United Kingdom, a portion of the income of the company from the investments of its life assurance fund is to be deemed to be " profits " comprised in Sched. D and charged to tax under Case III of that Schedule. R. 3 (2), which prescribes the basis for the purpose of ascertaining the portion of the income to be so charged, contains a proviso that, in the case of an assurance company, with its head office situate —as the head office of the society is situate—in a British possession, the Commissioners of Inland Revenue may, by regulations, substitute some other basis for the purpose of ascertaining the portion to be charged. Accordingly, on the application of the society, the Commissioners of Inland Revenue made a regulation whereby it was provided that such portion of the whole income from the investments of the society's life assurance fund should be charged to tax under Sched. D as bears the same proportion to the whole income as the amount of the society's liability in respect of its life assurance policies issued by it in cases where the policy holders are resident in the United Kingdom and in cases where the policy holders are resident abroad but the proposals were made to the society at or through a branch in the United Kingdom bears to the total amount of the liability in respect of all the life assurance policies issued by the society. In other words, the income chargeable to tax in the United Kingdom is the same fraction of the whole income from the investments of the society's life assurance fund as the liability of the society in respect of what I may call its " London " policies is of its liability in respect of all the life assurance policies issued by it. For the tax year 1929-30, the income chargeable on the society, ascertained in accordance with that regulation, amounted to £184,858; but the society had already been charged to tax by deduction on £73,265, and, in accordance with the provisions of r. 3 (4), the sum of £184,858 was reduced to £111,593 by deducting £73,265 therefrom.

The question at issue in the first of these two appeals is whether the society is entitled, under the Finance Act, 1920, s. 27, to relief at the rate therein prescribed from the tax paid by it on the said sum of £111,593. That section provides that if any person who has paid, by deduction or otherwise, or is liable to pay, income tax in the United Kingdom for any year of assessment on any part of his income, proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at the rate therein prescribed. The society proved to the satisfaction of the Special Commissioners that it had paid Dominion income tax for the year in question on a part of the £111,593; and they accordingly held that the society was entitled to relief under that section. From that decision the Crown appeals to this court.

The society was charged to State and Federal Income tax in Australia; but it was agreed for the purposes of this appeal that, according to Australian income tax law, any income derived from a source outside Australia, including a business in the United Kingdom, is exempt to the extent to which it is proved to be chargeable to United Kingdom income tax. It was submitted by the Crown that the £111,593, on which income tax had been paid in the United Kingdom as income derived from the life assurance business carried on by the society in London, was exempt from Dominion income tax, and, further, that the society could not identify any part of the £111,593 with any income on which the society had paid Dominion income tax.

Although the £111,593 was deemed to be income from the business carried on by the society at its branch office in London, it was in fact a portion or fraction of the total income from the investments of the society's life assurance fund; the fraction having been ascertained by the method prescribed by the regulation made by the Commissioners of Inland Revenue. The sum of £111,593 was made up by adding together that fraction of the income of each of the investments of the life assurance fund. For the year in question, the total income from the investments of the life assurance fund amounted to £3,726,143. On part of that sum, namely, £1,022,482, no Dominion income tax had been charged; but on the remainder, namely, £2,703,661, Dominion income tax had been charged and paid. The society made no claim for relief in respect of the United Kingdom income tax paid by it on the fraction of the income of the investments amounting to £1,022,482, on which no Dominion income tax had been charged or paid. It only claimed relief in respect of the tax paid by it on the fraction amounting to £2,703,661 on which Dominion income tax had been charged and paid.

Although, under the provisions of the Income Tax Act, 1918, the £111,593 was "deemed to be" profits "comprised within Sched. D" and was to be "charged as being income derived from business carried on in the United Kingdom," it was not suggested that it was so regarded according to Australian law or that the sum so charged was in fact exempted from income tax in Australia. Since the £111,593 was in fact made up of fractions of the income derived from each of the investments of the society's life assurance fund and on part of that income the society had paid Dominion income tax, I agree with the Special Commissioners in thinking that the society is entitled to the relief claimed.

Before disposing of the first appeal, there is one further matter to be considered. The rate of relief from United Kingdom income tax prescribed by the Finance Act, 1920, s. 27, is as follows:

> . . . (*a*) if the Dominion rate of tax does not exceed one half of the [appropriate rate of United Kingdom income] tax, the rate at which relief is to be given shall be the Dominion rate of tax: (*b*) In any other case the rate at which relief is to be given shall be one-half of the [appropriate rate of the United Kingdom income] tax . . .

The several States constituting the Commonwealth of Australia, as well as the Commonwealth itself, can impose income tax, and since income tax imposed by any State as well as income tax imposed by the Federal Government, comes within the expression "Dominion income tax," the income from the investments of the society's life assurance fund is not chargeable to a uniform rate of Dominion income tax. Part of the income bears both Federal and New South Wales income tax. Other parts bear Federal income tax or West Australian income tax only. If, however, the fraction of the society's income from the investments of its life assurance fund, which is chargeable to United Kingdom income tax under the provisions of r. 3, is regarded as made up of the like fraction of the income from each of the investments, no difficulty arises in ascertaining the amount of the relief to which the society is entitled.

In my opinion, this appeal fails, and must be dismissed with costs; and the case will go back to the Special Commissioners to ascertain the amount of the relief to which the society is entitled.

The second of these appeals, in which the society is the appellant, arises out of a claim by the society for relief under the Income Tax Act, 1918, s. 24, on the ground that the assessments made upon it under Case I of Sched. D for the years ending Apr. 5, 1937, 1938, 1939 and 1940 were excessive by reason of an error or mistake in the returns made by it for the purposes of those assessments.

During each of those years the income from the investments of the society's life assurance fund included interest and dividends which, by reason of the following provisions contained in the Income Tax Act, 1918, namely: (i) sect. 46 of the 1918 Act: (ii) Sched. C, r. 2 (*d*); and (iii) Sched. D, Miscellaneous Rules, r. 7, were exempt from income tax in the United Kingdom, because the society is not resident here. The statement submitted by the Special Commissioners for the opinion of the court, sets out the total income from the investments of the life assurance fund during the years in question, and also the amount of the interest and dividends comprised in that total which were exempt from United Kingdom income tax. Taking the first of those years, for example, the statement shows that the total income from the investments of the society's life assurance fund for that year was £4,145,067, and that of that total £72,354 was income exempted from tax in the United Kingdom. The fraction of the total income, in accordance with the provisions of r. 3 and the regulation made by the Commissioners of Inland Revenue thereunder, was .05565268, and it amounted to £230,684; and that was the amount which by r. 3 (1), was to be deemed to be "profits" comprised in Sched. D, and to be charged under Case III of that Schedule. But since the total income included the £72,354 which was exempt from tax, the society complained that it was entitled to relief in respect of that sum, since otherwise tax would be charged on income which was not by law chargeable.

The Commissioners of Inland Revenue recognised the validity of the society's complaint and gave the following relief. They deducted the £72,354 from the total income, thereby reducing the total income from £4,145,067 to £4,072,713, with the result that the fraction chargeable to income tax under r. 3 was £226,646. The society, however, is not content with that concession. It is said, in the first place, that the provisions of r. 3 afford no warrant for making any reduction of the total income from the investments of the life assurance fund. Since the rule provides that the income chargeable to tax under Sched. D should be a portion of "any income of the company from the investments of its life assurance fund wherever received," I am disposed to think that this criticism is well founded, and that, for the purposes of ascertaining the portion of the income chargeable to tax, it is necessary to take the prescribed fraction of the total income from the investments of the life assurance fund and that it is not permissible to make any deduction from that total.

Proceeding from the contention that the method adopted by the Commissioners of Inland Revenue for dealing with the £72,354 was unwarranted, the society contends that that sum ought to be deducted, not from the total income of £4,145,067, but from £230,684, the fraction of the total income which, by the rule, is deemed to be "profits comprised within Sched. D," with the result that the chargeable income becomes £158,330.

The Income Tax Act, 1918, Sched. D, Case III, r. 3 (4) provides as follows:

> Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced.

The contention put forward by the society, as I understand it, is that the income from the investments exempted from the payment of tax should be regarded as if it were income which had been "charged to tax by deduction or otherwise" within the meaning of those words in r. 3 (4). It is not easy to see how the words "income charged to tax" can be construed so as to include income which is not chargeable to tax. But counsel for the appellant society urged very strongly that such a construction was rendered necessary by reason of the decisions in *Hughes* v. *The Bank of New Zealand* (1), and in *Sinclair* v. *Cadbury Bros., Ltd.* (2).

In the former case the Bank of New Zealand, like the society, was not resident in the United Kingdom, but had a branch in London and, like the society, was assessable to income tax here in respect of the profits of that branch. But it was not assessable under Case III of Sched. D; it was assessable under Case I of that Schedule on the profits made by the branch, computed in accordance with the rules applicable to that Case. The Bank, like the society, held investments which, under the provisions of the Income Tax Act, 1918, were exempt from United Kingdom income tax, and the main question at issue in that case was whether the income received by the branch from those investments ought or ought not to be included as receipts in the computation of its profits. It was held that it ought not to be included in the computation, because the exemption from income tax was absolute, and, if the income from those investments was included as a receipt, it would necessarily be subjected to tax. The decision in the case of Cadbury Bros., Ltd., was to the like effect. In that A case the company carried on its trade at a factory erected on land which, by an Act passed in 1660, was exempt from all taxation. The company was assessed to tax under Case I of Sched. D in respect of the profits of its trade and the question at issue was whether, in the computation of the profits of the trade carried on by the company, the annual value of the land on which the factory was situate ought to be included as a trade expense. It was held that it ought to be so included because, unless it were so included, the company would, in B effect, be charged to tax on the annual value of the land contrary to the provisions of the Act of Charles II.

These cases establish beyond all question that the Crown cannot exact income tax, either directly or indirectly, on income which is by law exempted from payment of tax; but, with all respect to counsel for the appellant society, I am unable to see how they support the contention that in this case the £72,354, C the income which is exempt from the payment of tax, ought to be deducted from the £230,684 which, in accordance with the provisions of r. 3 and the regulation made by the Commissioners of Inland Revenue, is to be deemed to be profits within Sched. D, and to be chargeable to tax under Case III of that Schedule.

In my judgment on the first of these appeals I ventured to point out that the fraction of the total income deemed to be profits comprised in Sched. D— D which, for the first of the four years in question on this appeal was .05565268 and amounted to £230,684—is in fact the aggregate of the like fraction of the income of each of the investments of the society's life assurance fund. Since therefore, the sum of £230,684 contains that fraction of the £72,354 which is exempt from income tax, it follows that no tax can be exacted on so much of the £230,684 as consists of that fraction of the £72,354, not by reason of any express or implied provision to be found in r. 3, but by reason of the fact that no E tax may be exacted, either directly or indirectly, on income which is exempt by law from tax.

As the Special Commissioners pointed out, the actual result of this method of dealing with the £72,354 is precisely the same as that of the method adopted by the Commissioners of Inland Revenue; but it seems to me that it is the more correct method. In my opinion, therefore, the appeal fails and must be dismissed with costs.

F *Appeals dismissed with costs.*

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Bell, Brodrick & Gray* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

G

HARRISON *v.* METROPOLITAN PLYWOOD CO.

[KING'S BENCH DIVISION (Hilbery, J.), November 6, 7, 8, 30, 1945.]

lowed. DICKSON *v.* FLACK.
All E.R. 236.

s machinery—Absolute duty—Cutter of spindle moulding her guard provided most efficient guard—Whether duty extends er than operator—Absolute liability under Factories Act, 1937, H *s.* 14, *modified by Woodworking Machinery Regulations,* 1922 *reg.* 17—*Factories Act,* 1937 (*c.* 67), *ss.* 14, 60—*Woodworking Machinery Regulations,* 1922 (*S.R. & O.,* 1922, *No.* 1196), *reg.* 17.

A part of the blade of a vertical spindle moulding machine, at the defendants' factory, broke away and the plaintiff, who was at work as a press operator at the next machine, was injured by one of the pieces which flew out of the holder. The plaintiff claimed damages from the defendants for, *inter alia* the alleged breach of their statutory duty under the Factories Act, 1937, s. 14, and the Woodworking Machinery Regulations, reg. 17, which requires the provision, for that type of machine, of "the most efficient guard" having regard to the nature of the work being performed. It was contended on behalf of the defendants (i) that they had complied with the regulations, and (ii) if they had not, the plaintiff had no remedy for breach of the regulations because the provisions of the Factories Act, 1937, s. 14, were ousted by the regulations, which were for the protection only of the worker at a particular machine. The ring guard (said to be the "usual" form of guard for that type of machine) employed at the time was a guard only against certain dangers to which the worker at the machine would be exposed, and there was a known form of cage guard, the subject of an illustration in a Home Office Safety Pamphlet, which would have fenced the major part of the circle round the vertical spindle with a wire-mesh screen without interfering with work on the machine :—

Held : (i) the guard employed at the time of the accident was not "the most efficient guard" and there had been a breach of the regulations.

(ii) the modification effected by the regulations was a modification of the standard of fencing and not an elimination of certain classes of workers in the factory from a right to such protection as the modified fencing would afford, and therefore the plaintiff had a right to maintain an action for damages resulting to him from a breach of the statutory regulations.

Miller v. *William Boothman & Sons, Ltd.* (1) and *Nicholls* v. *Austin (Leyton), Ltd.* (2) *distinguished.*

[**EDITORIAL NOTE.** This is an interesting point on the extent of the duty to fence given by the Woodworking Regulations in substitution for the statutory liability under the Factories Act, 1937, s. 14. It is held that the protection given by the statutory duty to fence is not limited to the worker at a particular machine but extends to all workers in the factory.

As to Absolute Duty to Fence Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130 ; and for Cases, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76.]

Cases referred to :

*(1) *Miller* v. *William Boothman & Sons, Ltd.*, [1944] 1 All E.R. 333 ; [1944] 1 K.B. 337 ; 113 L.J.K.B. 206 ; 170 L.T. 187.

*(2) *Nicholls* v. *Austin (Leyton), Ltd.*, [1944] 2 All E.R. 485 ; [1945] 1 K.B. 50 ; 114 L.J.K.B. 21 ; 171 L.T. 353.

Action to recover damages for personal injuries. The plaintiff claimed that his accident and injury were the result of (i) a breach of statutory duty on the part of the defendants, his employers, or (ii) alternatively, a breach of their duty to him at common law. The facts are sufficiently set out in the judgment.

S. R. Edgedale for the plaintiff.

Phineas Quass for the defendants.

Cur. adv. vult.

Hilbery, J. : At the time of the accident of which he complains the plaintiff was employed as a press operator by the defendants at their factory at Leonard Street, London, E.C.2. The factory is a woodworking factory to which the Woodworking Regulations made pursuant to the Factories Act, 1937, apply.

On June 19, 1944, the plaintiff was at his work as a press operator at his machine in the defendants' factory. The next machine to the one which the plaintiff was working was a spindle moulding machine driven by mechanical power. A part of the blade of the vertical spindle moulding machine suddenly broke away, the pieces flew out of the holder and one of them buried itself in the muscles of the plaintiff's thigh. Those are the short facts.

If the plaintiff is entitled to succeed the proper sum to be awarded as damages, in the view which I take of the medical evidence and that of the plaintiff, is £125. I have no hesitation in accepting the evidence of Dr. Gilchrist and my view—formed after listening to all the evidence—coincides with the opinion which he formed, namely, that the plaintiff had recovered from his injury and was fit for his old work by Nov., 1944, though he might from time to time have some slight pain in the region of the scar. There was no diminished earning capacity attributable to the accident after Nov., 1944.

The claim is put on two grounds, (1) for breach of statutory duty and (2) for breach of common law duty. The statutory duty said to have been broken is more particularly the duty laid upon the defendants by the Woodworking

Machinery Regulations, reg. 17, which reads as follows :

> The cutter of every vertical spindle moulding machine shall when practicable be provided with the most efficient guard having regard to the nature of the work which is being performed.

It is admitted that this regulation applied to the machine which caused the accident ; but it is said, firstly, that the defendants complied with the regulations, and secondly, that if they did not the plaintiff—who was not working at the machine—has no remedy for breach of the regulation since this is one of a set of special regulations which are substituted for and oust the provisions of the Factories Act, s. 14, and that these special regulations are all for the protection of the worker at the particular machine for the fencing of which the regulations provide, and are not intended to give a remedy when they are not complied with to anyone except the worker at the particular machine which is shown not to have been fenced or guarded in accordance with these regulations. On further consideration I have come to the conclusion that the second contention is not well founded, and that unless the first contention prevails, the plaintiff has a right to succeed.

The duty laid upon the occupier in terms by the Factories Act, 1937, s. 14, is to fence securely :

> . . . every dangerous part of any machinery, other than prime movers and transmission machinery . . . unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced.

The obligation imposed is to fence dangerous parts of any machinery—save for such machinery as is expressly excepted—so as to make it secure, and not only secure for the worker at the particular machine which is dangerous, but secure for every person employed or working on the premises.

Sect. 60 of the Act, however, provides as follows :

> (1) Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to persons employed in connection therewith, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

The section goes on to provide that such regulations may :

> (2) (*c*) modify or extend with respect to any class or description of factory any provisions of Part I, Part II or this Part of this Act, being provisions imposing requirements as to health or safety.

The statutory regulations for the use of woodworking machinery—non-compliance with which by the defendants the plaintiff says was the cause of his injury—are the regulations made under these provisions.

In those circumstances the Court of Appeal has said, and I quote the judgment of GODDARD, L.J. (as he then was), in *Miller* v. *Boothman* (1) ([1944] 1 All E.R. 333, at p. 335) :

> In our opinion, these regulations must be regarded as modifying the provisions of sect. 14 in respect of these machines and of substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require. It is difficult, indeed, to see what other object these regulations could have . . .

And then a little further on :

> To anyone reading them it could not but appear that, provided he followed the provisions of the regulations and saw that his saws were constructed and protected in accordance therewith, he was fulfilling his duties under the Act.

Those statements were quoted with approval as a statement of the law by MACKINNON, L.J., in *Nicholls* v. *Austin* (*Leyton*), *Ltd.* (2).

Now in *Miller's* case (1) and in *Nicholls'* case (2), the Court of Appeal was dealing with a case where the employer—the occupier of the factory—had complied with the requirements of the Woodworking Regulations, which the court was saying had been substituted for the absolute duty to fence securely imposed by sect. 14 so far as concerned the provision and maintenance of a proper guard on the machine. The Court of Appeal was not considering what the situation was in a case where the duty to guard substituted by the special regulations for the duty imposed by sect. 14 had not been complied with. Indeed

Goddard, L.J., in his judgment, speaking of these regulations says ([1944] 1 All E.R. 333, at p. 335):

> . . . if their object and result be not what we have said, they would, indeed, be little better than a trap for factory owners. To anyone reading them it could not but appear that, provided he followed the provisions of the regulations and saw that his saws were constructed and protected in accordance therewith, he was fulfilling his duties under the Act.

Nor did the Court of Appeal, in either of the two cases I have just been considering, decide more than this, that the Woodworking Regulations were a code defining the employers' duty to fence which had been lawfully substituted, wherever they were applicable, for the absolute duty to fence so as to make the particular machinery secure which had originally been imposed by sect. 14. In other words, the substitute regulations deal with the nature and extent of fencing which must be provided and maintained on each kind of woodworking machine. The Court of Appeal did not decide that, because the nature and extent of the fencing which had to be provided was described by regulations, the terms of which indicated that their primary purpose was the protection of the workers at the machines, therefore, they were not also intended to be a protection to other workers in the factory.

No doubt the primary consideration, where woodworking machinery is concerned, is the protection of the worker at the machine. The very fact that he works at the machine exposes him to particular risks. One would, therefore, expect, as the fact is, that the regulations would everywhere provide for securing as high a degree of safety for him as practicable. But it does not necessarily follow that the regulations must, therefore, be construed as only for the protection of the workers at the machines, and not for the benefit and protection of other workers in the factory as well. The modification effected by the regulations is a modification in the standard of fencing; it is not an elimination of certain classes of workers in the factory from a right to such protection as the modified fencing will afford. I am, therefore, of opinion, that the plaintiff here has a right to maintain an action for damages resulting to him from a breach of the statutory regulations in question.

The question that then remains is whether or not the plaintiff has established a breach of these regulations. Reg. 17 requires the provision for the machine in question of the most efficient guard having regard to the nature of the work being performed. It was proved that there was a known form of cage guard which would have fenced the major part of the circumference of a circle round the vertical spindle with a wire-mesh screen, and that the work in hand could have been performed with that guard in position. Such a guard is in fact the subject of an illustration in the Safety Pamphlet No. 8, issued by the Home Office. It was further clear from the evidence that the so-called ring guard employed at the time was only a guard against certain dangers to which the worker at the machine would be exposed if it were not there; but there was no evidence that it was "the most efficient guard." When asked whether it was, the expert called for the defendants replied that it was a "usual" form of guard for such a machine.

On the evidence on balance I think it is just established that the plaintiff probably would not have sustained his injury if the regulation had been complied with. The result is that, as in my view the plaintiff is not precluded from alleging that at the time of his accident he belonged to a class of persons for whose protection the Woodworking Regulations were made, he is entitled to succeed.

This view of the matter makes it unnecessary for me to decide whether the plaintiff could have succeeded in a claim based on breach of the defendants' common law duty apart from statutory regulation. There must be judgment for the plaintiff for £125, with costs.

Judgment for the plaintiff with costs.

Solicitors: *Shaen Roscoe & Co.* (for the plaintiff); *Davies, Arnold & Cooper* (for the defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

GORDON *v.* GORDON.

[COURT OF APPEAL (Lord Greene, M.R., du Parcq and Tucker, L.JJ.), January 17, 18, 21, 1946.]

Contempt of Court—Attachment and committal—Order for custody of child—Failure to hand over child—Service of order—Order to be complied with on or before stated time—Order served out of time—Intention not to comply with order—Knowledge of order by person affected immaterial—Process of committal —Enforcement only if rules strictly complied with—R.S.C., Ord. 41, *r.* 5—*Matrimonial Causes Rules*, 1944, *r.* 62 (2).

The appellant was the husband of the respondent, and the marriage was dissolved by decree absolute on Aug. 25, 1943, on the ground of desertion by the respondent. There was one child of the marriage, born on Nov. 14, 1937, and an order was made for custody of the child in favour of the respondent, with access to the appellant. The appellant, while the child was living with him, took out a summons asking that the order giving the custody to the respondent should be rescinded. The summons was heard on Dec. 19, 1945, and the appellant was ordered to hand over the child on Dec. 20, 1945. The appellant admittedly made up his mind to disregard the order and did not hand over the child on the following day. As a result of an *ex parte* application for custody made by the respondent, the appellant was ordered to hand over the child to the respondent by or before 7 p.m., on Dec. 21, 1945, the copy of the order, however, being served on the appellant at 8 p.m. The respondent, by reason of the appellant's failure to comply with the order of Dec. 21, 1945, served a notice of motion on Dec. 22, 1945, to the effect that she intended to apply for an order of committal or attachment. On Dec. 31, 1945, the appellant was committed for contempt of court. It was contended for the appellant that the order made on Dec. 21, 1945, was bad on the ground that it was served after the time for its compliance had expired. It was contended for the respondent that there was no necessity for service of the order because (*a*) the appellant was evading service ; (*b*) the court had inherent jurisdiction to commit a person for contempt :—

HELD : (i) since orders for committal and attachment affected the liberty of the subject, proceedings for contempt by disobedience of an order to do something outside the court could only be enforced if the rules relating to the process of committal or attachment had been strictly complied with.

(ii) on the facts, the service of the order in due time was necessary for the purpose of founding proceedings in contempt, the court having no power to dispense with the formal requirements of the rule.

Iberian Trust, Ltd. v. *Founders Trust & Investment Co., Ltd.* (1) *applied.*

[**EDITORIAL NOTE.** Strict compliance with Rules relating to service of an order is necessary, even if the person to be served is aware of the pending service, and service out of time cannot, therefore, be made the basis of proceedings for attachment and committal.

In the course of their judgments their Lordships express their views upon two points of importance in which reform of existing practice is apparently needed. The first is the desirability of specifying in orders which may have to be enforced by proceedings for attachment or committal the place at which the act required is to be performed. The second is the need for providing by Rules that orders which are made for the benefit of infants may be enforced by attachment or committal notwithstanding the accidental failure to comply with the strict technical requirements of the Rules. TUCKER, L.J., indeed goes further and suggests that as the case under consideration shows that it may be impossible on the grounds of urgency to serve an order in time before it has to be carried out some alteration in the Matrimonial Causes Rules, 1944, r. 62, and R.S.C., Ord. 41, r. 5, is desirable where the person to be served is well aware that the order had been made.

AS TO SERVICE OF ORDER, see HALSBURY, Hailsham Edn., Vol. 7, pp. 42-54, para. 59 ; and FOR CASES, see DIGEST, Vol. 16, pp. 49-57, Nos. 527-644.]

Cases referred to :

*(1) *Iberian Trust, Ltd.* v. *Founders Trust & Investment Co., Ltd.*, [1932] 2 K.B. 87 ; Digest Supp. ; 101 L.J.K.B. 701 ; 147 L.T. 399.

(2) *Duffield* v. *Elwes* (1840), 2 Beav. 268 ; 16 Digest 56, *631*.

*(3) *Gordon* v. *Gordon*, [1903] P. 141 ; 16 Digest 65, *750* ; 72 L.J.P. 33 ; 89 L.T. 73.

*(4) *Hyde* v. *Hyde* (1888), 13 P.D. 166 ; 16 Digest 55, *607* ; 57 L.J.P. 89 ; 59 L.T. 529.

*(5) *Re Tuck, Murch* v. *Loosemore*, [1906] 1 Ch. 692 ; 16 Digest 50, *534* ; 75 L.J.Ch. 497 ; 94 L.T. 597.

APPEAL by the petitioner from an order of LYNSKEY, J., dated Dec. 31, 1945, committing the petitioner to prison for contempt of court. The facts are fully set out in the judgment of LORD GREENE, M.R.

Astell Burt for the appellant.

Alban Gordon for the respondent.

Cur. adv. vult.

LORD GREENE, M.R. : This is an appeal by the petitioner in the suit against an order by LYNSKEY, J., dated Dec. 31, 1945, obtained on the application of the respondent in the suit, and ordering that the petitioner, Louis David Gordon :

> . . . be committed to His Majesty's Prison, Brixton, in the county of London, for contempt of court in that he failed to comply with the requirements of the order of the HON. SIR CHARLTON HODSON, Kt., one of the judges of the High Court sitting at the Royal Courts of Justice, Strand, in the county of London, dated Dec. 21, 1945, requiring him to hand over to the respondent by or before 7 p.m., on that date the child of the marriage, namely, Helen Frances Gordon.

The order was directed to lie in the office, and it is still in the office pending the hearing of this appeal which we expedited having regard to the fact that the liberty of the subject was concerned, and which we thought proper to hear in open court for the same reason, notwithstanding the fact that the argument has necessarily referred to various matters connected with this infant which normally would have been heard *in camera*.

The petitioner was the husband of the respondent, and the marriage was dissolved by decree absolute on Aug. 25, 1943, on the ground of desertion by the respondent. There was one child of the marriage, Helen Frances Gordon, born on Nov. 14, 1937. I do not find it necessary to go into the history of these matters save in order to set out the nature of one or two orders which must be understood before the position can be appreciated.

On Nov. 29, 1943, an order was made in the Divorce Division for custody of this little girl in favour of the respondent, with liberal access to the petitioner, the father. On Nov. 9, 1945, the father, having then possession of the child under the access provisions, took out a summons asking that the order giving the custody to the mother should be rescinded, and various other matters. A good deal of evidence was filed on that summons. It was adjourned from time to time. There was an application to this court, and eventually the summons was heard by BARNARD, J., on Dec. 19. BARNARD, J., then made an order to the following effect, that the petitioner should take proceedings in the Chancery Division forthwith to make the infant a ward of court. He ordered :

> . . . that the petitioner do hand over the said child to the respondent on Thursday, Dec. 20, 1945, [that was the next day] by 6 o'clock p.m., the child to remain in the respondent's care and control until further order, without prejudice to any application by either party as to access or otherwise and without prejudice to any proceedings in the Chancery Division directed to be taken as aforesaid the respondent by her counsel undertaking not to bring the child into contact with [a named person].

That is the substance of that order. It asserted, so to speak, the mother's right to custody under the previous order of the Divorce Division which the father had unsuccessfully attempted to attack.

The father apparently took the view that the order of BARNARD, J., was not the right order to make, and he appears to have thought that the substance of his case had never really been properly brought to the mind of the judge. He therefore, admittedly and manifestly, made up his mind that he would disregard that part of the order which directed him to hand the child over to the mother on the following day. He accordingly did not do so. I should say that at this time the child was living with the father under the access provisions which the father was attempting to replace with a permanent order for custody in his own favour. She was living at the father's house at Seal, near Sevenoaks, in Kent.

There is one thing I want to say about this order, and the same observation applies to the later order of HODSON, J., that neither order specifies the place where the child is to be handed over. It is of great importance, especially in cases where parties are likely to be in controversy and make difficulties and perhaps be contumacious and hostile, that orders which may have to be enforced by proceedings for committal or attachment should be of a perfectly precise nature so that there can be no controversy about the duty which has to be performed under them. Both in the case of this order and in the case of the subsequent order of HODSON, J.,—and my reasons for saying this will appear, perhaps, more clearly presently—it would have been very much better if the orders had said the child was to be handed over at a definite place, either at the father's house or at some other place.

To proceed with the history: the mother not having obtained the child proceeded to make an application, which was at any rate in the first instance *ex parte*, to HODSON, J. I may point out that having regard to the time of year these matters were thought to be of urgency, because both parents were concerning themselves with the question of where the child should spend Christmas. The application before HODSON, J., was granted, and the order made was to this effect:

> Upon the application of counsel for the respondent it is ordered that by or before 7 o'clock today [that was Dec. 21, 1945] the petitioner do hand over to the respondent the child of the marriage namely Helen Frances Gordon.

That order was made during the afternoon of the day on which it had to be carried out. I need not go into the question of the extent to which the presence of counsel and solicitors on behalf of the respondent on that occasion might affect the matter, because in my judgment it is not necessary to do so. It is said, and said, I think, with obvious correctness, that the petitioner was undoubtedly aware of the order of BARNARD, J. In fact—I think my memory is right—he was in court when that order was made. It is said by counsel on behalf of the wife that the court ought to draw the inference that in the case of the order of HODSON, J., also the father knew of it at the time it was made, or shortly afterwards on the same day, with the result that, had he been minded to do so, he could perfectly well have complied with the order to hand over the infant at 7 o'clock that evening. We were invited to draw the inference that he had that knowledge, and that he had it before 7 o'clock. The facts which were brought to our knowledge with a view to supporting that inference did not appear to me to be sufficient, but having regard to the subsequent history, and the law and practice relating to these matters, I do not think it matters, for a reason which will presently appear. I am quite content to deal with this case on the footing that the father, the present appellant, knew of the order of HODSON, J., before 7 o'clock and could quite well have complied with it had he been so minded. We are told that in the presence of counsel who had been appearing for him on previous occasions, and who appears for him now (but who was on that occasion not appearing as counsel but more as *amicus curiae*, because the application to HODSON, J., was *ex parte*) it was made perfectly clear (and we are asked to assume that the appellant knew all about it) that the mother was proposing to go down in a motor car and take delivery of the child. It is said that the circumstance that that was mentioned as being her intention makes it necessary, or possible, to construe the order of HODSON, J., as an order to deliver the child before 7 o'clock at the father's house at Seal.

Some question has been raised in this court as to where precisely he was to hand over the child. If you look at the face of the order it is not mentioned. If the intention was that he should hand it over at his house the order ought so to have specified. It did not do so. I will assume in favour of counsel for the respondent what I do not myself think for the moment is established, that the father knew about this order before the time appointed, and that the understanding was, and that he was a party to it and was well aware of it, that delivery should be made to the mother at the father's house at Seal. Let me assume all that. What happened was this. At 8 o'clock that evening the mother was present at the house with somebody who was acting apparently as a process server, though he is described in his affidavit as a producer of films employed by the Gaumont British Picture Corporation. A copy of the order of HODSON, J., was then served on the appellant, who arrived at 8 o'clock. Counsel for the respondent informed us that the mother had in fact arrived before 7 o'clock. It was 8 o'clock when the father turned up at the house, an hour after the time appointed for handing over the child. There is no evidence as to when the mother arrived, whether she arrived before 7 o'clock or not. We were asked to infer from the fact that the father did not arrive home until 8 o'clock, in that, as it was assumed, he knew of the existence of this order in plenty of time, that he was evading service. That inference I must entirely decline to draw. It seems to me that the evidence relied on to support it is quite insufficient. The order contained what is referred to as a penal endorsement, although it was not in the precise form required by the relevant rule. Counsel for the appellant was proposing to make some point on that, but we did not hear him upon it. Therefore I express no view as to the adequacy of that endorsement.

The mother having failed to get possession of the child proceeded then to serve a notice of motion on the following day, Dec. 22, to this effect:

> Take notice that the respondent by counsel intends to apply to LYNSKEY, J., in his room at 12.15 p.m., on Monday, Dec. 24, for an order for your committal or attachment on the ground that you have failed to comply with the order of this honourable court dated Dec. 21, 1945.

That was addressed to the appellant. As a result of that LYNSKEY, J., made the order which I have already read and which is the subject of this appeal.

One thing stands out in this case with the utmost clearness. The appellant made up his mind deliberately and with full knowledge of the possible consequences to defy the orders of the court. There was the order of BARNARD, J. That he deliberately defied. Whether he knew or did not know before 7 o'clock on Dec. 21 that HODSON, J., had made his order, he determined that he would not hand over the child at any time pursuant to that order. We were told that the child has been since made a ward of court. COHEN, J., made an order that the child should go to boarding school, and reaffirmed the order of HODSON, J., for delivery of the child to the mother in time to enable it to go to school.

When the application was made to this court to expedite the appeal it transpired that the appellant was still defying all the orders of the court and determined to keep the child. That was stated by his counsel in court. When it appeared that the court would not be disposed to grant the indulgence of an immediate hearing of the appeal at a time when the appellant was proclaiming his intention to continue his conduct he thought better about it and undertook to hand over the child and to obey—I will not call it an order—the suggestion of this court that he must show his *bona fides* by bringing the child up and delivering it in the registrar's room that very evening. That was done. The mother had the child, and the child went to school. I only mention that in order to show that what I am about to say is abundantly established, that this appellant has throughout been entirely contumacious and put himself in a position where, on the merits, the orders of the court called as loudly as in any case I have ever known for enforcement by the appropriate process.

Attachment and committal are very technical matters, and as orders for committal or attachment affect the liberty of the subject such rules as exist in relation to them must be strictly obeyed. However disobedient the party against whom the order is directed may be, unless the process of committal and attachment has been carried out strictly in accordance with the rules he is entitled to his freedom. I am not speaking now of contempts in the face of the court, but contempts by disobedience of an order for something to be done outside the court.

In the present case the summons or notice of motion before LYNSKEY, J., asked for committal or attachment. That is a common form nowadays, since both remedies are open in the case of disobedience to an order, be that order a prohibitive order for which committal used to be the appropriate remedy, or an affirmative positive order for disobedience of which attachment was the remedy. Either remedy is now possible, but there is still a certain procedural difference, and, speaking quite generally, the procedure in the case of attachment is more technical than in the case of committal. Accordingly, when before LYNSKEY, J., counsel was asked to elect which remedy he sought, feeling no doubt in difficulty with regard to attachment owing to non-compliance with the technical rules relating to attachment, he elected to ask for committal, and committal he obtained.

The only matter that we have heard argued is a purely technical matter, which is that the order of HODSON, J., requiring delivery by 7 o'clock was not served until that time had elapsed, that is to say 8 o'clock in the evening. The relevant rule in the Matrimonial Causes Rules, 1944, is r. 62 (2) :

> A decree or order requiring a person to do an act thereby ordered shall state the time within which the act is to be done, and the copy to be served upon the person required to obey the same shall be endorsed with a notice in accordance with Form 13.

That rule in the Divorce Division follows in substance, with some verbal modifications, the corresponding Rule of the Supreme Court, Ord. 41, r. 5, which provides that :

A

> Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done . . .

Then there is a provision for the indorsement of the penal memorandum. It is to be remembered that the process of enforcing orders in civil litigation made for the benefit of a party against the other party by committal or attachment B is nothing more than a form of execution. It is that form of execution by which the successful litigant enforces his right against his unsuccessful opponent. If he fails to comply with the strict rules he is the sufferer, because he has not succeeded in protecting or enforcing his right by this very effective means. When one comes to deal with the case of an infant the position is fundamentally different, because orders in respect of infants are not made for the benefit of C any litigating party, such as a party to a divorce suit. They are made for the benefit of the infant and, therefore, one would expect to find that the rules relating to the enforcement of orders in the matter of infants by committal or attachment would recognise that fundamental difference. When the Court of Chancery is dealing with a ward of court it has certain powers, which I need not deal with here. We are dealing with a case where what is sought to be enforced is a custody order made in the Divorce Division. The enforcement D of such an order is perhaps necessarily left to the interested party, the parent to whom custody has been given, and it may be that no serious inconvenience comes from that. But when it comes to enforcing an order made for the benefit of the infant at the instance of one of the parties to the litigation who may make a mistake in procedure and may not comply with all the rigours of the rules, the person who suffers is not merely the interested party, as it would be in ordinary litigation, but is the unfortunate infant, who does not get the pro- E tection of the enforcement of the order which has been made in its interest, merely because the parent who has taken upon himself or herself the burden of trying to enforce that order has made some slip or been prevented by some accident from carrying out the strictness of the rules.

I cannot help thinking that if this case has shown one thing it has shown the desirability of making some special rules with regard to the enforcement by committal or attachment of orders made in respect of an infant who requires F the protection of the court and who ought not to be prejudiced by finding that an order, perhaps of an urgent and vital nature affecting its interests, has been flouted by the person against whom it is made and that that person cannot be committed or attached owing to the fact that the party seeking to enforce the order has not complied with the rules. It becomes more manifestly unfortunate—I will not say absurd—when one comes across the rule G that strict compliance with the rules as to service is required even in a case where the person against whom the order is made is perfectly well aware of it, is perhaps in court when it is made, and deliberately sets himself to flout it. In the case of ordinary litigation between parties the strictness of requiring service of the order is a thing one can understand, but why should an infant suffer by a strict rule of that kind, and why should the court's order in its favour for its protection be disregarded without remedy when the parent against H whom the order is made is perhaps sitting in court ? I have said that in this case I am prepared to assume that the father knew all about the order of HODSON, J., in time to comply with it by 7 o'clock, and if that assumption be correct it would be a very unfortunate case, and I am afraid it is an unfortunate case, that owing to non-compliance with the rules of practice it will be impossible to enforce that order by proceedings for contempt.

The only question, therefore, which we find it necessary to consider, is whether or not the order was enforceable having regard to the fact that it was served after the time by which it should have been complied with. The essential importance of that time can, I think, be related to what I said earlier with regard to the place of delivery. To deliver a child to somebody else you must deliver it somewhere. If the person against whom the order is directed is left in any doubt as to where he is to deliver the child, the order is irregular. If he is to deliver a child at a particular place at a particular hour to a particular person, then he is entitled to be told and have it brought to his knowledge in time to enable him to take the necessary steps to do it before the time indicated. After that time is past he cannot be strictly said to be in contempt.

The principle that where a definite time is mentioned in the order for doing something, service of the order after the expiration of that time is not sufficient to found proceedings for contempt is well established. I need not go into the authorities except to mention the latest, a decision of LUXMOORE, J., in *Iberian Trust, Ltd.* v. *Founders Trust & Investment Co., Ltd.* (1), in which he says ([1932] 2 K.B. 87, at p. 96):

> I think it is quite plain from the decision in *Duffield* v. *Elwes* (2) that that order could not be enforced by penal proceedings, because there can be no default in compliance with an order ordering something to be done within a certain time when the order was not served until after the time within which the act was to be done has expired. That again would be a complete answer to the application for attachment in this case.

In my opinion, service of the order in due time was necessary for the purpose of founding proceedings in contempt. It is a misfortune which may happen to a child, an infant, for whose benefit the order is made if, owing to some dilatoriness or accident, the person who has taken charge of serving the order serves it out of time. That may be all very well when the person on whom the order is to be served never knew of it, but it becomes unreasonable in a case where he knows of it and could perfectly well comply with it in time.

Counsel for the respondent did not attempt, and he could not have attempted to argue that, assuming the rules have to be strictly construed and applied, the service would have been good. He directed his argument to a different contention altogether. He said that in the present case there was no necessity for service and he put that on two alternative grounds. First of all, he said that this was a case where we ought to infer that the appellant was evading service. I have already said that is an inference I am not prepared to draw. He then said, alternatively, it was sufficient that the appellant in fact knew of the order, and he invited us to assume, and, as I have said, I will for the purpose of the argument assume, that the appellant did know of the order. That, counsel for the respondent said, was sufficient, and accordingly the fact that the order was not served in time did not hurt him. In my opinion that argument cannot be accepted. Here is a rule of court which has statutory force. It does not provide for any exceptions. It is quite explicit. It requires certain things to be done, and this court has no power to dispense with the requirements of the rule.

Counsel for the respondent referred us to some authorities which he claimed supported his view. The first one was, curiously enough, *Gordon* v. *Gordon* (3), but that was a case in which an order had been made giving the custody of the child to the father, the petitioner, and directing the mother to deliver the child up. There was litigation in an attempt to vary that order and an application was made to the court to enforce the order as to custody. The mother was ordered to give up the child to the petitioner. That order was disobeyed and later a motion was moved for a writ of attachment or for an order for committal upon affidavits stating that the mother had left the country with the child. The custody order apparently had never been served properly, but the court made an order for attachment and committal—which is rather curious—upon the ground apparently that the child had been removed out of the jurisdiction. Different considerations apply in such a case. The report is a very short one and I can find in it no authority whatsoever for any such right in the court as counsel for the respondent argues for to dispense with strict compliance with the rule as to service in cases where the person against whom the order is made in fact knows of it.

Counsel for the respondent then referred to *Hyde* v. *Hyde* (4), which was a case of evasion of service, and this court held that personal service of the order was not necessary to give the court jurisdiction to issue a writ of sequestration. Sequestration in that case was the form of execution which was sought. That case contains a *dictum* which has been adversely commented on in this court, suggesting that the court can dispense with the necessity of service in a case where the party against whom the order is made in fact knows of it. The case in which that criticism was made was in *Re Tuck* (5), where a trustee had disobeyed an order to pay money into court, the order not having been personally served upon him. He had been in court when it was made and actually initialled one of the briefs. In spite of that, it was held that personal service was required unless it was shown that he was evading service. The court consisted of SIR RICHARD HENN COLLINS, M.R., and COZENS-HARDY, L.J. COZENS-HARDY, L.J., in the judgment of the Court said this ([1906] 1 Ch. 692, at p. 695) :

> The learned judge held that the objection that the order had not been served until after Jan. 1 was not a good objection, because the defendant was present in court when the order was made, and, therefore, personal service was unnecessary. In support of this view the learned judge referred to *Hyde* v. *Hyde* (4), where COTTON, L.J., said (13 P.D. 166, at p. 171) : "It is true that as a general rule no order will be made for sequestration or attachment unless it can be shown that there has been personal service of the order disobeyed, but there are exceptions to that rule. If it were proved, for instance, that the person was actually in court at the time the order was made, service would be unnecessary in order to obtain process for contempt, and personal service is also dispensed with if it is shown that the reason why there has been no personal service is that the person to be served has evaded service." The observation of COTTON, L.J., upon which the learned judge relied was not necessary for the decision of the case in which it was made, but nevertheless it is a clear *dictum* by COTTON, L.J., and one which deserves careful consideration. It was not suggested to us that there was any reported case in which this *dictum* had been acted upon, and it is not easy to understand on what ground the cases where a defendant evaded service of an order of which he had notice came to be discussed at all if the fact of notice, apart from evasion, could be deemed sufficient to dispense with service of the order.

I need not read any more. It is quite clear that the proposition that knowledge of the order takes the place of service is negatived with the greatest emphasis and clearness and the very important distinction is brought out between an order directing the doing of an act and an injunction which restrains the doing of an act. I need not read more of that case. It is the most recent case in this court, and in my opinion we are bound to follow it. If I may respectfully say so, I cannot see how it ever came to be argued or suggested that the court has got some sort of inherent power to dispense with compliance with a perfectly clear rule of court requiring an order to be brought in a particularly formal way to a person's knowledge merely because he knows of the order from a different source. The requirement of a penal endorsement confirms this view.

Those responsible for the rules in their wisdom have required this great degree of strictness in cases where the liberty of the subject is liable to be affected and in my opinion the court has got no dispensing power. I have already indicated my view as to the desirability of some relaxation of the strictness of the order in cases where the person for whose benefit the order is to be enforced is an infant and not a mere party to litigation. That will be a matter, no doubt, for consideration by those responsible for the rules. We cannot make rules, we cannot dispense with rules.

In the present case it is perfectly clear that the order was not properly served in time. In view of that, there was no such breach of the order as would justify proceedings in contempt and the fact, which I am assuming, that the father knew all about the order in plenty of time does not justify us in any way in departing from the requirements of the rule. I think I have dealt now with all the relevant aspects of this case. The other matters which were adumbrated were never fully argued and I say nothing about them. In the result this undoubtedly contumacious person succeeds in retaining his liberty, as he is entitled to do, owing to the fact that the order was not properly served.

The appeal must be allowed.

DU PARCQ, L.J. : I agree that this appeal must be allowed and I agree with everything that has been said by LORD GREENE, M.R. The case certainly presents features which are highly unsatisfactory. It is not satisfactory that a man who has stated, not by his own lips but in an affidavit sworn by one of his legal representatives, that he has no intention of obeying the orders of the court, which at any rate he knew of perfectly well at the time when that affidavit was sworn, should escape with impunity. I fully realise that no court must ever forget the importance of the liberty of the subject and the importance of the principle that in this country people are not to be imprisoned without good cause, cause shown according to law. Liberty would never be preserved if the courts were to have one measure for people whom they think to be deserving and another measure for people whom they think to be undeserving. The law must be applied strictly. So far as the liberty of the subject is concerned, I am quite satisfied that on the facts of this case it would be impossible for us to do anything but to allow the appeal.

There is, of course, another matter of great importance, and that is that the orders of the court should be observed and that no litigant should be permitted to say that he feels strongly that the order is a wrong order and, therefore, will not obey it. I do, however, derive some satisfaction from the fact that, as LORD GREENE, M.R., has pointed out, the difficulties which may arise under this rule may be removed as a result of this case. The importance of the present case is due to the fact that we are dealing with the custody of a small child. The hearing of this appeal has been expedited. It was expedited because we were dealing with the liberty of the subject. There was a stage when counsel for the appellant told us it would be unnecessary after all to ask that the appeal should be expedited because the respondent was willing, and her counsel agreed that she was willing, that the matter should stand over, because she had no desire to be vindictive and was not anxious that the appellant should be sent to prison. Upon that this court took a course which very likely we should not have taken if the matter in dispute had merely been the detention of a chattel. As LORD GREENE, M.R. then said, expressing the view of the whole court, we did not think it proper to postpone the matter, because it did not rest with the parties to say whether mercy should be extended or not. It was not a question whether the respondent was vindictive or not. It was a question ultimately for the court whether it would be content that its orders should be defied with impunity. That I mention because it emphasises the public importance of the matter.

In this case I am glad to think that no harm has been done to the child. I think one may say that the attitude of the respondent herself, for which no one would criticise her, shows that she does not feel that grave harm has been done. It is, of course, a remarkable fact that, although the mother had an order for the custody of the child and the father only an order for access, he has succeeded in obtaining custody of the child for so long, but it has not been suggested by anybody that the child has suffered morally or otherwise in his hands. As I have said, good may come out of the case because provision may be made in future to prevent what may be—I do not use the word to suggest that technicalities are not of importance—a merely technical omission from having the result of assisting a person who is minded to be disobedient. It is very desirable, and I only say this in order to show that I entirely agree with what LORD GREENE, M.R., has said, that steps of that kind should be taken, because there may be cases where a child might be in the custody of a parent so unfit to have that custody that it might be a disaster that that parent should be enabled to retain it for a moment after the order of the court had been made. I have no doubt it is not beyond the wit of man to devise a rule or form of order which will make it impossible that that very undesirable result should ever follow. In the circumstances, though one cannot help feeling a slight regret that it should be so, I agree that the appeal must be allowed.

TUCKER, L.J.: I have come to the same conclusion, but with regret. In this case I think the affidavit sworn on behalf of the petitioner, which was used before LYNSKEY, J., shows that the only proper inference to be drawn is that the petitioner at all times was well aware of the order that had been made and was at all times intending to disobey. In those circumstances the question arises whether this court has any jurisdiction to dispense with the strict requirements of the Matrimonial Causes Rules, 1944, r. 62. I think it is quite clear that no grounds have been established which would justify this court in effect in ignoring the provisions of that order or dispensing with its fulfilment. In this particular case with a little more expedition perhaps and possibly by the filing of some further evidence it might have been possible to secure the punishment of this man for his contempt of the order of the court. But this case does show that there may be cases, not only cases concerning an infant in the Divorce

Court but possibly cases in the King's Bench Division under the corresponding Ord. 41, r. 5, where it is necessary in an urgent case for an order to be made which has got to be carried out at very short notice indeed. This case shows that where such an order has been made in cases of great urgency it may be impossible to draw up the order and to serve it on the person concerned in time before the order has to be carried out. Because of the existence of these two rules, the Matrimonial Causes Rules, 1944, r. 62, and R.S.C., Ord. 41, r. 5, the result is that cases may arise where persons can deliberately spurn the order of the court knowing that it has been made. I agree that it would be very desirable that those concerned with these matters might consider whether or not some alteration in the rules is required. Speaking for myself, I should suggest that Ord. 41, r. 5, might possibly also deserve reconsideration as well as the Matrimonial Causes Rules, 1944, r. 62. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Oscar Mason & Co.* (for the appellant); *Pierron & Morley* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

LONDON & NORTH EASTERN RY. CO. *v.* BERRIMAN.

[HOUSE OF LORDS (Lord Jowitt, L.C., Lord Macmillan, Lord Wright, Lord Porter and Lord Simonds), November 30, December 3, 1945, January 21, 1946.]

Railways—Death of signal fitter on line—Statutory duty of railway to appoint look-out—Signal fitter engaged on routine oiling of signal apparatus on permanent way—"Protection to permanent way men when relaying or repairing permanent way"—Whether signal fitter within the protection—Whether oiling "repairing the permanent way"—Railway Employment (Prevention of Accidents) Act, 1900 (*c.* 27), *s.* 1 (1), *Sched., cl.* 12—*Prevention of Accidents Rules,* 1902 (*S.R. & O.,* 1902, *No.* 616), *r.* 9.

The appellant railway company employed a gang of signal fitters whose main business was to repair the connections between the signal-boxes and the signals or points. When not needed for such repairs it was the normal practice for the men to engage in routine oiling of the various connections of the signal apparatus on the permanent way. On Dec. 27, 1943, two of the signal fitters were at the work of routine oiling when a train ran over them and they were both killed. There was no look-out man to warn them of danger from approaching trains. The Prevention of Accidents Rules, 1902, r. 9, provides that: "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, . . . in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out." The respondent, the widow of one of the deceased workmen, brought an action under Lord Campbell's Act for damages against the appellants alleging breach of statutory duty under r. 9. It was contended for the appellants that the respondent's husband at the time of the accident was not "relaying or repairing the permanent way" within the meaning of r. 9:—

HELD [LORD JOWITT, L.C., and LORD WRIGHT *dissenting*]: on a proper construction of the Prevention of Accidents Rules, 1902, r. 9, the respondent's husband was not employed in "relaying or repairing the permanent way" but was engaged in a different operation, *viz.*, oiling the connections on the signal apparatus, and, therefore, outside the protection afforded by the rule.

Decision of the Court of Appeal ([1945] 2 All E.R. 1) *reversed.*

[**EDITORIAL NOTE.** The House of Lords reverse the Court of Appeal by a majority of three to two. The decision turns upon the construction of the word " repair," which is held by the majority to denote putting right something which has gone wrong, and, therefore, to exclude the operation of routine oiling. The collocation of " relaying or repairing " in the Schedule to the Railway Employment (Prevention of Accidents) Act, 1900, is said to indicate different degrees of something entirely distinct from mere maintenance, which LORD JOWITT and LORD WRIGHT in their minority judgments regard as equivalent to repair.

AS TO PREVENTION OF ACCIDENTS ON RAILWAYS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 281-283, paras. 606, 607 ; and FOR CASES, see DIGEST, Supp. Railways, No. 598 *a*.]

Cases referred to :

*(1) *Greg* v. *Planque*, [1936] 1 K.B. 669 ; Digest Supp. ; 105 L.J.K.B. 415 ; 154 L.T. 475.

*(2) *A.-G.* v. *Lockwood* (1842), 9 M. & W. 378 ; 42 Digest 767, *1934* ; *affd. on other grounds, sub nom. Lockwood* v. *A.-G.*, 10 M. & W. 464.

(3) *Vincent* v. *Southern Ry. Co.*, [1927] A.C. 430 ; Digest Supp. ; 96 L.J.K.B. 597 ; 136 L.T. 513.

*(4) *Dredge* v. *Conway, Jones & Co.*, [1901] 2 K.B. 42 ; 24 Digest 924, *166* ; 70 L.J.K.B. 494 ; 84 L.T. 345 ; 3 W.C.C. 104.

*(5) *Hoddinott* v. *Newton, Chambers & Co.*, [1899] 1 Q.B. 1018 ; 34 Digest 238, *2031* ; 68 L.J.Q.B. 495 ; 80 L.T. 559 ; 1 W.C.C. 62 ; *on appeal*, [1901] A.C. 49.

*(6) *Unwin* v. *Hanson*, [1891] 2 Q.B. 115 ; 42 Digest 631, *337* ; 60 L.J.Q.B. 531 ; 65 L.T. 511.

*(7) *Tuck & Sons* v. *Priester* (1887), 19 Q.B.D. 629 ; 42 Digest 729, *1516* ; 56 L.J.Q.B. 553.

*(8) *Dyke* v. *Elliott, The Gauntlet* (1872), L.R. 4 P.C. 184 ; 42 Digest 730, *1526* ; 8 Moo.P.C.C.N.S. 428 ; 41 L.J.Adm. 65 ; 26 L.T. 45.

(9) *Wood* v. *Walsh & Sons*, [1899] 1 Q.B. 1009 ; 24 Digest 924, *165* ; 68 L.J.Q.B. 492 ; 80 L.T. 345 ; 1 W.C.C. 68.

APPEAL by the respondent company from a decision of the Court of Appeal (MACKINNON, LAWRENCE and MORTON, L.JJ.), dated May 23, 1945, and reported ([1945] 2 All E.R. 1). The facts are fully set out in the opinion of LORD JOWITT, L.C.

Sir Walter Monckton, K.C., *F. W. Beney, K.C.*, and *Felix C. Denny* for the appellants.

N. R. Fox-Andrews, K.C., and *John Charlesworth* for the respondent.

The House took time to consider its opinion.

LORD JOWITT, L.C. : My Lords, on Dec. 27, 1943, Frederick John Berriman, deceased, who was then a labourer in the employment of the appellant company, was knocked down by a train and killed whilst working in the course of his employment. His widow brings this action alleging that his death was due to the failure of the railway company to observe the Prevention of Accidents Rules, 1902, r. 9. The Railway Employment (Prevention of Accidents) Act, 1900, s. 1 (1), provides :

> The Board of Trade may, subject to the provisions of this Act, make such rules as they think fit with respect to any of the subjects mentioned in the schedule to this Act, with the object of reducing or removing the dangers and risks incidental to railway service.

No. 12 of the schedule is in the following terms :

> Protection to permanent way men when relaying or repairing permanent way.

Pursuant to the powers contained in the Act, rules were made in 1902 and the material words of r. 9 are as follows :

> With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working . . .

On the day in question the deceased man Berriman, in conjunction with another employee named Rowe, was engaged in cleaning and oiling a certain apparatus between or near to the running lines. There was a considerable number of trains passing upon these lines. The engine driver of the train leaving Brough at 1.20 p.m., on its way to Hull, when approaching the West

Parade Junction signal cabin saw two men who appeared to be just getting up from a stooping position. They were knocked down and killed by the oncoming train: they were Berriman and his mate Rowe. It was admitted that no protection had been given to these men by means either of persons or apparatus whilst they were doing their work: and it was not contested that they were working at a place where danger was likely to arise.

The work which they were doing was connected with the signalling apparatus. A The signalman in his box is able by pulling a lever to move signals and to deflect points so as to transfer a train from one running line to another. The mechanism which insures, for example, that the result of pulling a lever in the signal box is that points are deflected, consists of a series of rods, cranks and levers. Some part of this mechanism is embedded in the ground actually between the running lines and other parts are so close to these lines as to cause men working thereon to be in danger from passing trains in the absence of a proper look-out. The B question that arises is whether there was or was not a duty on the part of the railway company to give protection to these men by means of persons or apparatus, for if so there is no question but that the duty was neglected.

Upon these facts as it appears to me the following three questions arise:

1. What is the meaning of the words "permanent way" in the 1900 Act?

2. Was the deceased workman a "permanent way man" within the meaning of that Act? C

3. Was he at the material time engaged in repairing the permanent way?

I proceed to consider these three points in order, and first as to the meaning of the phrase "permanent way." It is, I think, legitimate in construing a statute relating to a particular industry to give to the words used a special technical meaning if it can be established that at the date of the passing of the statute such special meaning was well understood and accepted by those conversant with the industry. D In the present case in the endeavour to prove that the words "permanent way" had at the date of the passing of the Act acquired a special or technical meaning the appellant company in the court below called a Mr. Thompson, the engineer of the L.N.E.R. Co., in charge of their engineering work in the north-eastern area, and a Mr. Wallace, the chief civil engineer of the L.M.S. Ry. Co.

Even if we disregard the fact that these railway companies were not established E until many years after 1900 it seems to me that the evidence called completely failed to establish that the words "permanent way" had at any time acquired any special technical meaning. Mr. Wallace was asked to give his definition of the words and his answer was as follows:

> The permanent way is the final track laid down at the opening of the line and then subsequently renewed, as compared with the overland route of the contractors at its construction. F

Mr. Thompson gave the same answer and when asked where the permanent way ended on either side replied:

> The broad answer is that it ends where the ballast ends, which is sloped down to the natural earth at the sleepers end.

The most that the evidence of these two witnesses established was that for the G purposes of the internal organisation of the engineering work of their companies the work which had to do with signals and signalling apparatus was kept separate and distinct from the work which was concerned with the track. It seems to me quite illegitimate to spell out from this eminently practical division of work any definition of the words "permanent way" and indeed the attempt to do so leads to ridiculous conclusions. Thus the points which deflect a train from one running line to another are admittedly part of the permanent way, whilst H the mechanism which pulls the points over—even although fastened in the ground between the lines on which the train runs—is said not to be part of the permanent way. A hand-operated lever, such as is frequently to be seen in shunting yards, is said to be part of the permanent way even although it is placed completely outside the extremities of the sleepers simply because it is not connected with the signalling system.

I asked—and I asked in vain—during the course of the argument whether the water trough, which is placed between the running lines to enable an engine to pick up water whilst in motion, was or was not part of the "permanent way " ? My Lords, I confess that I can get no assistance in construing the words " permanent way " from this evidence and without attempting any definition of my own I am clearly of the opinion that a man working on a piece of mechanism embedded in the ground either between the running lines or so near to the running lines that he would be knocked down by a passing train is working on the permanent way. I confess that I am relieved to be able to come to this conclusion, for were it otherwise no man working on such a piece of mechanism, no matter how exacting or absorbing his work might be and no matter that it was undoubtedly a work of repair, would be within the protection of the statute. I find it difficult to believe that the Legislature in passing the 1900 Act can have intended any such result. For these reasons I agree with the Court of Appeal that the deceased man was at the time of the accident working on the permanent way. Having reached this conclusion, it seems to me to follow that a workman whose regular and habitual duty was to attend to mechanism which I have decided forms part of the permanent way is a " permanent way man."

There remains the third and to my mind the only difficult question, namely, whether at the relevant time the deceased workman was engaged in repairing the permanent way ? There is no evidence to show that on the day in question he was attending to any mechanism which had broken down or proved faulty. He had indeed left behind him the tool box which he was accustomed to take with him in such cases. His work was described in the evidence as " routine oiling and cleaning " ; for this purpose he and his fellow workman would take with them a feeder, a tin of oil and a brush. The evidence further established that this oiling and cleaning required to be done about once a week and that it was essential for the proper working of the system.

It is, I should suppose, impossible to lay down with any precision the periods of time within which this work of oiling and cleaning must be undertaken ; much must depend upon the circumstances ; but it seems clear that moving parts of the gear exposed to the weather would tend to get rusted and to attract dust and debris. If they were left unattended to they would gradually begin to work stiffly and at last would work so stiffly that they would be regarded as out of order and would be noted as a subject for repair. The Court of Appeal took the view that " repairing " as used in the Railway Employment (Prevention of Accidents) Act, 1900, must be construed as including the work of maintaining in good working order ; I agree with them and I agree with them largely because I can find no satisfactory criterion to tell me at what point that which is called repair as opposed to maintenance begins. It would, I suppose, be conceded that if a nut had worked loose and required to be tightened the work involved would be a work of " repair " even although the actual work occupied only a few seconds of time. Oiling and cleaning may take longer than tightening a nut and in the course of oiling and cleaning something which is " repair " in any sense of the word may be discovered. It might, for instance, be seen that a split pin which had sheered off required to be replaced. To limit the word " repair " in the sense contended for by the appellants seems to me to make the duty imposed by the statute quite impracticable. At one moment of time a man might merely be oiling and cleaning and at another moment he might be doing something which is repair in the narrow sense of the word—that is in making good something which has developed a fault. It would be impracticable for the railway company whenever he did repair work in this sense to afford him protection which they failed to give him in the course of his oiling and cleaning.

There is a further consideration which leads me to agree with the decision of the Court of Appeal. I have already reminded your Lordships of the evidence that this oiling and cleaning was necessary about every week. Supposing it was neglected—what would happen ? The mechanism would begin sooner or later to work stiffly, but the signalman would still be able to pull over his lever without much difficulty. After a short while he would notice that it was working very stiffly and in time it would not work at all. Then, I presume, it would be conceded that it was a case calling for " repair " ; but it would seem that the question is essentially one of degree, and that it is impossible to fix any definite point at which " maintenance " ends and " repair " begins. The word " repairing " is in my view a word sufficiently wide, if the context so requires, to include "maintaining."

Having regard to the fact that the primary intendment of the Act in question was to provide more adequate protection for railway servants, I think it should be so construed in this case. Accordingly, in my view, a man engaged in oiling and cleaning the moving parts of the machinery which enables the signalman to adjust the points is engaged in the work of repair. I find some support for this conclusion from *Greg* v. *Planque* (1), with which decision I agree.

For these reasons I would dismiss the appeal.

LORD MACMILLAN: My Lords, on Dec. 27, 1943, Frederick John Berriman, a signal fitter's labourer, in the employment of the London and North Eastern Ry. Co., was run down and killed by one of the company's trains when, in the course of his employment, he was engaged in oiling and cleaning the connecting rods which actuate points on the lines at West Parade Junction, Hull. In the present action by his widow against the railway company she claims damages on the ground *inter alia* that the death of her husband was attributable to a breach by the railway company of the Prevention of Accident Rules, 1902, r. 9, made by the Board of Trade pursuant to the Railway Employment (Prevention of Accidents) Act, 1900, s. 1 (1).

By that statute the Board of Trade were empowered, "with the object of reducing or removing the dangers and risks incidental to railway service," to make such rules as they thought fit with respect to twelve subjects mentioned in the schedule to the Act. Of these subjects the twelfth is:

> Protection to permanent way men when relaying or repairing permanent way.

Of the rules so made the ninth relates to this subject and reads as follows:

> With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out.

If this rule applied to the deceased and to the work upon which he was engaged when he met his death it is admitted that it was not observed, for no person or apparatus was provided by the railway company for the purpose of maintaining a good look-out or for giving him warning against any train or engine approaching him while at his work. There is no question that the deceased was working on or near lines of railway in use for traffic or that the case was one in which danger was likely to arise. But the rule requires for its application more than this. It is only where men are working on or near traffic lines "for the purpose of relaying or repairing the permanent way of such lines" that the protection of a look-out must be provided.

The railway company, in contesting the application of the rule to the case of the deceased, submitted that the deceased was not a "permanent way man" within the meaning of head 12 of the schedule to the 1900 statute, and was therefore not within the category of workmen whom the rule was, under the statute, designed to protect. They further submitted that the deceased was in any event not engaged in any work of relaying or repairing and that if he was engaged in repairing it was not the permanent way that he was repairing. These contentions prevailed with STABLE, J., who heard the case in the first instance, but they were rejected by the Court of Appeal. The actual job on which the deceased was engaged was that of oiling and cleaning the system of rods actuating points on the running lines. The points are tapering moveable rails which enable vehicles to be switched or guided from one line of track to another. They are operated from the signal box with which they are connected by a system of moveable rods. It is obvious that for the safe and efficient working of the points and connecting rods their moveable parts must be kept oiled and cleaned, and in good repair.

There was much argument as to whether what I may call this switching apparatus formed any part of the permanent way and whether the men whose duty it was to attend to it were permanent way men. It was said that the expression "permanent way" was a term of art in railway parlance and evidence was adduced by the railway company to the effect that in the vernacular of railway men the permanent way comprises only the ballast and sleepers, chairs, rails and fastenings of which the track is composed, while the apparatus for working the signals and points with which the system is equipped is never referred to as part of the permanent way, except in the case of points operated by hand levers and unconnected with any signals. This distinction, it appears, is reflected in the organisation of railway administration in which the departments concerned respectively with the permanent way and with signals and points are clearly differentiated and separately staffed.

I recognise that when Parliament employs technical terms without definition in a statute dealing with a particular art or industry courts of law are entitled to have the assistance of skilled persons in the interpretation of such terms and indeed the present statute and rules contain numerous technical terms as to whose meaning in railway parlance evidence would be almost indispensable. But assuming that evidence was admissible as to the meaning of "permanent way" I am not satisfied, on the evidence adduced in this case, which was largely based on administrative practice and convenience, that the expression "permanent way" as used in the statute and rule ought to be read in the limited sense for which the railway company contended. The moveable tapering rails which form the points are as much part of the running track as the immoveable rails and the apparatus of rods attached to these moveable rails for the purpose of actuating them is a necessary part of the equipment of the running track. The relaying or repairing of this apparatus is an operation attended with the same danger as the relaying or repairing of the rails themselves and, having regard to the purpose of the statute and rule, I can see no adequate reason for providing protection in the one case and not in the other.

I do not, however, find it necessary to pronounce finally upon this matter, for in my opinion, even if the system of connecting rods forms part of the permanent way, the deceased was not engaged in relaying or repairing these rods. He was oiling and cleaning them. There is, of course, no question that he was not doing any work of relaying the permanent way. The critical word for the present purpose is "repairing." I am unable, having regard to the ordinary usage of the English language, to characterise the work of oiling and cleaning as a work of repair. The collocation of the words relaying or repairing is significant. Relaying is the major operation of renewing what is so defective as to be past repair; repairing is the minor operation of making good remediable defects. There was nothing wrong with the points which the deceased was oiling and cleaning, nothing requiring repair. The engineer who oils his engines would certainly be surprised to be told that he was repairing them. Oiling and cleaning, to my mind, are operations designed to keep plant in good running order and to prevent the development of defects necessitating repair. There may well have been a good reason for limiting the requirement of protection to the case of men engaged in the work of relaying and repairing, for these operations suggest tasks occupying time and requiring concentration of attention, precluding those engaged in them from looking after their own safety. If the word "repairing" were to be extended to include the simple and routine matter of oiling and cleaning, the railway companies would require to provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning of an approaching train or engine every time one of their servants oiled a single bearing in the system of points and connecting rods and this under the sanction of prosecution and penalties. For it must be borne in mind that while the statute and rule have the beneficent purpose of providing protection for workmen, their contravention involves penal consequences under sect. 11 of the Act. Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language. I quote and adopt the words of Alderson, B., in *Attorney-General* v. *Lockwood* (2) (9 M. & W. 378, at p. 398):

> The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act or to some palpable and evident absurdity.

It appears from the evidence that it had not been the practice of the railway company, although the rule in question has been in operation for over forty years, to provide a look-out man when oiling is being done. On the other hand when a job of repair has to be done on the points which may take some time, a look-out man is asked for and provided.

If it is thought desirable to extend the protection of a look-out to the case of men engaged in oiling and cleaning it is for the legislature to do so, after investigation of all relevant considerations. The present rule in my opinion does not cover the case.

I am accordingly in favour of allowing the appeal and restoring the judgment of STABLE, J.

LORD WRIGHT: My Lords, the appellants, the railway company, are appealing against the judgment of the Court of Appeal, by which it has been held liable to compensate the respondent, the widow of Frederick John Berriman, in respect of the death of her late husband while working in the employment of the appellants. The issue is whether his death was caused by the breach by the appellants of the Prevention of Accidents Rules, 1902, r. 9, made pursuant to the Railway Employment (Prevention of Accidents) Act, 1900, s. 1 (1). The relevant provision of the Act and of the rules have been fully stated by LORD JOWITT, L.C., in the opinion which he has just delivered and need not be repeated here.

The respondent's claim was that the deceased man, while working on the appellant's railway for the purpose of repairing the permanent way in a position where danger was likely to arise, met his death by reason of the appellant failing to provide any good look-out or warning of any train or engine approaching him and the other man working alongside him. He and his mate were in fact killed by a passing train or engine, while engaged in cleaning and oiling the connections leading from the signal cabin up to the slide chair which moves the point. It is not now suggested that the accident was caused or contributed to by any negligence on the part of the deceased men or either of them. The sole question is as to the effect of the rule in the circumstances of the case.

It is clear that what the men were cleaning and oiling when they met their death was the mechanism connecting the signal cabin and the point. The signal man in the cabin works a lever. This operates on a system of iron rods and cranks. The rods run alongside the line of rails until they come opposite the place where the point is. The point may be described as a rail sharpened to a point and capable of being moved backwards and forwards up to or away from the rail, so as to determine the direction of the train. In order to effect this, the motion communicated to the rod from the signal box is changed from a motion alongside the rails to a motion at right angles, so that it can move the point backwards or forwards. The deceased man and his mate were on the railway classification called signal fitters. They were responsible for oiling and cleaning the mechanism from the signal cabin to the slide chair, a sort of shoe which actually held and moved the point. The oiling and cleaning of that part of the mechanism were treated as part of the duties of a separate gang distinguished in railway terminology as permanent way men. But I regard the whole mechanism as part of the permanent way. The rods operating the point were carried on blocks across the lines of rails when they were diverted from their course alongside the line of rails. It is not denied that the slide chair and the point itself are parts of the permanent way. The attempt to split up a single composite mechanism into separate parts cannot be justified, according to my opinion, by anything in the nature of the system but can only be regarded as an arbitrary distinction for the convenience of the railway working. In my judgment, the deceased men were at the time of their death working on or near lines of traffic and in doing so were in a place where danger was likely to arise. No one witnessed the accident, except the driver of the train who, in the actual circumstances, did not see the men until it was too late to avoid them. The bodies were found on or near the lines, in fact one body was found in the four-foot way between the rails and the other outside the rails in the space between the line of rails and the next line. The two men had been seen a little time before the accident bending or standing up in attitudes consistent with the work they were obviously engaged upon. The operation of cleaning and oiling the connecting mechanism was in practice done by two men working together as in this case, one holding the oil feeder and the other the brush and tin, so that he could dip and then rub with the brush. There was a considerable length of straight rod, but in addition there were various cranks and pulleys and the mechanism called the detector box which acts as an interlocking apparatus between the signals and the points. There are thus a number of different parts which the deceased men had to clean and oil. They had a considerable area under their charge and the system was to clean and oil all the various connections in that area once a week. The cleaning and oiling was clearly an important work, necessary to secure the prompt and easy working of the mechanism between the signalman's lever and the points. Absence of friction was essential.

It is said, however, that the men were not working on the permanent way because that is limited to the rails, the sleepers, the ballast and other parts necessary to carry the traffic. I think this is too narrow a view. It cannot be justified by the actual conditions of the line. I have already explained that the permanent way is a complex of inter-connected parts, one of which consists of the mechanism for working the points, which are themselves rails. Not only is this mechanism necessary for working the railway at all, but it is physically a part of the permanent way because it rests upon it and indeed is actually incorporated in it by means of the blocks on which it rests which are embedded in the way ; further if the rails, including the points, are part of the permanent way, as admittedly they are, so are the slide chairs which operate the points and so must be the rods which move these chairs and govern the points.

But the appellant has still a further contention. Item 12 of the schedule to the Act uses the words " permanent way men." These do not appear in the rule. It is said that " permanent way men " has a technical railway meaning, because of the classification of the employees I have quoted above, and that the rule must be read as embodying that special meaning, otherwise it would not be carrying out the schedule and would be *ultra vires*. There is no plea that the rule is *ultra vires* and in fact it has been treated as valid according to its actual terms by this House in *Vincent* v. *Southern Ry. Co.* (3). But in addition the argument can be disposed of by determining the meaning of permanent way men in the schedule to the Act. In my opinion, no more is meant than " men whose work has to be done upon the permanent way." It would not include railway servants whose duty may take them on occasion on to the permanent way, as for instance a station-master or other official who has to pass up and down the way in the course of his employment. But it does include men like the two men who were killed, who have to do work on it, and who while there will have their attention fixed on the work they are doing, and will thus be peculiarly exposed to the danger against which the Act seeks to protect them. Thus, in r. 9, it is not necessary to repeat the actual words " permanent way men " because their effect is reproduced in the rule. But there is also a broader ground for not limiting the meaning of " permanent way men " as the appellant suggests. The protection of men in the position of the deceased is the object of the measure. There is no definition in the Act of the term " permanent way men." There is no reference in the Act or rules to any practice of the railway company. What the appellants seek to do is to incorporate this practice into the schedule and rule so as to give the words a special meaning. I know of no principle of construction which would justify this course. It would be contrary to the scope and object of the Act and rule, because it would exclude from their scope men who fulfil all the conditions and would *pro tanto* nullify the object of the legislation which is that of reducing or removing the dangers and risks incidental to railway service. This, it is said, should be done on the basis of incorporating by implication into the Act and rule a classification or terminology adopted by the railway company for purposes of domestic convenience which have no relation to the object of the Act and indeed are contrary to it. No such implication is possible in my opinion. The actual words are capable of clear and intelligible interpretation in the sense which I have defined.

It may further be noted that the Act was passed in 1900 and r. 9 was made in 1902, and there is no evidence that the Legislature had any knowledge of the alleged practice, even had it existed in 1900. Accordingly, construing as I do the words as they stand in the Act and in r. 9, I think the deceased men were within the protection of the measure.

But there still remains a further objection raised by the appellants to the respondent's claim. One condition, expressed both in the schedule and in r. 9, is that the men should be "relaying or repairing the permanent way at the material time." Only in that event does r. 9 apply. I have sufficiently described what the men were doing. The question is whether the work of cleaning and oiling constitutes relaying or repairing or—more precisely—whether such work constitutes repairing because it is clear that the men were not relaying, that is reconstructing the line. This has given rise to much discussion. The most important objection taken by the appellants seems to be that there was no actual fault in the mechanism (so it is said) which the men were putting right. It is said that "repair" implies an actual need of repair, that is, repair presupposes something defective which actually impedes the proper working of the system. What the men were doing, it is said, was "routine" cleaning or oiling; that, it is contended, is not repair, but maintenance and the word maintenance is not used in the Act or rule. It is also urged that in any case cleaning or oiling would not in ordinary parlance be described as repairing.

The issue has certainly called for serious consideration, but I have come to a clear conclusion that the Court of Appeal were right in deciding as they did on this point. Morton, L.J., in his careful judgment concluded that "repairing" here means or includes "maintaining in good working order." He had been discussing the view of the judge that "repair" presupposes that something was not functioning properly; in that event the judge said he might have been prepared to concede that if the defect was simply due to the need of a certain amount of oil, the operation of oiling might be a measure of repair. Lawrence, L.J., similarly, applying a definition of repairing given by Avory, J., in *Vincent's* case (3), was of opinion that repairing included maintenance and all the routine work which had to be done to put the line in proper working order. MacKinnon, L.J., adopted substantially the same view.

I see no reason to dissent from that. I think the distinction which is drawn by the appellants is too narrow to be valid in construing a measure like this which is aimed at protecting men from the dangers of working on the permanent way. The danger is the same whether the men are working to remedy known and operative defects or working to get rid of a condition which if not dealt with from time to time, would eventually prevent proper functioning. The proverb "A stitch in time saves nine" imports that repair is necessary to cure an incipient defect before the stage when a tear or rent has been reached. In chalk countries pipes are cleared out before the incrustation has blocked their being used for the flow of water. Decarbonisation of motor cars is done before the engine has ceased to be able to work. All these preliminary or precautionary measures would ordinarily be described as repair just as naturally as they would be described as maintenance. Maintenance indeed is a form of repair. It is aimed at remedying deleterious conditions which exist though they have not reached the stage of actual perceptible mischief. Metal surfaces in a machine which have to work on each other freely and without friction do suffer from an actual present defect until friction is removed by cleaning away dust or incrustation and achieving the free play by the addition of lubricants. That, I think, is fairly called repair. It has negative and positive aspects, cleaning the surfaces for which operation the brush is used, and lubricating for which the oil is necessary. When we send a watch to the watchmaker to clean, we normally speak of what is done as repair. Instances of the same kind might be multiplied indefinitely. I cannot see any difference in this context between repair and maintenance. Prevention, we are told, is better than cure but either process is repair. Such, I think, is the natural and ordinary use of words: the plain man would not, I am convinced, regard the distinction between maintenance and repair as other than unpractical and arbitrary.

This is particularly true when applied to a measure like this. Its object is to protect and save human life. Least of all in such a measure can technical subtleties prevail, where the issue is between men's life and death. If it is necessary to take the specified precautions, when the work on which the man is engaged on the permanent way is renewing or replacing bolts or the like, surely it is equally necessary to impose the same safeguards when the man is cleaning and oiling. In each case, there is danger and the danger is the same. I do not mean that the Act or rule must be construed in an unnatural or forced manner. As I have said, I regard the construction adopted by the Court of

Appeal as being in accordance with good sense, and everyday use of language.

It is, however, said that as the Act imposes a penalty for a breach, it must be construed as strictly as possible in favour of the offender. There is some authority in support of this argument but none so far as I know in the case of measures like the present. Such a measure must be construed fairly, no doubt, but still as far as is reasonable and proper so as to achieve the declared object of the measure. Most measures of a remedial character, such as Factory Acts and a great many others, have penalty clauses, but I have never known that circumstance being regarded as a ground for a narrow and pedantic construction. What is paramount is the protection or benefit of the worker, whose right to claim damages is governed by a fair and liberal interpretation of the enactment. Still less would it be a valid argument, in my opinion, against the construction which I adopt that it would impose some additional burden on the railway company. That drawback must yield to the purpose of saving life, which must outweigh some small extra expense or trouble to the company. On the whole the authorities favour the construction I adopt of the word " repairs."

The cases cited under the Workmen's Compensation Act generally deal with static constructions, building and the like, not a machine on which metal surfaces work on each other, in which the risk of friction, even short of seizing, is always serious. Decisions under a different statute are not generally precedents for the construction of another statute. I merely refer to one or two in order to show that the word " repair " is not generally interpreted in the narrow sense contended for by the appellants. In *Dredge* v. *Conway* (4) the Court of Appeal held that the " repair " of a building in the Workmen's Compensation Act included painting, whitewashing, cleaning, etc. The work was not merely ornamental but was necessary for the protection and maintenance of the building. The court applied observations of Lord Macnaghten, in *Hoddinott* v. *Newton, Chambers & Co.* (5) ((1901) A.C. 49, at p. 55) :

> Construction, repair, demolition—these three operations cover, I think, every varying phase in the life of a building from its beginning to its end.

He had said (*ibid.*, at p. 54) :

> . . . repair, as . . . commonly understood, is repair whether much is done or little.

I shall only quote one other illustration, which I find in *Greg* v. *Planque* (1). That was a case between landlord and tenant and among other matters raised the question whether cleaning a flue was executing repairs within the meaning of the lease. It was held that it was. I merely refer to it because of some general observations in the judgment in which Scott, L.J., says ([1936] 1 K.B. 669, at p. 678) :

> The word " repair " is an ordinary English word and its natural meaning is wide . . . . If one's motor car is not running well and is sent to the works for overhaul, one would normally regard it as " repair " work, even if told that all that had to be done was to decarbonise the cylinders. People use ordinary words in rather a wide sense.

I shall not multiply citations for what seems to me to be obvious.

For myself, I would dismiss the appeal.

Lord Porter : My Lords, the respondent's husband, F. J. Berriman, was a signal fitter's labourer employed by the appellants and it is plain that at the time of his death he was engaged in an occupation which exposed him to danger. The appellant's staff was divided, it appears, at least for administrative purposes into groups performing divergent functions and two of those groups consist of the signal fitters so called on the one part and of the permanent way men so called on the other. The duty of the former being to deal with not only the signals themselves and their equipment but also the points and the rods which work them ; rods which normally travel along the lines of rails possibly for some distance either outside or inside the track and are bolted to the rails for the purpose of moving the points to and fro. The duty of the latter is concerned solely with the track itself and the rails, the work of one group apparently ending, and the other beginning, at the spot where the rods are bolted on to the point rails, with the result that the rods, though supported by fastenings let into the track or held by the sleepers, are counted as within the cognizance of the signal group even though they cross the track and are supported on rollers bedded upon the sleepers, whereas the slide chairs over which the points themselves move are within the competence of the so-called permanent way men and it is their task to oil them.

In this organisation the deceased man worked in a group of four persons whose duty it was to repair, keep in order and oil the signals and their equipment. One may perhaps describe the two sides, as little tendentiously as possible, by calling those who deal with the track and rails the plate-laying side and those who like the deceased man dealt with points and signals the A signal side. Their separate functions are described first of all by one Benjamin Marshall, who was on the plate-laying side, and secondly, by one Green, a fellow worker with Berriman on the signal side. These witnesses undoubtedly do separate the function of the two groups to the extent that oiling the slide of the point rod is signal work, whereas oiling the slide of the point itself is undertaken by the plate-laying side.

With these considerations in mind, it is necessary to set out the relevant B provisions of the statute and rules dealing with the case and the contentions of the two parties. As has been stated the deceased man was killed when engaged on his duties as a signal fitter and whilst, as I think, oiling the point rods either in or alongside the track, and his widow sues the appellants on the ground that they did not provide persons for the purposes of maintaining a good look-out or for giving warning against any train or engine approaching C such a man so working. This contention depends upon the wording of the Railway Employment (Prevention of Accidents) Act, 1900, and the rules made thereunder. The Act itself is entitled "an Act for the better Prevention of Accidents on Railways," and sect. 1 (1) provides :

> The Board of Trade may, subject to the provisions of this Act, make such rules as they think fit with respect to any of the subjects mentioned in the schedule to this Act, with the object of reducing or removing the dangers and risks incidental to railway D service.

The schedule refers to a number of topics mostly concerned with the safety of mechanical apparatus used in railway working. Amongst other matters it mentions:

> 6. Protection of point rods and signal wires, and position of ground levers working points.

E The only reference to the safety of men as such, as opposed to the safety of the appliances they use, is contained in No. 12, which mentions :

> Protection to permanent way men when relaying or repairing permanent way.

Under the powers conferred by the Act, rules were made in 1902 and reliance is placed upon r. 9 which so far as is material is in the following terms :

> With the object of protecting men working singly or in gangs on or near lines of F railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working . . .

This rule is obviously meant to deal with topic 12 of the schedule to the Act, whereas the safety of the apparatus with which the deceased man was concerned G is provided for by r. 5, which runs as follows :

> Where point rods and signal wires are in such position as to be a source of danger to persons employed on a railway whilst in the execution of their duty, such point rods and signal wires must, within two years from the coming into operation of these rules, be sufficiently covered or otherwise guarded.
>
> Within the same period ground levers working points must be so placed that men when working them are clear of adjacent lines, and shall be placed in a position parallel H to the adjacent lines, or in such other position and be of such form, as to cause as little obstruction as possible to persons employed on the railway whilst in the execution of their duty.

The respondent says that her husband was a permanent way man, that he was repairing the permanent way when he was killed and that contrary to r. 9 the railway company did not provide any person for the purpose of maintaining a good look-out. It is admitted that no look-out was provided and no question arises as to the likelihood of danger arising but the appellants maintain (i) that the deceased man was not a permanent way man ; (ii) that he was not at the time of the accident relaying or repairing anything; and (iii) that in any case he was not at that time repairing the permanent way. The respondent asserted that the proper sequence of approach to the contentions was to ask first whether Berriman was engaged in working on the permanent way, secondly whether, in the light of the answer to that question, he was a permanent way man, and thirdly, whether he was repairing the permanent way. As for reasons which I give later, I think that the dead man was not repairing the permanent way or indeed engaged on work of repair at the time of his death, the other two questions are not strictly material to this decision, but they have been fully argued and I think it desirable to express a tentative though not necessarily a final view upon them.

Prima facie, of course, words, whether in an Act of Parliament or elsewhere, must be construed as bearing their natural meaning, and in the present case if unassisted by any evidence, I should take the "permanent way" to include the track, *i.e.*, the rail and sleepers and that which supports them together with its immediate equipment such as at least signal wires and point rods and their supports; and "permanent way men" I should take to be those whose duty it was to attend to the track so defined and the equipment referred to. The technical division adopted by the railway for the purpose of its organisation I should regard as having no material bearing on this result.

It is, however, true that any occupation may employ terms in a technical sense and if it be shown that they normally have a technical sense in any industry, then that is the sense and the only sense which they must be considered to bear when used in reference to that industry. It is said that the evidence of the railway witnesses has established such a special meaning for the words "permanent way" and "permanent way men" in the present instance and if I thought that the effect of the evidence was to establish such a meaning in general railway parlance, I should give effect to it. But I do not think that a technical meaning has been proved. The evidence seems to me to establish no more than that railway managers have for their own purposes of management divided their staff into various categories, one of which they dub permanent way men. They do not establish that the phrase is used in this sense throughout the railway world; still less that that is its only general use. Similarly I cannot find that the meaning of "permanent way" is limited to that portion of the line of which they employ these words. The fact that the use of a phrase in a limited sense is convenient to the management does not prove that it bears that meaning throughout the industry and, short of an allegation that the railway world throughout its various branches of management and men use the relevant words as excluding men whose duty it is to see to the signals points and their equipment, I prefer to attribute to them the wider meaning which in my view they more naturally bear. "Permanent way" in my opinion includes not only the track itself but also all the equipment of guiding a train on its proper course and on to its proper track as well as the metals on which it runs and the ground or structure supporting them, and I feel great difficulty in saying that the point lines are part of the permanent way whereas the point rods which move them and are permanently fastened to them for that purpose are not.

The principle and its limitation are I think well expressed by Lord Esher, M.R., in *Unwin* v. *Hanson* (6) ([1891] 2 Q.B. 115, at p. 119):

> If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words . . . Now dealing with the cutting of trees in the country, is there not a language which all people in the country conversant with trees know and understand? It is not a question of mere forestry, but of what persons generally living in the country know and understand by the use of a particular term with respect to the cutting of trees there.

The class whose understanding is to be taken into consideration includes all those conversant with the industry concerned. It is not enough for the evidence to establish that a portion only, *viz.*, the management, limit the expression to a particular class. But though the deceased man may have been included amongst permanent way men, the question remains to be answered, was he laying or repairing the permanent way. It appears to be established that he and his mate were engaged in oiling or cleaning and oiling either the signal lines or the point rods. They had not taken their tools with them, and were equipped only with an oil can, a brush and a feeder. Moreover there was no record on the slate of any other work which they were required to do. In these circumstances the evidence establishes that they were engaged on routine oiling, which might include brushing the dust from the signal wires or point rods, but no more. It was no doubt established that in working they were exposed to danger, that their task took them alongside or inside the track, and it was urged that they required protection just as much as a platelayer working on the track itself. Moreover it was pointed out that according to the appellant's evidence the men who oiled the point slides were classed as permanent way men, and as such, it was said, within the mischief of the Act and rules.

My Lords, just as I think the expression permanent way men is to be used in its normal and natural meaning, so to my mind repairing the permanent way must be similarly construed. I cannot think that the ordinary man, if asked whether the deceased man was engaged in repairing the permanent way when he was brushing down and oiling the signal wires and point rods, would say that he was. The exact meaning of repair is perhaps not easy to define, but it contains, I think, some suggestion of putting right that which has gone wrong. It does not include the mere keeping in order by oiling, brushing or cleaning something, which is otherwise in perfect repair and only requires attention to prevent the possibility of its going wrong in the future.

Moreover, the combining of "repairing" with "relaying," if it has any effect at all, seems to me to narrow, not to widen, the meaning of the former word. The one word suggests renewal, the other the putting of something into proper order, not the prevention of some future fault. The combined words suggest the putting of the track into proper order, either by renewing or mending. In this last expression of opinion I do not find myself able to accept the view of the members of the Court of Appeal, who, as I understand, regard the words as pointing to a wide contrast between two activities. To me, on the contrary, they seem to point to the one general activity of putting in order, an activity which may, however, be carried out in one of two ways, either by renewing or mending. The case most strongly relied upon by the respondent was *Greg* v. *Planque* (1), where the Court of Appeal appears to have held that cleaning a chimney came within the designation of "repair." The allegation seems to have been that the defendant conducted operations upon the chimney, and he appears to have carried out work of repair elsewhere on the premises at the same time. With some hesitation Greer, L.J., treated the word "repair" as covering the maintenance of the flue in the condition in which it ought to be to carry out the purposes for which it was placed where it was. The exact work done is nowhere specified, but it seems to have exceeded mere routine sweeping; but, whatever it was, I do not find much assistance from the construction of other words in another collocation and dealing with another state of affairs.

It is, however, suggested that it would be unfortunate if men engaged in oiling the point slides, being admittedly permanent way men, should be protected, whereas men employed in oiling the point rods alongside them would not be, or that men working hand signals or point rods should be classed as permanent way men whereas men dealing with mechanical signals or point rods should not be. In either case, however, in my view the question is not are the one or the other permanent way men, but are they repairing the permanent way, and in either case I think they are not.

If reason for the limitation of protection to men relaying or repairing the permanent way be required, it is, I think, to be found in the consideration that such men will for extended periods be concentrated on their work and unable to watch for oncoming trains whilst so engaged, whereas men cleaning, oiling or changing points by hand are only momentarily engaged and can insure their own safety by looking to see the state of the line or lines before they undertake their job.

I have only to add that, as in my view no repair within the meaning of the rule was being done, it becomes unnecessary to discuss the principle and limitation of the rule that, where a statute imposes a penalty (as this one does) and the obligation in respect of which the penalty is imposed is expressed in ambiguous terms, the more lenient construction of the section should be adopted so that the penalty may not be incurred in a doubtful case.

For the reasons, however, stated above I would allow the appeal.

Lord Simonds: My Lords, in this case, the facts of which I need not recite, three questions appear to arise for your Lordships' consideration. I find it convenient to state them in the following order. First, were the deceased Berriman and his companion Rowe at the time of the fatal accident working upon something that was part of the "permanent way"? Second, was Berriman a "permanent way man"? Third, was he relaying or repairing the permanent way? Unless all these questions are answered in the affirmative, this appeal must succeed. I would answer each one of them in the negative.

The action brought by Berriman's widow being founded on an alleged breach by the appellants of a statutory duty, I turn first to the Act under the authority of which was made the rule alleged to have been broken. By the Railway Employment (Prevention of Accidents) Act, 1900, s. 1 (1), the Board of Trade was authorised, subject to the provisions of the Act, to make such rules as they might think fit with respect to any of the subjects mentioned in the schedule to the Act with the object of reducing or removing the dangers and risks incidental to railway service. Amongst the subjects mentioned in the schedule, and the only one relevant to the present purpose, is No. 12:

> Protection to permanent way men when relaying or repairing permanent way.

It was under the authority conferred by this section and schedule that the rule your Lordships have to consider was made and by reference to them that you must construe it. The Prevention of Accidents Rules, 1902, r. 9, prescribes that:

> With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall . . .

Then there follow certain directions which admittedly the appellant company did not in the present case observe. It will be noticed that the rule departs from the language of the Act. For "permanent way men" the expression is substituted "men working singly or in gangs on or near lines of railway . . ." But the rule must be construed by reference to the Act: the scope of the Act cannot be enlarged by a rule made under it. The question, therefore, is that which I have posed, "What is meant by 'permanent way men' in the Act?" When that meaning has been ascertained, the rule must be read and, if necessary, limited accordingly. But before I consider this question which I have placed second in order, I must return to the first question which involves the consideration of the expression "permanent way." Here the same expression is used both in the Act and the rule.

My Lords, I see no reason why I should not apply in the construction of this statute what I have always understood to be a cardinal rule in the construction of statutes, which is nowhere better stated than in *Unwin* v. *Hanson* (6). There the question was what was the meaning of the common English word "lop" in a highway statute and Lord Esher, M.R., thus stated the principle ([1891] 2 Q.B. 115, at p. 119):

> If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.

Here the statute under consideration relates to a particular industry and to a particular section in that industry. I am, therefore, bound to inquire whether the expression "permanent way" and equally the expression "permanent way men" have a particular meaning in that industry. The case is stronger than in *Unwin* v. *Hanson* (6). Everyone knowns what the word "lop" means. Yet the inquiry was whether it had a special meaning. Here everyone may know what "permanent" means and what "way" means, but I venture to think that any one's knowledge of what "permanent way" means is in proportion to his familiarity with the railway industry. It is not here as in the cited case a question of rejecting a general in favour of a special meaning. It is only by reference to the industry that the meaning can be ascertained and, though specialised experience or general observation may lead any of your Lordships to an opinion of great weight upon such a matter, yet it remains a question of evidence what the words mean in the industry. They are a term of art and it is by those skilled in the art that I must be instructed.

What I have said applies equally to "permanent way" and "permanent way men." I turn to the evidence for guidance. It is not entirely satisfactory, but it is all one way. Thompson who was described as the "engineer at York, of the L.N.E.R. Co." and "in charge of the civil engineering work of the railway company in the north-eastern area" was called by the appellants. He was asked, "Does the expression 'permanent way' have some definite meaning to railway men?" To this question counsel for the respondent objected but the judge (Stable, J.) allowed it, and, as I think, rightly allowed it. This may indeed be regarded as crucial. For, if such a question is not admissible, there is an end of the case and I at least am in darkness. But the question was allowed and was thus answered:

> Beginning from the foundation so to speak, it consists of ballast, sleepers, the chairs which carry the rails, the rails themselves, and the fastenings which fasten the rails to the sleepers and the rails to the chairs and also the switches and crossings which form the junctions—which are special forms of rails and chairs—and they include those slide chairs that have been mentioned in this case, the slide chair on which the point rail slides.

This was the positive answer. In cross-examination he was asked a number of questions in relation to the connecting rods and other apparatus by which the point system was worked from the signal box with a view to obtaining an admission that these also were part of the permanent way. He unequivocally denied that they were, and to the question, "Is not your distinction between where the permanent way begins and where it ends very artificial?" replied, "No, it is a very clear cut distinction, so clear that some railways make two departments divide at that point."

Similar evidence was given by one Wallace, chief civil engineer of the L.M.S. Ry. Co. I need not refer to it in detail but would recall two questions and answers in cross-examination:

> *Q.*—If it [the final track] includes points and points are included in permanent way, is not the mechanism which moves the points included in permanent way? *A.*—No. *Q.*—If points are included in permanent way, why do you say that the mechanism which gives life or usefulness to them are not included in the permanent way? *A.*—Because they are part of the signalling. The actuation of the points is part of the signalling.

My Lords, here is uncontradicted evidence by two gentlemen highly competent to give such evidence upon the meaning in the railway world of the expression "permanent way." I can see no possible reason for rejecting it. If I have said that it is not entirely satisfactory, that is because it relates to the year 1944 and the relevant words occur in an Act of 1900. I should, therefore, have liked to have had evidence relating to that time. But in the absence of any suggestion to the contrary I think I am entitled to assume that there has been no change in user.

Some doubt has been cast upon the value of this evidence for this reason. It appears that, where points are moved by a hand lever and there is no connection with the signalling apparatus, the "permanent way man" looks after such levers and they are treated as part of the permanent way. It is suggested that, therefore, any other apparatus, the function of which is to work the points, whether or not it is connected with the signalling-box, should be regarded as part of the permanent way. There is no force in this suggestion. There are bound to be borderline cases. Hand levers for moving points are found "only in yards, in sidings and engine sheds or goods yards or something of that. You are not allowed to have hand-points on passenger roads." The differentiation may not be entirely satisfactory from the point of view of scientific terminology, but it does not at all impair the value of the evidence that the apparatus which is connected with the signal-box is not part of the "permanent way."

The evidence is even more cogent that "permanent way man" is an expression which describes a particular class of worker. I should have been surprised if there was not such evidence. It is not an expression that I should have expected to find in an Act of Parliament, if all that was meant was a man who was "working in certain tasks on the permanent way" or "whose duty is or includes working on the permanent way," these being the meanings ascribed by MacKinnon, L.J., and Morton, L.J. But whether my expectation is just or not, the evidence given by the same witnesses is conclusive that in the railway industry there is a definite category of workers known as "permanent way men," to which the deceased Berriman did not belong.

The final question is whether, when the fatal accident occurred, Berriman was engaged in relaying or repairing the permanent way. I assume for this purpose that the connecting rods and other apparatus are part of the permanent way and that he was a "permanent way man." My Lords, it is enacted by sect. 11 (1) of the Act under consideration that, if any railway company acts in contravention of or fails to comply with any rule made under the Act, it shall be liable for each offence on conviction under the Summary Jurisdiction Acts to a fine not exceeding £50. I think that the same rule of construction must apply whether the duty and the penalty are imposed by the same section of an Act, or by different sections of an Act, or the one by a rule made under the Act and the other by the Act itself. That rule of construction is very well settled; though not always easy of application. I will state it by three familiar citations. In *Tuck & Sons* v. *Priester* (7) Lord Esher, M.R., said (19 Q.B.D. 629, at p. 638):

> We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.

Lindley, L.J., in the same case said (*ibid.*, at p. 645):

> . . . the well settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it. . . .

Finally I will cite the words of James, L.J., delivering the judgment of the Privy Council in *Dyke* v. *Elliott* (8) (L.R. 4 P.C. 184, at p. 191):

> . . . Where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

It was suggested, my Lords, that some distinction is to be made in the application of this rule according to the avowed purpose of the Act. It would, I think, be unfortunate if any decision of this House gave any colour to such a suggestion. Wherever the Legislature prescribes a duty and a penalty for the breach of it, it must be assumed that the duty is prescribed in the interests of the community or some part of it and the penalty is prescribed as a sanction for its performance. Whether the purpose is, as it was in *Tuck's* case (7), the protection of copyright, or, as in the case before your Lordships, the protection of the life and limb of certain workers, the same principle prevails. A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court.

My Lords, in the present case it is upon the word "repairing" that the respondent relies. It is not suggested that the deceased was engaged in relaying the permanent way. He was in fact engaged with his companion, who shared his fate, in oiling the connecting rods and other apparatus by which the points were worked from the signal box. He may also have been engaged in cleaning the same apparatus, though this is not very clear from the evidence. It is probably irrelevant, for I do not understand that any argument was founded on cleaning as distinct from oiling. The work upon which he was engaged was a matter of routine and did not arise out of any defect which he was instructed to put right. The question then is whether he was repairing the permanent way. Stable, J., held that he was not; the Court of Appeal held otherwise, and I must examine the reasons that they gave. MacKinnon, L.J., thought that it was a nice point but that on the whole he was repairing it within the meaning of the rule; he accepted the suggestion that "repairing" really means maintenance. LAWRENCE, L.J., thought that in the context "repairing" referred to the work of maintenance, which included all the routine repairs which have to be done to put the line in proper working order. MORTON, L.J., agreed that in its context "repairing" means or includes "maintaining in good working order."

My Lords, I cannot accept this view. I agree that every word must be construed in its context and I will in due course examine that context. But here is a common English word and it is legitimate and valuable to see what is its ordinary meaning. I do not doubt that apart from obsolete usage its meaning in the transitive sense is that which I find in the first dictionary that comes to my hand, "to restore to good condition by renewal or replacement of decayed or damaged parts or by refixing what has given way; to mend." It does not appear to me possible to bring within this definition the operation of oiling or cleaning or oiling and cleaning any article. A man oils his bicycle or his car. Does he repair it? He surely does not. I should be prepared to agree that, if some apparent functional disorder of a machine was cured by the simple process of oiling, it might be said that the workman had repaired it by oiling it, though I think it would be a misuse of language. But here we have nothing but a routine precautionary measure, which I find it impossible to describe as repair. Had one of these workmen after oiling the apparatus been asked whether he had been repairing it, he would surely have answered, "No." And that is the answer which I must give unless the context compels me to something else than the ordinary meaning.

What then is the context upon which the respondent relies? I can find none which in any way justifies a departure from the ordinary meaning of the word. Its immediate neighbour is "relaying." That juxtaposition affords no reason why the meaning of "repairing" should be enlarged. Then it is suggested that some context is found in the general scope and purpose of the Act. This is an argument which should carry no weight. Why should your Lordships conclude that the Legislature using the word "repair" meant something else than ordinary men mean by repair? There is nothing irrational in thinking that some special protection is needed for workers who are engaged in relaying or repairing the permanent way but it is not needed if they are engaged only in oiling and cleaning. I must decline, upon some speculation as to what the Legislature might have intended, to ascribe to the language of the Act a meaning that it does not naturally bear. Finally, remembering that rule of construction to which I have referred, I would in any case confine the word within its natural meaning. If it is reasonably capable of a wider meaning (which my deference to those who think so compels me to admit), at least it cannot be denied that the meaning that I have ascribed to it might reasonably and properly be entertained by the appellants. If so, an interpretation should not be adopted which involves them not only in civil liability but in penal consequences.

I do not think it necessary to examine at length the authorities to which your Lordships were referred. The only case which appears to have any bearing and that remote, upon the present case is *Dredge* v. *Conway, Jones & Co.* (4), upon which both LAWRENCE, L.J., and MORTON, L.J., to some extent relied. It had been decided by the Court of Appeal in *Wood* v. *Walsh* (9) that painting the outside of a house was not repair within the Workmen's Compensation Act, 1897, s. 7 (1). In *Dredge's* case (4) the same court treated this case as having been dissented from by this House in *Hoddinott* v. *Newton, Chambers & Co.* (5), and held ([1901] 2 K.B. 42, at p. 46). that since "painting as one of the operations to which a building is exposed comes under the head of repair" so also did whitewashing. Your Lordships are not, I think, concerned to question the correctness of this decision. But it does not appear to me to be a legitimate application of it to say that every operation, to which everything that forms part of the permanent way is subject, also falls under the head of repair.

I concur in the motion that this appeal should be allowed.

Appeal allowed.

Solicitors: *Miles Beevor* (for the appellants); *Pattinson & Brewer* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

THE MINISTRY OF PENSIONS *v.* FFRENCH.

[King's Bench Division (Denning, J.), January 29, 1946.]

Emergency Legislation—Compensation—Personal injuries—Factory worker injured on way to shelter during alarm—War injury—Reduction of lights—Enforcement of blackout—" Injurious act "—" Use of weapon "—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *s.* 8 (1).

The respondent was employed as a sweeper in the machine bay of a factory which had 6½ miles of glass roofing. In the event of the approach of enemy aircraft there was a system of warning upon which the arc lights in the factory were switched off and the personnel went immediately to shelter. After a regular warning had been given the respondent, while on her way to shelter, fell over a bag of steel material and sustained a fractured elbow. In an appeal by the Minister of Pensions against a decision of a Pensions Appeal Tribunal in the respondent's favour, it was contended on her behalf (i) that the reduction of the lighting and the regulations that the personnel should go to shelter on a warning were injurious acts within the definition of war injuries in sect. 8 (1) of the Personal Injuries (Emergency Provisions) Act, 1939 ; (ii) that the enforcement of the blackout was the use of a weapon for the repulse of enemy action within the same definition ; and (iii) that the claim had originally been wrongfully rejected because there was no incident involving bombs or gunfire :—

Held : (i) the general system of blackout, the reduction in lighting and the regulations that the personnel should go to shelter on a warning, were none of them intended to cause injury nor was the natural and probable consequence of them to cause injury, and that, therefore, the injury was not caused by an " injurious act " within the definition.

(ii) the word " weapon " was used in the section in its ordinary and not in an extended sense and the enforcement of the blackout was not the use of a weapon for the repulse of enemy action within the definition.

(iii) if there had been bombs or gunfire the only question might be one of causation, and the injury would not necessarily have been a war injury.

[**EDITORIAL NOTE.** This case establishes that " injurious act " in the definition of war injury in the Personal Injuries (Emergency Provisions) Act, 1939, means an act which is in its nature injurious, and not merely one which causes injury. Blackout ordered in view of an imminent raid is not such an injurious act, nor is it a " weapon " used in repelling the enemy.

For the Personal Injuries (Emergency Provisions) Act, 1939, s. 8 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1065.]

Appeal by way of case stated from a decision of a Pensions Appeal Tribunal. The facts are fully set out in the judgment.

Rt. Hon. Sir Donald Somervell, K.C., and *Hon. H. L. Parker* for the appellant.
John Thompson for the respondent.

Denning, J. : This appeal raises the question whether the injury suffered by the respondent was a war injury within the Personal Injuries (Emergency Provisions) Act, 1939.

The facts in the case stated have, by agreement, been supplemented before me by the statement of the case. They show that the respondent was employed as a sweeper in the machine bay of a factory at Ruislip, in Middlesex. It was a factory where there was 6½ miles of glass roofing, and in the case of enemy aircraft approaching there was a system of warning upon which the arc lights in that factory would be switched off and the personnel would go to shelter at once. At the time of the accident the respondent, after the regular warning for taking shelter had been given, was proceeding to the works' shelter. On her way she fell over a bag of steel material and sustained a fractured elbow. There was a lot of machinery in the place and it was particularly difficult for her to see her way in the lighting which was then existing, when the arc lights had been shut off.

The question is whether her injury was a war injury. The definition in the Personal Injuries (Emergency Provisions) Act, 1939, s. 8 (1), is :

" War Injuries " means physical injuries—(*a*) caused by (i) the discharge of any missile (including liquids and gas) ; or (ii) the use of any weapon, explosive, or other noxious thing ; or (iii) the doing of any other injurious act ; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy. The main argument in this case for the respondent was that the injury was caused by the doing of an injurious act within the section. The acts which are particularly suggested to be "injurious acts" are two, the reduction of the lighting in the glass-roofed part of the factory, and also the regulation that under those conditions the personnel shall go to the shelter on a warning being given.

I am quite satisfied that the words "injurious act" in this section do not
A mean simply an act which causes injury. Some meaning must be given in addition to that, because the word "injurious" would otherwise be completely otiose. In my view an "injurious act" is an act which is in its nature injurious, that is, an act which is either intended to cause injury, or an act the natural and probable consequence of which is to cause injury.

In this case I am quite satisfied that there was no injurious act which caused the injury. The general system of blackout, the reduction of lighting, and the
B regulations that the personnel should go to shelter on a warning, are none of them intended to cause injury, nor is the natural and probable consequence of them to cause injury. That being so, I am satisfied that this injury was not caused by an "injurious act" within the definition.

It has been suggested in the case stated that the enforcement of the blackout is the use of a "weapon" for the repulse of enemy action. I do not think that it
C is. The word "weapon" is used in the section in its ordinary sense, not in an extended sense. Then it was said that the Minister of Pensions rejected the claim because there was no incident involving bombs or gunfire, but I do not read that as meaning that if there had been bombs or gunfire it would necessarily have been a war injury. If there had been bombs or gunfire taking place, there would be the discharge of missiles and the use of weapons, and then in such a case, the only question might be one of causation. That is absent here.
D This case must depend on whether this injury was caused by any "injurious act," and I find that it was not.

It is not necessary for me to consider the question whether these things were done "in repelling an imagined attack by the enemy." It is sufficient for me to say that on the facts found by the Tribunal this is not a war injury, and the appeal will be allowed.

Appeal allowed.

E Solicitors: *Treasury Solicitor* (for the appellant); *L. Bingham & Co.* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

THE MINISTRY OF PENSIONS *v.* NUGENT.

F [KING'S BENCH DIVISION (Denning, J.), January 14, 1946.]

Emergency Legislation—Pensions—War risk injury—Coastguard employed at look-out hut on sea point—Whether propinquity to sea, tidal water or harbour sufficient for pension entitlement—Pensions (Mercantile Marine) Act, 1942 *(c.* 26*), s.* 1 (2)*—War Pensions (Coastguards) Scheme,* 1944 *(S.R. & O.,* 1944, *No.* 500).

The respondent was enrolled as an auxiliary coastguard, on Feb. 9, 1939,
G and served continuously in that capacity until July 11, 1943, when he collapsed on duty at the look-out hut on Slepper Point, Padstow, after which he never returned to duty. The Pensions Appeal Tribunal found that in the performance of his duties the respondent suffered physical injury by exposure resulting in disablement directly attributable thereto, and held that there was sufficient physical or geographical propinquity to the sea or tidal water or harbour to entitle him to a pension under the War Pensions (Coast-
H guards) Scheme, 1944, read with the Pensions (Mercantile Marine) Act, 1942, s. 1 (2):—

HELD: the Pensions (Mercantile Marine) Act, 1942, s. 1 (2), applied only to physical injuries sustained "at sea or in any other tidal water or in the waters of any harbour" and propinquity to the sea or tidal water or harbour was not sufficient to bring the case within the definition in that subsection.

Qu.: whether the War Pensions (Coastguards) Scheme, 1944, was *intra vires* the Minister of Pensions.

[**EDITORIAL NOTE.** War risk injury in the War Pensions (Coastguards) Scheme is defined by reference to the Pensions (Mercantile Marine) Act, 1942, as a physical injury sustained at sea or in any other tidal water or in the waters of any harbour. This must be properly construed and cannot apply to a coastguard injured on land simply by reason of propinquity to the sea. Indeed, it is doubtful if the Scheme is *intra vires* since the definition is intended to apply to seafaring persons. This may well exclude persons such as coastguards, who are merely borne on the books of one of His Majesty's ships, which may not be a real ship at all.

It may be noted that DENNING, J., expresses the view that appeals to the court from the Pensions Appeal Tribunal are on a similar footing to appeals on points of law from the county court to the Court of Appeal, in that the point must have been decided by the Tribunal and for that purpose must have been present to their minds.

FOR THE PENSIONS (MERCANTILE MARINE) ACT, 1942, s. 1 (2), see HALSBURY'S STATUTES, Vol. 35, p. 318.]

APPEAL by way of case stated from a decision of a Pensions Appeal Tribunal, raising the question whether an auxiliary coastguard had sustained injuries entitling him to a pension. The facts are fully set out in the judgment.

Hon. H. L. Parker for the appellant.

Sir Noel B. Goldie, K.C., and *G. H. Crispin* for the respondent.

DENNING, J.: This is a case stated by a Pensions Appeal Tribunal on a point of law, raising the question of whether an auxiliary coastguard had sustained injuries for which he is entitled to a pension.

The facts as the Tribunal found them were:

> That Harry Nugent, of 16, High Street, Padstow, Cornwall, was enrolled, at 57 years, as an auxiliary coastguard on Feb. 9, 1939, and served continuously in that capacity until July 11, 1943, when he collapsed on duty at Slepper Point Look-Out Hut, Padstow. This hut was situated 3 miles from his home; he had walked there arriving at 10 minutes to 12 o'clock at night, and fainted 45 minutes after reaching the hut. He made a partial recovery and, on coming to, completed his watch, but the following afternoon at home he again collapsed and never returned to duty. He had regularly, in the course of his duties, to walk to and from this hut, in all weathers, day and night. He was armed with rifle, and 50 rounds of ammunition, was under orders to hold the hut and to be on the look-out in case of hostile action and keep in telephonic communication with the Royal Naval Officer, Padstow.

and the Tribunal found:

> That his duties as auxiliary coastguard were physically strenuous and exacting to him at his age; that the conditions under which he performed them were abnormal as contrasted with peace-time conditions; that they were of a precautionary nature in anticipation of enemy action against ships or otherwise, and that in the performance of his duties he suffered physical injury by exposure resulting in disablement directly attributable thereto.

Now the point of law is really whether, on those facts, the coastguard brings himself within the provisions of the War Pensions (Coastguards) Scheme, 1944, the Tribunal saying that no question of law was specifically or in express terms raised by the Minister either in his written decision communicated to the appellant or at the hearing before the Tribunal. If the matter had rested there, in my view there would be no appeal at all, because I take the view that the point of law, in order that there should be an appeal on it, must have been decided by the Tribunal, and for that purpose it must have been at least present to their minds either by being specifically raised before them, or at least in their minds so that they could deal with it. In this respect I think the appeals from the Tribunal to me are on a similar footing to appeals on points of law from the county court to the Court of Appeal. In this case, however, the Tribunal in the case which they have stated make it plain that the point was present to their minds and that they decided it. They said that they felt that as he was an able seaman attached to His Majesty's ship "President," and as he was employed as coastguard in an area within the region of His Majesty's ship "President" at Slepper Point Look-Out, at Padstow, there was sufficient physical or geographical propinquity to the sea, or tidal water, or a harbour to bring his case within the scope of the Acts entitling him to a pension; and they say that the question for the High Court is whether or not the Tribunal came to a correct decision in point of law. I take it from the way in which they have stated the case, and from the fact that they have given leave to appeal, that they actually decided the point of law, namely, that "there was sufficient physical or geographical propinquity to the sea, or tidal water, or a harbour" to entitle the coastguard to a pension. It is against the decision on that point of law that the Minister appeals to me.

Assuming for the moment that it was *intra vires* the Minister to make this War Pensions (Coastguards) Scheme, it is plain that this coastguard only comes within it if he can show that he sustained a war risk injury. A war risk injury is defined by reference back to the definition in the Pensions (Mercantile Marine) Act, 1942, s. 1 (2), which applies only to physical injuries sustained at sea or in any other tidal water or in the waters of any harbour. What the Minister says is that, on the facts in this case, this injury was not sustained at sea or in any other tidal water or in the waters of any harbour, and that, therefore, the coastguard is not entitled. He says that propinquity to the sea or tidal water or harbour is not sufficient. The subsection which I have to construe is this, sect. 1 (2) of the 1942 Act, and that Act, it is to be noted, really had in mind men of the Merchant Navy, mariners and other sea-faring persons.

I am quite satisfied on reading the whole of the Act, and in particular sect. 1 (2), that what the legislature had in mind with regard to those mariners and other sea-faring persons was injuries which they sustained, to put it generally, afloat, *i.e.*, at sea or in any other tidal water or in the waters of any harbour. It seems to me that, construing that section in relation to mariners and other sea-faring persons, the right interpretation is that it does not apply to cases of injuries which are sustained in propinquity to the sea or a harbour. The words are too strong for me to overcome. They are "at sea or in any other tidal water or in the waters of any harbour." It is not permissible for me to put any different interpretation on them in regard to coastguards out of my sympathy for them. It seems to me that the work of coastguards very often does not take them to sea at all or take them afloat, as in the case of this man. His work might be near the sea at a look-out hut and might not take him to sea at all, but, as I have said, it is not permissible for me to expand the definition in the 1942 Act because of my sympathy with the coastguard.

In truth, I am not by any means satisfied that this War Pensions (Coastguards) Scheme was within the powers of the Minister, and I think that may be the underlying trouble in the case, because the only power of the Minister was to make a scheme for applying the provisions of the Naval War Pensions Order to "persons employed or engaged in ships forming part of His Majesty's Navy." Of course, when you have persons employed or engaged in ships, the definition becomes perfectly intelligible—the definition in the 1942 Act to which I referred which applies to mariners and to other sea-faring persons; but when you get it applied to coastguards, for whom the Minister purports to make this Scheme, simply because they are borne on the books of one of His Majesty's ships in commission, it is a very different matter. I have not heard a full argument upon it, but it seems to me to be a very different matter to say that a person who is simply borne on the books of one of His Majesty's ships, which may not be a real ship at all, but only a name, and borne on there administratively, is a person employed or engaged in ships forming part of His Majesty's Navy. There seems to me to be considerable doubt whether the War Pensions (Coastguards) Scheme was within the powers of the Minister at all; and that may be the root trouble in this case. This man was clearly performing duties which are analogous, to say the least, to those performed by the Home Guard, or Civil Defence workers; and even if they were only on land, in proximity to the sea, it would seem that he ought to fall within a pension scheme. I cannot speak as to any other orders or warrants, but, on the argument before me, I am bound to hold, on the point of law, that propinquity to the sea, or tidal water, or a harbour, is not sufficient to bring the case within the definition in sect. 1 (2) of the 1942 Act.

The appeal, therefore, must be allowed; and I answer the question by saying that the Tribunal did not come to a correct decision in point of law, and the injury was not sustained at sea or in any other tidal water or in the waters of any harbour.

Appeal allowed.

Solicitors: *Treasury Solicitor* (for the appellant); *Culross & Co.* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law*].

COUNTY OF MONMOUTH *v.* COUNTY BOROUGH OF NEWPORT.

[KING'S BENCH DIVISION (Atkinson, J.), December 19, 1945.]

Local Government—Alteration of area—Extension of county borough to include part of county area—Loss to county ratepayers—Financial adjustments—Increased burden on county ratepayers—Arbitration—Amount of compensation—Method of assessing compensation—"Income"—Local Government Act, 1933 (*c.* 51), *ss.* 151, 152, *Sched.* V, *r.* 1—*Newport Extension Act,* 1934 (*c.* lvii), *s.* 58.

By the Newport Extension Act, 1934, a certain area, profitable from the rating authority's point of view, was transferred from the applicant county to the respondent county borough, giving rise to a claim for financial adjustment between the two authorities. In ascertaining the amount of compensation to which the applicant county was entitled, the Local Government Act, 1933, s. 152, Sched. V, r. 1, provides: "Regard shall be had to (*a*) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place . . . Provided that no alteration in income in consequence of an apportionment under the regulation . . . shall be taken into account." The total expenditure of the applicant county before the alteration of boundaries was £745,942, the burden of expenditure being £712,882 on the area retained, and £33,060 on the area transferred. The Exchequer Grant was £355,744, and the ratepayers in the area retained benefited to the extent of £339,977. The area which had been transferred benefited to the extent of £15,767. If £339,977 be deducted from £712,882, the pre-transfer burden falling on the applicant county would amount to £372,905. By the readjustment, consequent on the transfer, the income of the applicant county from the Exchequer Grant was reduced to £344,487. The expenses which had been incurred by the applicant county in respect of the transferred area amounted to £8,385, with the result that the new burden on the retained area was, therefore, £745,942 minus £344,487, leaving £393,070, an increase of £20,165. It was contended for the applicant county that the proper method for calculating the increased burden was to deduct from the expenditure for the whole county the expenses which had been incurred on the area now transferred, less the old income which the ratepayers had received, namely, £339,977. It was further contended that interest was payable to the applicant county on the sum claimed as compensation from the date when the area in the applicant county was transferred to the respondent county borough. It was contended for the respondent county borough that the income from the Exchequer Grant, even for that reduced area in the applicant county, must be deemed to be the full grant of £355,744 which could be deducted from the total expenditure incurred by the applicant county, leaving a figure of £381,813 which showed an increased burden of only £8,908:—

HELD: (i) on a proper construction of the Local Government Act, 1933, s. 152, Sched. V, r. 1, the word "income" referred to in the proviso there must be regarded as the income of the ratepayers in the applicant county whose burden had been increased by the transfer of the area to the respondent county borough.

(ii) there was no ground for awarding interest in respect of the period between the date when the area was transferred to the respondent county borough and the date when the compensation might be awarded to the applicant county.

[**EDITORIAL NOTE.** This case deals with the construction to be put upon the word "income" in Sched. V, r. 1, of the Local Government Act, 1933, in assessing the amount of compensation payable on alteration of boundaries. An examination of the various results arrived at by adopting different interpretations of the word leads to the conclusion that the word is to be construed as referring to the income of the ratepayers in the area whose burden is increased by the alteration.

AS TO ADJUSTMENT OF BURDENS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 248-252, paras. 450, 451; and FOR CASES, see DIGEST, Vol. 33, pp. 25-27, Nos. 113-131.]

Cases referred to :

(1) *Fludyer* v. *Cocker* (1805), 12 Ves. 25 ; 40 Digest 199, *1660*.

(2) *Swift & Co.* v. *Board of Trade*, [1925] A.C. 520 ; 25 Digest 138, *558* ; 94 L.J.K.B. 629 ; 133 L.T. 49.

*(3) *Fletcher* v. *Lancashire & Yorkshire Ry. Co.*, [1902] 1 Ch. 901 ; 40 Digest 197, *1650* ; 71 L.J.Ch. 590.

(4) *Birch* v. *Joy* (1852), 3 H.L. Cas. 565 ; 40 Digest 198, *1656*.

*(5) *Re Richard & Great Western Ry. Co.*, [1905] 1 K.B. 68 ; 11 Digest 156, *367* ; 74 L.J.K.B. 9 ; 91 L.T. 724.

Special Case stated by an arbitrator under the Local Government Act, 1932, s. 151. The facts are fully set out in the judgment.

Sydney G. Turner, K.C., *Erskine Simes, K.C.*, and *H. B. Williams* for the applicants.

A. S. Comyns Carr, K.C., *Maurice P. Fitzgerald, K.C.*, and *E. J. C. Neep* for the respondents.

Atkinson, J. : This is a consultative special case stated by an arbitrator who was appointed under the Local Government Act, 1932, s. 151. By an Act passed in 1934, the county borough of Newport had its boundaries extended incorporating part of what until then belonged to the county of Monmouth. By the Newport Extension Act, 1934, s. 58, a financial adjustment between the two authorities had to follow, carried out in accordance with the Local Government Act, 1933, ss. 151, 152.

To follow the nature of this adjustment it is necessary to go back to the Local Government Act, 1929. The Act discontinued certain Exchequer Grants which had been made to local authorities, derated agricultural land, and partially derated industrial hereditaments. To make good the losses involved, sect. 86 provided that there should be paid out of moneys provided by Parliament in respect of the year beginning on the appointed day, which was Apr. 1, 1930, and each subsequent year, an annual contribution towards local government expenses in counties and county boroughs to be called the " General Exchequer Contribution." This was, of course, to make good the losses brought about by the derating. The amount was to be periodically revised. The amount first fixed was to be for the period of 3 years beginning on the appointed day, and the next amount for a period of 4 years, so this came into the second period. Sect. 88 provided for an annual apportionment of the money voted by Parliament among counties and county boroughs. First there was apportioned an amount equal to a certain percentage of the losses involved by the derating provisions, and the balance was apportioned dependent upon the weighted population of the areas involved. The amount apportioned to a county was called " the county apportionment."

Sect. 89 deals with what is to be done with a county's apportionment. It provides that :

> Out of the county apportionment of every county other than the county of London there shall be set aside such amount as will be sufficient to pay to the councils of districts situate wholly or partly within the county the sums hereinafter directed to be so set aside, the residue of the county apportionment after such sums as aforesaid have been so set aside, shall be paid to the council of the county and shall be called the " General Exchequer Grant " of that council . . .

The General Exchequer Grant was to be paid to the council of the county to be used for general county purposes, meaning purposes for which the whole county is chargeable.

The question raised in this case concerns only the General Exchequer Grant which was to be used for general county purposes. A county does not levy rates itself, various urban districts and councils do the levying. In a rate note which is exhibited to and forms part of the case, we see exactly how it was done. It is a little important that it should be dealt with in some detail. Each rate note had on it, among other things, a description of the services administered by the county council under a heading " General County Purposes." Then there followed a list of those purposes, eight of them, with the rate in respect of each purpose to arrive at the sum of 8*s.* 5¼*d.*, in the £, which represented the particular part of the total burden of the county each ratepayer had to pay. Then it sets out the amount receivable by the county council from this Exchequer Grant in respect of which the ratepayer is entitled to a credit, namely, 3*s.* 7*d.* in the £. Finally it is stated that " the rate in the pound actually called for by the county council for general county purposes is the difference between the two amounts marked with a cross, namely, 4*s.* 10¼*d.*" So that the form of the rate note (and it is one which has been picked at random, I gather, but relating to the period in question) told the ratepayer of the county what his total responsibility was, and the extent to which that responsibility was relieved by his own particular share of the grant.

It is necessary to observe that while rateable value is wholly irrelevant to the apportionment among counties and county boroughs, once the county has got the Exchequer Grant allotted to it, it then has to be dealt with in accordance with rateable value. The county apportionment had been fixed and apportioned as at Apr. 1, 1933, and the amount apportioned to the county of Monmouth, the sum available for general county purposes, was £355,744.

Sect. 108 of the 1929 Act provided that the Minister of Health should make regulations dealing with the way in which grants were to be readjusted on alteration of boundaries. When the county lost its area incorporated in Newport, there had to be, and there was, a readjustment, and that sum of £355,744 was cut down to £344,487. The transferred area had been a very valuable one to the county. The rateable share of expenses was 4.432 per cent. of the whole. It was responsible for £33,060 out of the £745,942, and the expenses incurred on the area only amounted to £8,385. Its share of the Exchequer Grant amounted to £15,767, and it paid in rates £17,293.

The Newport Extension Act, 1934, s. 58 (1) provides :

> Where in consequence of this Act any adjustment of any property income debts liabilities or expenses or of any financial relations is required an adjustment shall be made between the councils or other authorities affected under and in accordance with sects. 151 and 152 of the Act of 1933 . . .

So that what had to follow was that which the arbitrator in this case was called upon to do, a readjustment with regard to certain debts, liabilities or expenses.

The Local Government Act, 1933, s. 151, which, so far as I can see, has not very much to do with this case provides :

> (1) Any public bodies affected by any alteration of areas or authorities made by an order under this Part of this Act may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities and expenses (so far as affected by the alteration) of, and any financial relations between, the parties to the agreement.

Subsect. (2) says the agreement may provide for a whole list of things. Subsect. (3) says :

> In default of an agreement as to any matter requiring adjustment, such adjustment shall be referred to the arbitration of a single arbitrator . . .

Sect. 152 is more relevant :

> (1) On an adjustment under the last preceding section the following provisions shall have effect . . . [I can leave out (*a*).] Provision shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable, in accordance with the rules contained in the Fifth Schedule to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions.

The dominant idea of that subsection is that the arbitrator is to ascertain, if it is not otherwise agreed, the increase of burden on the ratepayers left in the non-transferred area.

The Local Government Act, 1933, s. 152, Sched. V, r. 1 says this :

> Regard shall be had to (*a*) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place . . .

The whole trouble here is caused by the proviso :

> Provided that no alteration of income in consequence of an apportionment under the regulations made under para. (*b*) of subsect. (1) of sect. 108 of the Local Government Act, 1929, shall be taken into account.

That means here, provided that no alteration of income in consequence of the re-apportionment whereby the £355,744 was reduced to £344,487 shall be taken into account. If you are told you have to leave out one of the main factors bearing upon the burden, the result is bound to be at least somewhat artificial but one has to do the best one can with it.

The first dispute with regard to which a question is raised in this case is, what is the effect of that proviso ? Up to a point there is not any dispute and the matter is easy. Dealing first with the old burden, what would have been the burden, the figures are all agreed. The total expenditure of the county in the year before the alteration of boundaries was £745,942. That burden fell as to £712,882 on the area to be retained, and as to £33,060 on the area to be transferred. The grant in aid was £355,744, and the ratepayers in the area to be retained benefited to the extent of £339,977. That was their share of the Exchequer Grant. The area to be transferred benefited to the extent of £15,767. If £339,977 be deducted from £712,882, the pre-transfer burden is arrived at, and the sum is £372,905. There is no dispute as to that figure.

The readjustment reduced the grant income to £344,487, a loss of £11,257. The expenses which had been incurred by the county council in respect of the transferred area amounted to £8,385. The new burden on the retained area was, therefore, £745,942 minus the £8,385 minus the £344,487, leaving £393,070, an increase of £20,165. That was the actual increase of burden, but that does not solve the problem because this proviso says that no alteration of income in consequence of the re-apportionment is to be taken into account, and, therefore, that calculation has to be put on one side. Its only value is that it tells one exactly what the real loss was.

The proviso prohibits the arbitrator taking that figure into account. He has to deal with it in another way, and the county's contention is this. The new burden is obviously £745,942 minus £8,385. That is a figure of £737,557, less, as they say, the old grant income which these particular ratepayers had received, that is to say, the sum of £339,977. Their contention is : Give us credit in this calculation for just precisely the same income as we got before ; allow us that and you get a burden of £397,580, which is £24,675 over and above our old burden of £372,905.

The borough challenges this method only with regard to the last figure. It claims that the income from the grant, even for the reduced area, must be deemed to be the full grant of £355,744. They agree, of course, there is no question about it, that the load of expenses is the £737,557, but, on the other hand, the borough contends that they can deduct the full £355,744 from that and get a figure of £381,813. which shows an increased burden of only £8,908.

To that contention counsel for the applicants says the words " no alteration of income " in the proviso must mean no alteration of the income of the ratepayers whose burden is being considered, and it cannot mean that they are to be deemed in the " will be " calculation to receive an income from grant, not merely that never would or could be received in the future, but one which never had in fact been received by them in the past. If I may just read a passage from his argument, because he put his point more clearly than I have, I have no doubt, he said :

> Now, my Lord, this is not true, because if you look at sect. " A " para. 2, you see that the reduced county, after the Minister's apportionment, is going to get a smaller amount, and even without the Minister's apportionment, in our submission, you would not be driven by the proviso to so absurd a result as an assumption that the statute means that the reduced county is notionally to be regarded as in receipt of the same grant as the unreduced county used to get. Putting the case in a nutshell, our submission is that the proviso does not force the arbitrator to any such conclusion.

Then came rather an interesting remark from counsel for the respondents : " Nor, of course, is that the way in which we put it." But, as I read the case, and as I have read his argument, he does put it in that very way both in his argument in the case and in his argument before me. That is the first issue which is raised in this case : What is the proper deduction in respect of the grant with which the arbitrator has got to credit this body of ratepayers ? If one bears in mind again the form of the rate demand note, you get this : let us conceive that the arbitrator has the exhibited rate note in front of him, and the one for the year following after the change had been made. He has got in front of him for the first of those two years a general county purpose rate of 8*s.* 5¼*d.* wanted. That will be bigger in the second because now a larger amount has to be raised from fewer people. He sees in the second rate note the new figure of £344,487, properly apportioned, but he has to shut his eyes to that and say : " I am not allowed to look at that, that is not to come into the account. What am I to do ? I have to deal with it as if there were no change. Why should I make a change ? There is the 3*s.* 7*d.* in the first rate note. Why is not that my guide as to how the benefit of this grant income is to be calculated ? " Yet, the other side say : " Oh no, you must ignore that. You must now divide the whole £355,000 odd among this smaller number of people and see what that produces." Counsel for the applicants says that that is doing the very thing the proviso says you must not do. The proviso says there is to be no change of income. It does not say no change of grant, there is to be no change of income, and, therefore, he argues, and it seems to me with very great force, that the arbitrator has got to take as the same grant that by which these particular ratepayers had benefited before.

Counsel for the respondents took a lot of trouble to show, as he suggested, that the county's contention would lead to absurd results. He said you would get the same increase of burden if there was no block grant at all, and also if there was a block grant of 100 per cent., and, of course, no re-adjustment. The first thing to be said about that is that if the proviso does not apply, you are not driven to formulae, or anything of that sort ; you get at the exact figure. At any rate, he says here you start with £745,942 as the burden where there is no grant at all. The retained area pays £712,882, and the transferred area £33,060. The new burden is clearly £737,557. Take the £712,882 from that, and the increase of burden is £24,675, which is the figure the applicants would arrive at, and always will arrive at, if there is to be no change. That figure is absolutely accurate ; that that would be the measure of the increased burden is beyond question.

Then counsel for the respondents took the other case where the grant is 100 per cent., and he said that to apply the same test there you would get again a benefit of £24,675, when, of course, there has been no loss at all because the area is going to get a much bigger amount than it got before. It is going to get the full £355,000 odd. To my mind that does not help because where there has been no new apportionment, the proviso does not come into it ; you deal with exact figures. But it did lead me to this very interesting calculation. Supposing there had been 100 per cent. available grant, and supposing 40 per cent. of it were wiped out by the readjustment. What do we find ? There the new burden is the £737,000 odd, the new grant would be £705,942, and there would in fact be an increased burden of £31,612, but that has to be ignored : still that would be in fact the increased burden. If you apply the method put forward by counsel for the applicants, of course you get the same result as before, £737,557, less the proportion of the whole 100 per cent. grant, that is, £712,882, and you get an increased burden of £24,675. But, applying the other test, £737,557 burden, less the full 100 per cent. of £745,942, and you are better off by £8,385. Counsel for the respondents talked about methods leading to absurdities, but a method of calculation which proves that the area is £8,385 better off, when the fact is that the area will be £31,000 worse off, does not appeal very much to me.

The main way in which counsel for the respondents put his case in argument, departing from the contentions in the case, was this—I suppose the idea would be a very useful one if it were sound, and it would enable the arbitrator to by-pass the proviso altogether—ascertain what value the transferred area had been to the retained area. The rate contribution of the transferred area was £17,293. The expenditure saved was £8,385. Deduct one from the other and you get a loss of £8,908. If I may quote his exact words : " A simple way of looking at it is to say what have the ratepayers in the reduced area lost ? They have lost £17,293, but have saved £8,385, so that their net loss is £8,908. That is the actual truth of the matter." But is that the actual truth ? It seems to me on the face of it that there are two fallacies involved. What have the ratepayers lost ? They have lost £17,000, but they have saved £8,385. That implies that the £8,385 had been the burden, or part of the burden, on the reduced area. Of course, it had been no such thing. It had been part of the burden on the whole area, and only a portion of it would be included in the £712,882. Only a portion of it had fallen on the reduced area. Then the contention implies that it has been paid for out of the £17,293, when, of course, it has not. We know that the grant in aid paid for 4.46 per cent. of all the expenses, and that rates had only to pay .54 per cent. of them. So that very nearly half of all the expenses including this sum had been paid for by the grant in aid. That is one criticism. But one may look at it perhaps in another way. The argument implies that the only value of the transferred area to the whole county had been the £17,000 odd paid in rates. But in truth the transferred area had had another value as well. There can be no doubt that it had attracted grant to the county when the £355,744 was apportioned to the county. I do not know whether it is possible for an arbitrator to ascertain how much it attracted, but we do know that when it was taken away, £11,000 odd was knocked off.

Let me assume for the sake of illustration that the area had been responsible for adding £11,000 to the county apportionment. If the county got additional grant which more than covered the cost of the services rendered to the transferred area, it is plain that there was some grant income benefit accruing to the county over and above the amounts paid in rates. The county administration before the transfer could have truly said : "This area is bringing us in £11,000 in grant at a cost of £8,908. There is £2,000 odd to the good there and we are getting over £17,000 in rates. This area is worth over £19,000 to the county." That line of argument has, to my mind, been altogether insufficiently explored. It is not dealt with in the case. I do not think that it is sound. I have come to the conclusion that the contention of the county must be well founded. I think that in applying the proviso the income referred to must be the income which had been received by the people whose burden the arbitrator has got to consider. If they are going to be deemed to have received an income from grant they never have received, the proviso would not be applied properly because there would be a change to be brought into account when the proviso says there is to be no change. I think that the arbitrator must deal with the matter on the footing that these ratepayers receive precisely the same grant that they received before.

There is one other point I want to say a word about on that which is not without its importance. It will be observed that the Local Government Act, 1933, s. 152, Sched. V, r. 2, says this :

> The sum payable to a local authority in respect of the increase of burden shall not exceed, or, if payable by instalments or by way of annuity, the capitalised value of the instalments or annuity shall not exceed, the average annual increase of burden multiplied (*a*) so far as that increase of burden is attributable to the cost of maintenance of roads, by twenty-one ; and (*b*) in other cases, by fifteen.

The words are "shall not exceed" that 21 years' purchase and 15 years' purchase. If an arbitrator is satisfied that a formula which he has been driven to adopt has perhaps given more than the burden has in fact been increased by, he can, I think, make allowance for that in the number of years' purchase he applies. All it says is "shall not exceed the average annual increase of burden" multiplied by 21 or 15. On the other hand, if he has adopted a meaning which has given too little, he has no way of putting it right. The governing words in sect. 152 (i) (*b*) are "such sum as seems equitable," and it obviously must be that he must get as near as he can to the real fact. He has got to get at it in a certain way. I do not pretend to know why that proviso is there. At any rate, he has to follow it, but if he feels it has led him to a too generous result, he has it in his power to say : "It would not be equitable to give you the maximum number of years' purchase, I give you something less." But, at any rate, that is a thing which the arbitrator may bear in mind.

Now comes the second question asked. It is a long time since 1934 when this change was made, and for one reason or another it has only come up for settlement now some 10 or 11 years after the change was made. There is no suggestion that anybody is to blame on one side any more than the other, there is no hint of that. There is no suggestion that anybody has been at fault about it.

There are two arguments advanced by counsel for the applicants in support of his claim for interest. He says that the county ought to get interest, at any rate that the arbitrator ought to be told that he has power to give such interest as he thinks right dating back right to the time of the transfer until the time when he fixes the amount of compensation. Two arguments have been advanced. The first rests on equitable principles, and the second rests on the terms of the section. It is not suggested that the terms of the Civil Procedure Act, 1833, or the Law Reform (Miscellaneous Provisions) Act, 1934, are of any help, but it is said that in equity interest may be recovered in a number of cases where it was not recoverable at law; for instance, certain cases where a particular relationship exists between creditor and debtor, or where money has been obtained or retained by fraud, or where the defendant ought to have done something which would have entitled the plaintiff to interest at law. On a contract for the sale and purchase of land it is the practice to require the purchaser to pay interest on the purchase money from the date when he took, or might safely have taken, possession of the land. This practice rests upon the view that the act of taking possession is an implied agreement to pay interest: see *Fludyer* v. *Cocker* (1), and *Swift & Co.* v. *Board of Trade* (2). The view has been extended to cases of compulsory purchase under the Lands Clauses Consolidation Act, the notice to treat being treated as creating the relation of vendor and purchaser. That was an interesting extension because in an ordinary case of vendor and purchaser the amount is ascertained; but it was extended to a case where the amount was not ascertained at the date of notice to treat and might not be ascertained for a considerable time.

It is urged that the rule ought to be extended to this case, as Newport has had the benefit of the area since the appointed day, whereas the county has not had the benefit of the compensation money. The words "compensation money" have been perhaps used a little loosely. The word "compensation" does not occur in the Act, but we all know what it means. The county has lost a profitable rate-paying area and probably has had to borrow money for capital purposes, which it would not have had to borrow if it had had the money payable under this award.

The best case for the county is *Fletcher* v. *Lancashire and Yorkshire Ry.* (3). There the defendant company was the owner of a canal, and the plaintiffs were the owners of mines under the canal and the adjacent land. Under the provisions of a private Act, when the plaintiffs got within a certain distance of the canal they had to give two months' notice to the company of their intention to proceed with their mines. If the company were willing to purchase and make compensation for the coal under and near the canal, it could give a counter notice, in which case the owner was bound to sell, and the amount to be paid was to be settled by arbitration. It was held that the plaintiff was entitled to interest in the same way as if it had been an ordinary purchase and sale, from the date of the counter notice. But it is to be observed that this decision went absolutely on the fact that it was a purchase. Buckley, J., said ([1902] 1 Ch. 901, at p. 908):

> But the question remains, what are the mine-owner's rights as regards interest under the general law? The principle laid down in the House of Lords in *Birch* v. *Joy* (4) is perfectly plain. When such a state of things arises between a vendor and purchaser as that the latter has become entitled in equity to the thing purchased and to the receipt of the rents (if there be such), or to the enjoyment (if there can be enjoyment) of the thing purchased, there arises in equity a correlative right in the vendor to have interest on his purchase money if remaining unpaid.

In contrast to that there is *Re Richard & Great Western Ry. Co.* (5), where the headnote says:

> Where an owner, lessee, or occupier of mines or minerals lying under or near a railway gives notice to the railway company, under sect. 78 of the Railways Clauses Act, 1845, of his intention to work the same, and the company give notice of their willingness to make compensation, and the amount of compensation is determined by arbitration under the Lands Clauses Act, 1845, the arbitrator has no power to award interest, in respect of the time between the giving of notice by the company and the making of the award, upon the sum awarded as compensation.

I do not want to read what was said, but the distinction was drawn between a sale and purchase, and a mere payment of compensation. It was held that interest did not run. Counsel for the applicants quoted this passage to me from the judgment of COLLINS, M.R. ([1905] 1 K.B. 68, at p. 72):

> The matter is simply the assessment of compensation, and at no stage in the discussion until the amount due has been ascertained can any implication as to interest arise. Neither, in such circumstances, is there any foundation for a claim for breach of contract in not paying over the money in a reasonable time. Such a question could only arise after the amount had been ascertained in manner provided by the Act of Parliament.

Then there is *Swift & Co.* v. *The Board of Trade* (2). Certain food had been seized under statutory powers. Compensation had to be assessed. There was a lot of delay in assessing compensation, and the question arose whether interest could be given and it was held that interest could not be given; to hold otherwise would be giving compensation for something which was done in accordance with the law. Therefore, I think that on the equitable principle argument the claim for interest must fail.

The argument which rested on sects. 151 and 152, was that a great many things can be agreed upon under sect. 151, and that in default of agreement as to any matter requiring adjustment the matter could be referred to the arbitrator; in other words, the arbitrator can award anything that the parties could have agreed to pay. It is said that if Newport borough had agreed to pay interest as from the date of the taking over, it would be a perfectly sound agreement. I cannot see myself that sect. 151 helps. I do not see any very apt words there relating to the matters arising in this arbitration. I think sect. 152 is the relevant one. What does it say?

> . . . the following provisions shall have effect . . . (*b*) provision shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable . . . in respect of any increase of burden . . .

Interest has nothing to do with the increase of burden. I do not myself see how the words "such sum as seems equitable . . . in respect of any increase of burden" can be held to include power to an arbitrator to give interest because interest has nothing to do with the increase of burden, it would be awarding interest, not in respect of matters in dispute, but in respect of the delay in the ascertainment of the increase of burden. I quite agree it is very easy to say: "Oh, this is a case in which interest ought to be paid" meaning by "ought" bearing in mind ordinary fair dealing between man and man. But, after all, by to-day the occasions on which interest can be given are well established, even in equity. It is certainly not for a judge of first instance to create a totally new ground for giving interest. I do not think under the law as it is the arbitrator has any power to do that, and that question must be answered accordingly.

Holding that view the third question as to whether, if interest is given, it is controlled by the last clause of the Fifth Schedule, does not arise.

Turning to the questions, I answer the first question in para. 5 by saying that the contentions of the county council are correct in law, and that the arbitrator has no power to award interest in respect of the period between the appointed day and the date of the award.

Solicitors: *Torr & Co.*, agents for *Vernon Lawrence*, Newport, Mon. (for the applicants); *Rees & Freres*, agents for *S. M. T. Burpitt*, Town Clerk, Newport, Mon. (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

CUMBERLAND CONSOLIDATED HOLDINGS, LTD. *v.* IRELAND.

[Court of Appeal (Lord Greene, M.R., du Parcq and Tucker, L.JJ.), January 11, 14, February 1, 1946.]

Sale of Land—Vacant possession—Position of parties pending completion—Maintenance of property—State and condition of property sold—Breach of undertaking to deliver vacant possession.

On Mar. 24, 1945, the appellant, as vendor, and the respondents, as purchasers, entered into a contract for the sale of certain freehold property which included a warehouse. The property was expressed to be sold with vacant possession on completion, which took place on May 3, 1945. The contract also provided that the purchaser bought with full notice of the state and condition of the property sold and took the property as it was. The warehouse, which covered a large area, had been disused for some time and had been damaged by fire. Underneath the upper part of the warehouse, and extending over the whole area, there were cellars. When the negotiations began about two-thirds of the height of the cellars was filled with rubbish consisting chiefly of bags of hardened cement and empty drums. During the negotiations the appellant undertook to remove the rubbish, which was valueless. A small part was in fact removed, but the greater part, sufficient effectively to preclude the user of the property by the respondents in the way and for the purpose they intended, was was left behind. The appellant, having refused to remove the remainder of the rubbish, the respondents had it removed at their own expense and successfully sued the appellant in a county court for the amount paid by them. On appeal it was contended on behalf of the appellants (i) that the respondents could not complain of the presence of the rubbish by reason of the condition in the contract which related to the state and condition of the property sold; (ii) that the expression "vacant possession" was used in order to show that the property was, on completion, to be transferred free from any claim of right to possession in the vendor or any third person, and that the presence, on the premises, of chattels which had been abandoned by the vendor did not constitute on evidence any such claim of right:—

Held: (i) the rubbish formed no part of the property sold, and its presence upon the property sold could not be said to be covered by the words "state and condition of the property sold," which related to the physical condition of the property sold itself.

(ii) subject to the rule *de minimis*, a vendor who left property of his own on completion, could not be said to give vacant possession, since by doing so he was claiming a right to use the premises for his own purposes, as a place of deposit for his own goods, inconsistent with the right which the purchaser had, on completion, to undisturbed enjoyment.

(iii) the right to actual unimpeded physical enjoyment was comprised in the right to vacant possession, and the existence of a physical impediment, which substantially prevented or interfered with the enjoyment of the right of possession of a substantial part of the property, to which the purchaser did not expressly or impliedly consent to submit, stood in the same position as an impediment caused by the presence of a trespasser. The appellant had therefore failed to deliver vacant possession.

(iv) pending completion, the appellant stood in the position of quasi-trustee to the respondents, and, by the act of abandonment of the rubbish had committed a breach of trust, for which an action would have lain for damages.

[**EDITORIAL NOTE.** It is curious that the expression "vacant possession" does not appear ever to have been authoritatively defined. In connection with service of summons in ejectment it has been held that there may be no vacant possession when beer is left in a cellar (*Savage* v. *Dent* (1736) 2 Stra. 1064), or when furniture or goods are left on the premises (*Isaacs* v. *Diamond* [1880] W.N. 75). For the purpose of sale of land the expression is generally assumed to mean possession of property free from any claim of right by the vendor or a third party, but the court holds in this case that the expression extends to freedom from any physical impediment to enjoyment which would substantially interfere with the enjoyment of the property. The court takes the view that as it is the duty of a vendor to eject an unauthorised occupant in order to give vacant possession to a purchaser, so it is equally his duty to remove any substantial accumulation of chattels as would by their continued presence preclude the use of the word "vacant" in regard to the premises.

As to Position of Parties Pending Completion, see HALSBURY, Hailsham Edn., Vol. 29, pp. 337-344, paras. 456-461; and for Cases, see DIGEST, Vol. 40, pp. 178-190, Nos. 1472-1594.]

Cases referred to:

*(1) *Lysaght* v. *Edwards* (1876), 2 Ch.D. 499; 40 Digest 182, *1518*; 45 L.J.Ch. 554; 34 L.T. 787.

(2) *Clarke* v. *Ramuz*, [1891] 2 Q.B. 456; 40 Digest 184, *1536*; 60 L.J.Q.B. 679; 65 L.T. 657.

(3) *Royal Bristol Permanent Building Society* v. *Bomash* (1887), 35 Ch.D. 390; 40 Digest 187, *1562*; 56 L.J.Ch. 840; 57 L.T. 179.

(4) *Engell* v. *Fitch* (1869), L.R. 4 Q.B. 659; 40 Digest 263, *2284*; 10 B. & S. 738; 38 L.J.Q.B. 304.

Appeal by the defendant from an order of His Honour Judge Allsebrook, made at Whitehaven and Millon County Court, and dated Oct. 10, 1945. The facts are fully set out in the judgment of the court delivered by Lord Greene, M.R.

J. P. Ashworth for the appellant.

G. Heilpern for the respondents.

Cur. adv. vult.

Lord Greene, M.R. [delivering the judgment of the court]: The appellant, who was the defendant in the action, appeals against a judgment for the sum of £80 0*s.* 7*d.* with costs, awarded against him by way of damages for breach of an undertaking to deliver vacant possession of a warehouse which was the subject-matter of a contract of sale between the appellant as vendor and the respondents as purchasers.

The contract was in the form of a written memorandum, which was signed on Mar. 24, 1945, and embodied particulars and special conditions of sale, and also what are known as the national conditions of sale. The property sold was of freehold tenure and consisted of a warehouse, yard and buildings described in the particulars. The purchase price was £1,000. By cl. 7 of the special conditions the property was expressed to be sold with vacant possession on completion. No date for completion appears in the copy of the contract before the court, but completion in fact took place on May 3, 1945. National condition 9 (3) provided that:

> . . . the purchaser shall be deemed to buy with full notice in all respects of the actual state and condition of the property sold . . . and shall take the property as it is.

The question which we have to decide s iwhether upon the facts as found the county court judge was wrong in law in holding that the appellant had failed to give vacant possession. If he was right in so holding, no question is raised as to the correctness of the judgment in regard to the measure of damage. It is not suggested that the contractual force of the obligation to give vacant possession came to an end when the conveyance was executed.

The facts are of an unusual character, and the question of law to which they give rise has not apparently been the subject of previous decision. The warehouse, which covered an area of some 1,900 sq. ft., had been disused for some time, and had been damaged by fire. Underneath the upper part of the warehouse, and extending over the whole area, there were cellars below ground level which were ceiled at ground level by a wooden floor. These cellars were some 9ft. in height. When the negotiations began some two-thirds of this height was filled with rubbish consisting chiefly of bags of cement which had gone hard, and of empty drums. It was all valueless and, in the words of the county court judge, "its presence prevented the use of the cellars for any purpose." During the negotiations the appellant undertook to remove the rubbish, but no attempt is made to base a cause of action on that undertaking. Some of the rubbish was in fact removed, but the greater part of it was left behind, amounting to a "considerable" quantity, so much as "effectively to preclude the user of the property by the purchasers [respondents] in the way and for the purposes they intended." We are not clear as to what force, if any, the county court judge intended to give to this reference to intended user. Before the partial removal no user of the cellars was possible. The only evidence as to what was removed appears to have been that of one Baum, who said that some drums only were removed, leaving 200 drums, and that none of the other material was removed. We can find nothing in the evidence to suggest that this limited amount of removal to any substantial extent improved the previous position as far as non-usability was concerned, nor do we think that the judge's reference to intended user is to be construed as meaning that the cellars had been made usable for any purpose by reason of the removal of some of the drums.

The appellant having refused to remove the rest of the rubbish, the respondents had it removed at a cost of £80 0*s.* 7*d.* It was not argued before us that the respondents by accepting a conveyance had waived the alleged breach of the undertaking to give vacant possession.

One argument put forward by counsel for the appellant can be disposed of at once. It was to the effect that the purchaser could not complain of the presence of the rubbish owing to condition 9 (3) quoted above. But this condition relates to the " state and condition of the property sold." The rubbish formed no part of the property sold and its presence upon the property sold cannot, in our opinion, be said to be covered by the words " state and condition of the property sold." Those words refer, in our view, to the physical condition of the property sold itself, such as its state of repair, and do not extend to the case where the property sold is made in part unusable by reason of the presence upon it of chattels which obstruct the user. Such obstruction does not affect the " state and condition of the property " but merely its usability, which is a different matter altogether.

The principal argument on behalf of the appellant was of a different character altogether. It was said that the expression " vacant possession " was merely used in contradistinction to " possession " simpliciter, in order to show that the property was on completion to be transferred free from any claim of right to possession in the vendor or any third person such as a tenant or a licensee: and that the presence on the premises of chattels which had been abandoned by the vendor did not constitute or evidence any such claim or right. It was admitted that the rubbish belonged to the appellant at the date of the contract, and that he could have removed it before completion. It was said, however, that he had abandoned the rubbish, and had accordingly reserved no right to keep it on the premises or to enter on the premises after completion in order to remove it. When asked as to the date when the abandonment took place, his counsel replied that it took place at the moment of completion.

In considering this argument it is important to bear in mind the duties of a vendor pending completion. His position is that of a quasi-trustee for the purchaser. As was said in *Lysaght* v. *Edwards* (1), by SIR GEORGE JESSEL, M.R. ((1876), 2 Ch.D. 499, at p. 507):

> He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it.

An action for damages for breach of these obligations can be brought after conveyance (*Clarke* v. *Ramuz* (2)), at any rate in the absence of waiver. A vendor who, between contract and conveyance, deposited on the property old rubbish of his own which he desired to abandon would clearly commit a breach of his obligations if the presence of the rubbish caused a substantial detriment to the property. In the present case the rubbish was on the property at the date of the contract, and was not deposited subsequently, as in the example given. But at the date of the contract the rubbish still belonged to the vendor since admittedly no abandonment had taken place. By abandoning his property in the rubbish he did something in relation to the land which was detrimental to the land. He converted a quantity of rubbish belonging to himself which was removable by him into a permanent source of damage. By the very act of abandonment he changed the whole situation, and in effect at that moment converted the land into a dump for his rubbish. In these circumstances, there being no waiver or consent by the purchaser, we are of opinion that an action would have lain for damages for breach of trust, and that the measure of damages would have been the same as that awarded by the judgment under appeal.

But it is said that the cause of action is not breach of trust, but breach of the contract to give vacant possession. This is no doubt true, although we should be averse to dealing with this appeal on what is no more than a point of pleading. But even if full weight is given to the objection, we do not think that it ought to be allowed to assist the appellant for this reason. If there had been no abandonment, and the property in the rubbish had remained in the vendor after completion, there would, in our opinion, have been a breach of the undertaking to give vacant possession. Subject to the rule *de minimis*, a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, *sc.*, as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment. Counsel for the appellant endeavoured to escape from this difficulty by relying on the abandonment which he said necessarily negatived any such claim by the appellant; once he abandoned the rubbish it could not be said that he was using the property as a place for deposit for his chattels, since *ex hypothesi* the rubbish was no longer his. But if we are right in our view that by abandoning the rubbish the appellant committed a breach of trust, can he be allowed to allege his own breach of trust as a defence to the present action? To allow him to do so would lead to serious injustice, and in our opinion, he is precluded from raising this point. In fact he is in a dilemma; for he must be claiming the right either to keep property of his own on the premises, or to use the premises as a place on which to deposit rubbish which he desires to abandon. In either case his action is inconsistent with the respondents' rights.

But there is, we think, a quite different ground upon which the judgment under appeal can be supported. The phrase "vacant possession" is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion. But it is not confined to this. Occupation by a person having no claim of right prevents the giving of "vacant possession," and it is the duty of the vendor to eject such a person before completion: see *Royal Bristol Permanent Society* v. *Bomash* (3), and *Engell* v. *Fitch* (4). The reason for this, it appears to us, is that the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which the purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser. It is true that in each case the purchaser obtains the right to possession in law, notwithstanding the presence of the impediment. But it appears to us that what he bargains for is not merely the right in law, but the power in fact to exercise the right. When we speak of a physical impediment we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property. Such cases will be rare, and can only arise in exceptional circumstances, and there would normally be (what there is not here) waiver or acceptance of the position by the purchaser. The facts as found by the county court judge are of a very exceptional nature, since the presence of the rubbish which the purchaser never bought and to whose presence he never submitted did in fact make it impossible for him to use a substantial part of the property which he had bought.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Howson, Dickinson & Mason*, Whitehaven (for the appellant); *W. C. Crocker*, agent for *W. C. Sumner*, Whitehaven (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

MILMO *v.* CARRERAS.

[Court of Appeal (Lord Greene, M.R., Morton and Bucknill, L.JJ.), January 24, 25, 1946.]

Landlord and Tenant—Written agreement purporting to be a sub-lease—Sub-term expressed to extend beyond date of expiry of head lease—No reversion left in head tenant—Head tenant not entitled to serve notice to quit—No contractual obligation on so-called sub-lessee to deliver up possession to head tenant.

M. was the tenant of a flat under a lease which expired on Nov. 28, 1944. On Oct. 25, 1943, he entered into an agreement in writing with C., whereby he purported to grant a sub-lease of the flat to C. for one year from Nov. 1, 1943, "and thereafter quarterly until such time as one of the said parties shall give to the other 3 months' notice in writing." By reason of the provision for quarterly extension, the purported sub-lease thus extended beyond the date when the head lease would expire. The agreement contained a covenant by the tenant to deliver up at the termination of the term. The covenant was expressed to be with the landlord. Earlier in the agreement, M. was called "the landlord" and the expression was defined as including "the person or persons for the time being entitled to the reversion immediately expectant on the term hereby created." On Apr. 27, 1945, M. served on C. what purported to be a notice to quit on Aug. 1, 1945. It was contended by C. that the agreement of Oct. 25, 1943, must be regarded as an assignment of the residue of M.'s term under the head lease, and therefore C. had no power to serve the notice because the reversion was vested not in him but in the head landlord. On behalf of M., it was contended that, since the agreement was not under seal, under the Law of Property Act, 1925, s. 52 (1), it could not take effect as an assignment of the residue of M.'s term and should, therefore, be regarded as a sub-lease. It was further contended that, if it did not operate as a sub-lease, the agreement established a contractual relationship between M. and C., under which M. was entitled to determine the so-called term and C. was under an obligation to deliver up possession to M.:—

Held: (i) by the agreement of Oct. 25, 1943, M. had divested himself of his whole term under the head lease. He was not entitled to call for possession of the flat, because the reversion was not in him and therefore the relationship of landlord and tenant could not exist between him and C.

(ii) the document of Oct. 25, 1943, could only be construed as an agreement to assign the head term. Assuming that the transaction was not a conveyance "taking effect by operation of law" within the meaning of the Law of Property Act, 1925, s. 52 (2) (*g*), and that sect. 52 (1) of the Act had the effect of avoiding the document as a conveyance of the legal estate, the result would, nevertheless, be the same as if the agreement had effectively passed the legal estate, because it would take effect in equity as an agreement of which specific performance could have been obtained.

(iii) even if the agreement had any contractual validity, (*a*) M. could not give notice to determine a non-existing term; (*b*) the obligation on C. to deliver up possession could not be construed as a mere contractual obligation between M., as an individual, and C. The covenant to deliver up at the termination of the term was expressed to be a covenant with the landlord, who was the person entitled to the reversion, and therefore, since M. had divested himself of his entire interest in the flat, C. was bound to deliver up possession to the head landlord.

[**EDITORIAL NOTE.** It is held that the existence of a reversion is vital to the existence of the relationship of landlord and tenant. Where, therefore, the landlord has disposed of the premises for a term exceeding his own he cannot give a valid notice to quit, whether such disposition takes effect as the transfer of a legal estate or, by reason of the absence of a deed, in equity only.

Where a purported sub-lease, being in writing, is construed as an assignment, Woodfall suggests that this is a "conveyance taking effect by operation of law" within the Law of Property Act, 1925, s. 52 (1) (*g*), and as such valid without a deed. The court, while not actually deciding the point, leans in favour of the view expressed, although the phrase is generally regarded as applying to probates, adjudications in bankruptcy and the like.

As to an Agreement Purporting to Sublet for a Term Greater than the Head Lease, see HALSBURY, Hailsham Edn., Vol. 20, pp. 83, 84, para. 94; and

FOR CASES, see DIGEST, Vol. 30, pp. 483-485, Nos. 1435-1450.]

APPEAL by the plaintiff from an order of His Honour JUDGE HARGREAVES, made at the West London County Court, and dated Oct. 31, 1945. The facts are fully set out in the judgment of LORD GREENE, M.R.

G. Granville Sharp for the appellant.

M. A. B. King-Hamilton for the respondent.

LORD GREENE, M.R.: I cannot refrain from sympathising with the appellant in the unfortunate position in which he finds himself through no fault of his own, but, in my opinion, this appeal must fail. The appellant was the tenant of a flat, No. 4, in a building known as 29 and 30 Emperor's Gate, Kensington. He held under a lease from a company called the Haversham Estates, the lease being for seven years beginning on Nov. 29, 1937. It expired, therefore, on Nov. 28, 1944.

The appellant was an officer in the territorial army, and was called up and served throughout the war. On Oct. 25, 1943, he entered into a written agreement with the respondent, Colonel Carreras, who has also served in the army during the war. That document purports to be a sub-lease of the flat. It is in the usual form of a sub-lease, and contains the provisions commonly found in such a document, but, unfortunately, the sub-term which it purports to create in favour of Colonel Carreras extended in point of time beyond the date when the head lease from Haversham would expire. The term which this document purports to grant to Colonel Carreras is for one year from Nov. 1, 1943:

> . . . and thereafter quarterly until such time as one of the said parties shall give to the other 3 months' notice in writing to expire on Feb. 1, May 1, Aug. 1, or Nov. 1, in any year.

It is clear, therefore, that that so-called term would necessarily continue (by reason of the provision for quarterly extension) beyond Nov. 28, 1944, when the lease from Haversham Estates would expire. The document was apparently prepared by Messrs. Row, who were the agents of Haversham Estates. They acted as agent for Captain Milmo, the appellant, in connection with the preparation of the document, but unfortunately they misread an entry in their books, or the entry by some unfortunate accident was incorrect—it does not matter which—because they got the impression from the book that the term which Captain Milmo held under the head lease began in 1939 and not in 1937. If that had been the case, the so-called term granted by this so-called sub-lease would not have extended beyond the term created by the head lease, but would have been for a less period, and the present difficulty would never have arisen. By reason of that error of two years in relation to the record in the agents' books, the sub-term which this document purports to grant in fact extended longer than the term under the head lease.

It appears that Mr. Lock, of Messrs. Row, continued to receive the rent from Colonel Carreras, and, although, in the first instance, he credited it, in a book which he kept, to Captain Milmo and paid over some portion of it to Haversham Estates, he subsequently, in order to save time and staff, paid it direct to Haversham Estates. The amount of the rent was the sum of £140 a year. It was suggested by counsel for the appellant, in connection with one of his arguments, that in some way Mr. Lock must be regarded as having acted as the agent for the Haversham Estates in connection with the preparation and execution of this document. There is no such finding, and, indeed, if there had been, it could not possibly have stood because there is no evidence whatsoever to suggest that Mr. Lock, or his firm, was acting as agents for Haversham Estates in that connection. He was agent for Captain Milmo in preparing the document, in collecting the rent from Colonel Carreras and in crediting that rent to Haversham Estates, which he did in satisfaction of Captain Milmo's then supposed liability under the head lease which Mr. Lock, and everybody else, assumed was still vested in Captain Milmo.

On Apr. 27, 1945, Captain Milmo, desiring again to occupy the flat, served on Colonel Carreras what purported to be a notice to quit on Aug. 1, 1945. He had very good reasons for wishing to get back into the flat, and, so far as the point which might have arisen under the Rent Restrictions Acts is concerned, the county court judge took the view that, as between him and Colonel Carreras, the hardship which would be caused to Colonel Carreras would be less, if an order for possession was made, than the hardship to Captain Milmo, if an order

for possession was refused. In view of the opinion which the judge formed,
and the conclusion to which I have come, the consideration of the Rent Restrictions
Acts does not arise.

The main question, and the only question, to which I need direct my observations
arises in this way. It is said that this document, which purports to
create a sub-tenancy, must, by the operation of a well known rule of law, be
given the effect of an assignment of the residue of Captain Milmo's term under
the head lease. That being so (it is said) Captain Milmo had no power to serve A
any notice; in fact, any such notice would merely be waste paper because, on
the true construction of the document, it would be a notice to determine a
sub-lease which, according to the argument, was non-existent by reason of the
fact that the document operated as an assignment of the head term. It is said
that nobody but the landlord in whom the reversion was vested would be entitled
to obtain an order for possession against Colonel Carreras, and such an action
therefore, was maintainable (apart from the Rent Restrictions Acts) only by B
Haversham Estates, their position being that of head landlords under a lease
which had come to an end on Nov. 28, 1944; as against them (apart from the
Rent Restrictions Acts) Colonel Carreras would have no title to remain when that
term expired.

We have had a very interesting and careful argument from counsel for the
appellant, who has referred us to a number of authorities bearing on the question C
of what is the effect of a document purporting to be a sub-lease, which purports
to create a sub-term equal to, or greater than, the residue of the head term.
There have been many cases in which the effect of such a document has been
considered, and a controversy has existed as to whether such a document must
be described as an assignment, or whether it can properly be described as a
sub-lease. I do not propose to examine those authorities; they are to be found
dealt with at length in all the text books, and perhaps the most convenient D
and authoritative reference that I can give with regard to them is to be found
in Platt on Leases, Vol. 1, pp. 9-19. There are ten pages of discussion of
the earlier authorities. It is perhaps worth mentioning that in certain old
authorities, which suggested, and, indeed, held, that certain transactions could
be described as sub-leases, the substantial point was this: if they were assignments,
the Statute of Frauds, 1677, s. 3, would have made them void, and the
court was concerned to give some effect to such transactions, notwithstanding E
that they purported to create a term which extended beyond, or was coincident
with, the head term. The court was anxious to avoid the rigours of sect. 3 of
the Statute of Frauds. But it is important to notice what effect was, in fact,
given to the transactions considered in those decisions. I may say in passing
that they have been very severely criticised, and it is very doubtful whether
they can be considered as law, in so far as they assert that a lease can exist
where there is no reversion left under it in the grantor. But they do not go F
further than this, I think. They accept the position that one of the most
ordinary incidents of a lease, *viz.*, the right to distrain for rent, does not exist
in such a case. There is no right of distress, but they say, for example, that
the right to sue on the covenant to pay the so-called rent exists. Some of them
go further than that and affirm the right to sue on other covenants. I think
I am right in saying that not one of them is based on the view that, in the case G
of such a transaction, there is any reversion left in the so-called sub-lessor.
Whether such a document can be called a sub-lease or not seems, in these cases,
to have been largely a matter of words, and I do not propose to discuss the
question whether they are right or wrong. For the purposes of this case, I
think it is sufficient to say that, in accordance with a very ancient and established
rule, where a lessee, by a document in the form of a sub-lease, divests himself
of everything that he has (which he must necessarily do if he is transferring H
to his so-called sub-lessee an estate as great as, or purporting to be greater
than, his own) from that moment he is a stranger to the land, in the sense that
the relationship of landlord and tenant, in respect of tenure, cannot any longer
exist between him and the so-called sub-lessee. That relationship must depend
on privity of estate. I find it impossible to conceive of a relationship of landlord
and tenant which has not got that essential element of tenure in it, which implies
that the tenant holds of his landlord. He can only do that if the landlord has
a reversion. You cannot have a purely contractual tenure. Tenure exists by

reason of privity of estate. This seems to be the effect of all the decisions, and this position is recognised by them all.

We have, therefore, this position arising in the present case. After the execution of this document, subject to a point I will mention later, Captain Milmo became a stranger to the land. He had no estate in the land, the whole estate which he had held under the head lease passed to Colonel Carreras, and from that moment onwards, although some contractual relationship might still remain between him and Colonel Carreras, in the sense that perhaps he could have sued for the so-called rent, he no longer had any connection with the flat in the capacity of landlord. His case is this: he says, "Under this document I had power to bring the so-called term to an end" That seems to me to be quite unarguable because there never was a term. All that the document did, and could do, was to transfer to Colonel Carreras the whole of Captain Milmo's then existing term under the head lease. The obligation to deliver up, in the so-called sub-lease, cannot be construed to be a mere contractual obligation as between Captain Milmo personally, as an individual, and Colonel Carreras. I think that this is clear when the document is examined. In it, Captain Milmo, by a definition clause, is called the landlord:

> . . . which expression shall include the person or persons for the time being entitled to the reversion immediately expectant on the term hereby created.

Of course, the document did not create a term because in law it was incapable of doing so. The habendum is:

> To hold unto the tenant from Nov. 1, 1943, for a term of one year and thereafter quarterly until such time as one of the said parties [the parties being the landlord which includes Captain Milmo and the person entitled to the reversion] shall give to the other 3 months' notice in writing to expire . . .

I ask myself: how could any document bring to an end at any time a non-existent term? It seems to me quite impossible to make that clause work in such a way as to have any kind of contractual force, having regard to the effect which the law requires to be given to this document. Then there is a covenant by the tenant to deliver up at the termination of the term, and that is expressed to be a covenant with the landlord, the definition of which I have read. The term never existed, and to whom is he to deliver up? I can give no other construction to this covenant than that he should deliver up to a person having the reversion at the time of the expiration of this alleged term, and whatever other thing may be said about the position of Captain Milmo, he was not a reversioner under this lease. He was a stranger to the land once he had parted with the whole of the estate vested in him. In view of the effect which the law compels us to give to this document, I cannot see how it is possible to find any right in Captain Milmo to have possession delivered up to him. The position would appear to be that, when this document was executed, Colonel Carreras became the assignee of Captain Milmo's term. He became, therefore, tenant of the Haversham Estates under the head lease which expired on Nov. 28, 1944. When that expired, subject to the Rent Restrictions Acts, he was bound to deliver up possession to Haversham Estates. I have not seen the head lease, so I do not know what the exact terms of it are, but, apart from anything special, that, as it appears to me, would be the position.

A question arose as to the precise position of Captain Milmo, and it became necessary to consider whether, in view of the Law of Property Act, 1925, s. 52, this document could have effect as an assignment. Sect. 52, which took the place of sect. 3 of the Statute of Frauds, and sect. 3 of the Real Property Act, 1845, provides:

> (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

Then [in subsect. (2)] there are certain exceptions, one of them being:

> (*g*) conveyances taking effect by operation of law.

It is said—and WOODFALL ON LANDLORD AND TENANT, 24th Edn., appears to be inclined to take the same view, at p. 841, note (*d*)—that that exception of conveyances taking effect by operation of law would apply to such a case as this and that there would be no need for the document to be under seal in order that it should operate as an assignment of the legal estate because that operation was given to it by a rule of law. It is not necessary, in my view, to say whether that is right or wrong, although the argument seems to be an attractive one.

Assuming that the exception does not apply—and none of the other exceptions appear to apply—and that the words of subsect. (1) alone are to be considered, all that they provide is that a conveyance is to be void for the purpose of conveying the legal estate unless made by deed.

Giving that decision full force in the present case, it does not, of course, mean that this document would not operate in equity as an agreement to give to it the effect which ought to be given to it. Having regard to the fact that, treated as an agreement, it is an agreement to create a so-called sub-term extending beyond the length of the head term, it can be only construed, and given effect, as an agreement to assign the head term, and an agreement of which specific performance could have been obtained. The position, therefore, would have been that Captain Milmo would have been trustee for Colonel Carreras of the residue of the head term, and could have been compelled to assign it so as to give Colonel Carreras the legal term. It is obvious that, if that be the true position, Captain Milmo could not be in the position of landlord of Colonel Carreras. His position would be that of a person who has contracted to assign a lease which is vested in him; in other words, he would be merely a vendor of the head lease and not the landlord under a sub-lease. Therefore, even assuming that sect. 52 (1) does have the effect of avoiding this document as a conveyance of the legal estate, the result, in my opinion, is not different from what it would have been if it had been effective.

I think I have covered all the points which arise in the case. In my opinion Captain Milmo by this unfortunate document divested himself of the entirety of his interest in the flat, and he was thenceforward a stranger to it. He had neither power to give a notice to determine a non-existing term, and thereby confer upon himself the right to resume possession, nor had he any right to call upon Colonel Carreras to deliver up possession to him. In any event, he was not the person who, under the language of this document, was the person entitled to call for possession. Therefore, even if this document was to be regarded as having some purely contractual validity, on its true construction I can find no contractual obligation on Colonel Carreras to deliver up possession to Captain Milmo.

The appeal must, therefore, be dismissed.

MORTON, L.J.: There can be no doubt that when Captain Milmo and Colonel Carreras signed the agreement of Oct. 25, 1943, they both intended that, in the circumstances which have in fact arisen, Captain Milmo should have possession of this flat. I share the sympathy which the Master of the Rolls has expressed for Captain Milmo's position. Having been for over five years on active service, he now desires to occupy the flat with his wife and child. It is perhaps regrettable that this very technical point should have been taken by the respondent. However, as it has been taken, we merely have to decide whether it is good in law or not. I entirely agree that it is a good point in law, and that this document has the effect which the Master of the Rolls has stated. I agree so entirely with the judgment which has been delivered that I only desire to add two very short comments. I do not see how the relationship of landlord and tenant can possibly exist unless the so-called landlord has a reversion. In so far as any of the cases cited to us suggest that this relationship can exist in those circumstances, I do not think the decisions were well founded, and I agree with the comments which the Master of the Rolls has made upon them.

With regard to the provisions of the Law of Property Act, 1925, s. 52, it is not necessary to express a concluded view as to whether the document in question in this case did, or did not, operate to convey a legal estate. But, for my part, I am disposed to share the view expressed in WOODFALL ON LANDLORD AND TENANT, 24th Edn., that it did operate to confer a legal estate. *Prima facie*, it seems to me that this is a case in which a conveyance within the meaning of the Law of Property Act, 1925, has taken effect by operation of law. I agree that the appeal must be dismissed.

BUCKNILL, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Powell, Skues & Graham Smith* (for the appellant); *King Hamilton & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

STACEY *v.* WILKINS. BROMHAM AND OTHERS *v.* WILKINS.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J., Humphreys and Henn Collins, JJ.), January 28, 1946.]

Gaming and Wagering—Private lottery—Promotion and conduct—Breach of statutory conditions—Names and addresses of promoters on tickets—Liability of printer—Betting and Lotteries Act, 1934 (*c.* 58), *ss.* 21, 22, 24.

A lottery, restricted to members of a branch of the British Legion, was promoted by the sports and entertainments committee of the branch, who employed the first appellant to print the tickets. The promoters of the lottery were stated on the tickets to be the sports and entertainments committee of the branch and the sports secretary, who alone was referred to by name. Sect. 24 (2) (*d*) of the Betting and Lotteries Act, 1934, requires that in the case of a private lottery every ticket should bear on the face of it the name and address of each of the promoters. The first appellant was convicted under the Betting and Lotteries Act, 1934, s. 22 (1) (*a*), of printing tickets for use in a lottery. The second appellants, who were members of the executive committee of the branch were convicted under sect. 22 (1) (*g*) of the Act, of aiding and procuring the sports secretary to contravene that section :—

HELD : (i) the lottery was a private lottery within the definition in sect. 24 (1) of the Act and was, therefore, a lawful lottery.

(ii) the statement that the promoters were a committee was not a sufficient compliance with sect. 24 (2) (*d*).

(iii) the offences, if any, committed by all the appellants were offences under sect. 24 of the Act, of conducting a private, *i.e.*, a lawful, lottery in a wrong manner.

(iv) no offence was committed by any of the appellants under sect. 22 of the Act which deals with unlawful lotteries, and the convictions should, therefore, be quashed.

[**EDITORIAL NOTE.** The object of the provision of the Betting and Lotteries Act, 1934, that in the case of private lotteries the names and addresses of all the promoters must appear on the tickets is to insure that if any question of prosecution arises it may be known who should be summoned. The name of every member of a committee who is a promoter should, therefore, appear, while in the case of a *persona juridica* the corporate name would presumably be sufficient. A private lottery does not cease to be private by reason of breach of this condition, and a prosecution under sect. 22 of the Act is, therefore, held to fail, since the defence that the lottery is lawful as being private is still open, notwithstanding the irregularity in the disclosure of names for which a punishment is provided by sect. 4.

FOR THE BETTING AND LOTTERIES ACT, 1934, ss. 21, 22 and 24, see HALSBURY'S STATUTES, Vol. 27, pp. 289-292.]

APPEAL by way of case stated against convictions by the justices of the county borough of Port Talbot for offences under the Betting and Lotteries Act, 1934, s. 22. The facts are fully set out in the judgment of LORD GODDARD, L.C.J.

Vernon Gattie for the first appellant.

G. R. F. Morris for the second appellants.

Ralph Sutton, K.C., and *D. Morgan Evans* for the respondent.

LORD GODDARD, L.C.J. : We will give judgment with regard to the printer first in this case.

This is a case stated by the justices of Port Talbot in respect of the conviction of a printer under an information taken against him under the Betting and Lotteries Act, 1934, s. 22. It appears from the case that a lottery was promoted by the sports and entertainment committee of the British Legion, Briton Ferry Branch Benevolent Fund, and apparently the committee, or some members of the committee, employed the appellant, Stacey, who is a printer, to print tickets for use in that lottery. The charge against him was that he " in connection with a certain lottery known as ' British Legion Briton Ferry,' promoted at Briton Ferry, unlawfully did print certain tickets for use in the said lottery contrary to the Betting and Lotteries Act, 1934, s. 22." He was convicted and fined £10.

The material sections are these: sect. 21 of the Betting and Lotteries Act, 1934, provides:

> Subject to the provisions of this Part of this Act, all lotteries are unlawful.

Sect. 22 (1), which is the section under which he was convicted, provides:

> Subject to the provisions of this section, every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere (*a*) prints any tickets for use in the lottery . . . shall be guilty of an offence.

Under subsect. 2 it is provided:

> In any proceedings instituted under the preceding subsection it shall be a defence to prove that the lottery to which the proceedings relate was such a lottery as is declared by any subsequent section of this Part of this Act not to be an unlawful lottery, and that at the date of the alleged offence the defendant believed, and had reasonable ground for believing, that none of the conditions required by that section to be observed in connection with the promotion and conduct of the lottery had been broken.

Then by sect. 24 (1) it is provided:

> In this section, the expression "private lottery" means a lottery in Great Britain which is promoted for, and in which the sale of tickets or chances by the promoters is confined to, either (*a*) members of one society established and conducted for purposes not connected with gaming, wagering or lotteries . . . and which is promoted by persons each of whom is a person to whom under the foregoing provisions tickets or chances may be sold by the promoters and, in the case of a lottery promoted for the members of a society, is a person authorised in writing by the governing body of the society to promote the lottery.

Then under subsect. (2) there are certain conditions which have to be observed for the conduct of a private lottery, and one of them (*d*) is that:

> . . . every ticket shall bear upon the face of it the name and address of each of the promoters and a statement of the persons to whom the sale of tickets or chances by the promoters is restricted, and a statement that no prize won in the lottery shall be paid or delivered by the promoters to any person other than the person to whom the winning ticket or chance was sold by them, and no prize shall be paid or delivered except in accordance with that statement.

The first thing to observe is that the magistrates have found, among other things, that tickets were sold by persons connected with this lottery to persons outside those to whom under the statute it was lawful to sell them, and that offence was committed by certain persons. The main charge against the printer was that the name and address of each of the promoters was not printed on the ticket, but it is important to observe, that the magistrates apparently accepted the contention of the prosecution that because offences had been committed by persons in selling these tickets to people to whom they were not entitled to sell them, the printer became liable for that. So far as that is concerned, the court has no hesitation in saying that the justices came to a wrong conclusion; but the point we have to consider first is whether or not the requirement that "every ticket shall bear upon the face of it the name and address of each of the promoters" was complied with in this case. That is a point upon which it is no doubt important that this court should express an opinion for the purpose of giving guidance to printers and those responsible for seeing that the Betting and Lotteries Act is properly complied with and enforced.

The tickets in this case had these words printed on them: "Sale of these tickets confined and restricted to members of the British Legion, Briton Ferry, Matches played," and so on, and the prizes are set out. Then: "Promoters: The British Legion Sports and Entertainments Committee for the British Legion, Briton Ferry Branch Benevolent Fund. O. D. Richards, Sports Secretary"; and that is the only name and address that is given of a promoter or promoters.

It seems to be perfectly clear from the facts found by the justices, and the tickets themselves, that this was a private lottery, but one of the conditions of conducting a private lottery is that every ticket shall bear on the face of it the name and address of each of the promoters. It has been pointed out by counsel for the respondent that the object Parliament must be deemed to have had in mind at that time was that those who are responsible for seeing that the Betting and Lotteries Act is carried out, or that illegal lotteries under it are suppressed shall know who are the promoters of these private lotteries which are made legal, so that if there is any question of the legality or otherwise, it should be known who are the people to be summoned; and in my opinion it is not possible to say that a statement that the promoters are a committee is a sufficient compliance with the section. If the promoters were a corporate body, no doubt it would be enough to give the name of the company or other corporate body which was acting as promoter, but where it is a committee it can only be the members of the committee who are the promoters, and, therefore, the names of the members of the committee who are the promoters must be given on the ticket. It does not follow that every member of the committee was a promoter; some of the members of the committee may have refused to sanction the lottery, in which case they would not be promoters.

It therefore appears to the court that the condition as to the names and addresses of the promoters was not complied with in this case. But a further difficulty arises here, and that is whether or not the offence for which this defendant was summoned was made out. As I have already pointed out, he was summoned under sect. 22 (2). There it is a defence for him to show that it was not an unlawful lottery, and this clearly was not an unlawful lottery because it was a private lottery as defined by sect. 24. Then it is said that he is also to show that "at the date of the alleged offence the defendant believed, and had reasonable ground for believing, that none of the conditions required by that section to be observed in connection with the promotion and conduct of the lottery had been broken"; nor had they at the time of the alleged offence. What he might have been summoned for was for an offence under sect. 24 (3), which provides:

> If any of the conditions specified in the preceding subsection is broken, each of the promoters of the lottery, and where the person by whom the condition is broken is not one of the promoters . . . [and the printer is not one of the promoters] . . . that person also, shall be guilty of an offence.

The offence, if any, which he committed, therefore, was in breaking one of the conditions, namely, the condition that the ticket should bear on the face of it the name and address of each of the promoters. Therefore, though he might have been convicted of an offence under sect. 24 (3), in my opinion it is quite clear that he did not commit an offence under sect. 22 (1).

I think the confusion which perhaps has arisen in this case is due to the fact that it has not been borne in mind that if the lottery is a private lottery, it ceases to be an unlawful lottery, and it does not cease to be a private lottery because one of the conditions in sect. 24 is broken; that is an offence of conducting a private lottery, that is to say, a lawful lottery, in a wrong manner. That was the offence that was committed here, and it was not the offence for which the defendant was summoned. Therefore, so far as the printer is concerned, this appeal must succeed and the conviction be quashed.

HUMPHREYS, J.: I agree with the judgment of my Lord, and on the main point, which is the first point, I have nothing to add.

With regard to the second point, I think some assistance may be derived from a glance at sect. 23 of the Act, the question here being whether by breaking one of the conditions mentioned in sect. 24 (1) (*d*) the printer has committed the offence of printing tickets for use in a lottery which, as the result of sect. 1 means an unlawful lottery, or whether what the person is responsible for is the offence of printing tickets which do not comply with the requirements of subsect. (2) (*d*), that being a separate offence. Very much the same thing is said in sect. 23. It provides for the exemption of what are called small lotteries incidental to certain entertainments. There, also, persons who promote, as an incident of certain entertainments, what would be an unlawful lottery, are not to be prosecuted because a lottery so promoted is not an unlawful lottery; and again I find the words "but the conditions specified in the next succeeding subsection shall be observed," and then: "every person concerned in the promotion or conduct of the lottery shall be guilty of an offence unless he proves that the offence was committed without his knowledge." I think those are words which make it quite beyond question that what is being done is to create a new offence, and therefore a specific defence is supplied for the person who can avail himself of it, namely, that he was unaware that the offence was being committed.

For that reason, as well as the reasons which have been stated by my Lord, I agree also with the second part of the judgment and with the conclusion.

HENN COLLINS, J., agreed.

The appeals by the second appellants, (members of the executive committee of the Briton Ferry Branch of the British Legion) against convictions under sect. 22 (1) (*g*) of the Act, were allowed, after brief argument, on the ground that they, too, should have been summoned, if at all, under sect. 24 of the Act.

Appeals allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *T. D. Windsor Williams*, Neath (for the appellant Stacey); *Arnold Carter & Co.*, agents for *Harold L. Roberts*, Briton Ferry (for the appellants Bromham and others); *Torr & Co.*, agents for *Richard John*, Cardiff (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HAWTREY *v.* BEAUFRONT, LTD.

[KING'S BENCH DIVISION (Croom-Johnson, J.), January 11, 12, 14, 1946.]

Landlord and Tenant—Term—Certainty—Commencement and termination defined by reference to commencement and termination of war—Date of termination of European war—Declaration by Government that national emergency ended—Notice to quit—Validity of—Validation of War-time Leases Act, 1944 (*c.* 34), *ss.* 1, 2—*Tenancy Agreements* (*End of the War in Europe*) *Order*, 1945 (*S.R. & O.*, 1945, *No.* 703/L.8).

By a tenancy agreement in writing, dated Sept. 3, 1939, the plaintiff demised, to the defendant company, premises known as Marks Barn, Crewkerne, Somerset, for the period of the national emergency or European war or threatened European war. The term was to be computed from the date of the actual entry on the premises by the tenants until such national emergency or war should have been terminated by the signing of terms of peace or such other declaration by the Government that the national emergency no longer existed. The defendant company entered into possession of the premises. On June 15, 1945, the plaintiff's solicitors sent a letter to the directors of the defendant company enclosing a notice also addressed to the directors at Marks Barn, the registered office of the company, giving them, the directors, one month's notice to quit the premises which they occupied under the terms of the agreement of Sept. 3, 1939. Receipt of letter and notice was acknowledged by defendants' solicitors. In an action by the plaintiff for possession of the premises it was admitted that the agreement was for the duration of the war. It was, however, contended on behalf of the defendant company that (i) notwithstanding that the term was still a good term by virtue of the Validation of War-time Leases Act, 1944, s. 1 (1), the plaintiff was not entitled to take advantage of that subsection and give notice to quit, because there never had been a signing of terms of peace nor a declaration by the Government that the national emergency no longer existed, and (ii) in any event, the notice was invalid because it was directed to the directors of the defendant company and not to the company itself:—

HELD: (i) the tenancy agreement was an agreement for the duration of the European war validated, in so far as the duration of the term was concerned, by the Validation of War-time Leases Act, 1944, s. 1 (1); and by virtue of the Tenancy Agreements (End of the War in Europe) Order, 1945, made under sect. 2 (2) of that Act, the plaintiff was entitled, on and after May 9, 1945, to exercise his right under sect. 1 (1) of the Act to determine the tenancy by notice to quit.

(ii) the notice to quit was addressed to the directors of the defendant company as persons acting on behalf of the company and was, therefore, a valid notice to quit to the defendant company.

[**EDITORIAL NOTE.** Between the Munich agreement in 1938 and the outbreak of war in 1939 a number of leases were entered into for the purpose of providing premises available for evacuation. These, so far as they were expressed to be " for the duration of the war" were held, in *Lace* v. *Chandler* (1) to be invalid for want of certainty in the term. The Validation of War-time Leases Act, 1944, was passed for the purpose of giving validity to such leases, and the lease here in issue, the duration of which is expressed to be until the war has terminated by the signing of peace or by declaration of the Government that the national emergency no longer exists, is held to be within the Act. Although it is unnecessary for his decision, CROOM-JOHNSON, J., expresses the view that the broadcast by the Prime Minister relating to unconditional surrender amounted to a "declaration by the Government" within the meaning of the lease.

A As TO TERM DEFINED BY REFERENCE TO DETERMINING EVENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 148-150, para. 161; and FOR CASES, see DIGEST, Vol. 30, pp. 462-466, Nos. 1245-1292.

As TO FORM AND CONSTRUCTION OF NOTICE TO QUIT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 135-137, paras. 145, 146; and FOR CASES, see DIGEST, Vol. 31, pp. 445-450, Nos. 5919-5971.

FOR THE VALIDATION OF WAR-TIME LEASES ACT, 1944, ss. 1, 2, see HALSBURY'S STATUTES, Vol. 37, pp. 341-344.]

B Cases referred to:

*(1) *Lace* v. *Chandler*, [1944] 1 All E.R. 305; [1944] 1 K.B. 368; 113 L.J.K.B. 282; 170 L.T. 185.

*(2) *Hankey* v. *Clavering*, [1942] 2 All E.R. 311; [1942] 2 K.B. 326; 167 L.T. 193.

*(3) *Doe d. Matthewson* v. *Wrightman* (1801) 14 Esp. 5; 31 Digest 443, *5901.*

*(4) *Doe* v. *Spiller* (1806), 6 Esp. 70; 31 Digest 447, *5938.*

C ACTION for the recovery of possession of premises let for the duration of the war. The facts are fully set out in the judgment.

G. R. F. Morris for the plaintiff.

D. A. Scott Cairns for the defendants.

CROOM-JOHNSON, J.: This is an action in which the plaintiff seeks to recover possession of premises known as Marks Barn, Crewkerne, in the county D of Somerset, from the defendants, who, he says, were his tenants under a tenancy agreement in writing, dated Sept. 3, 1939.

The action was started by a specially endorsed writ, and after proceedings for summary judgment had been started under R.S.C., Ord. 14, r. 1, an order was made under the terms of r. 8, which ordered that this action should be set down as a short cause for trial, the only point raised before the master as a defence being that a certain notice to quit the premises, relied upon by the plain- E tiff, was not a valid notice to quit. The order went on to provide, in common form, that the defendants could supplement that by giving notice of additional defences. In some way what the defendants did was to deliver a defence, so-called, in a separate document on Sept. 12, 1945, and in that, without any reference to the point which had been raised under the proceedings for summary judgment, the defendants set up that the agreement of tenancy was for the term of the national emergency and that that term had not been terminated in the manner F provided in the agreement, or at all.

The matter starts in this way. The plaintiff is the owner of the premises to which I have referred. On Mar. 1, 1939, he entered into an agreement with the defendants which provides for a certain option. The defendants conduct a well known school, which they were desirous of removing from Camberley, Surrey, to some more remote place if and when an emergency or war should G arise. That agreement, be it noted, was a fortnight before the Germans marched into what was left at that time of Czechoslovakia. The option was an option in consideration of a substantial sum of money to take the premises in question, exercisable by the tenants, the defendants, "immediately the national emergency or threat of war arises or on the actual commencement of war and if and when the same shall be exercised by the tenants"—"the same" being the option—"then the landlord shall grant and the tenants shall accept the tenancy of the H said premises." The agreement went on to provide that the lease (it is not, I think, mentioned anywhere before in this document) "or tenancy agreement shall be put in the form or to the effect set forth in the schedule hereto," and then there are certain other provisions which are proper in such an event. The schedule did not follow exactly the terms of the option agreement: it is only a difference of a word. In the agreement the expression is: "for the period of any national emergency and any European war or threatened European war." In the *habendum* in the schedule of the proposed agreement for tenancy the words are:

> To hold unto the tenants for the period of the national emergency or European war or threatened European war to be computed from the date of the actual entry on the premises by the tenants until such national emergency or war shall have been terminated by the signing of terms of peace or such other declaration by the Government that the national emergency no longer exists.

The option was exercised and the lease for a tenancy agreement in the terms of the schedule was actually executed on Sept. 3, 1939, the day upon which war broke out, and thereafter the defendants entered into possession of the premises, removed their school there, and have been carrying on and are still carrying on upon the plaintiff's premises.

In the meantime, in *Lace* v. *Chandler* (1) the Court of Appeal had decided that a tenancy "for the duration of the war" does not create a good leasehold interest, the term, when the agreement takes effect, being uncertain, and, also, that it was impossible to construe the particular tenancy agreement as a legal lease for a long period. The ground of that decision was, as I understand it, that the term did not point out the period during which the enjoyment of the premises was to be had, so that the duration as well as the commencement of the term be stated:

> The certainty of a lease, as to its continuance, must be ascertainable, either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void.

That is a citation from the judgment of LORD GREENE, M.R. ([1944] 1 All E.R. 305, at p. 306), and taken from FOA ON LANDLORD AND TENANT, 6th Edn., p. 115.

It soon became manifest that there was a very large number of agreements that in one form or another had been expressed differently, so far as tenancies were concerned, "for the duration of the war," and the matter had to be cured by legislation. Unfortunately when the Legislature came to deal with it, instead of leaving the parties, as far as they could, to the agreement that they had made, merely validating the plain intention which the parties thought they were expressing, the Legislature decided that they would superimpose upon that something a great deal more, and they proceeded, as I see it, in a statute to which I will refer in a moment, to some extent to make a new agreement for the parties altogether.

By the Validation of War-time Leases Act, 1944, s. 1 (1), it was provided that:

> Subject to the provisions of this section, any agreement, whether entered into before or after the passing of this Act, which purports to grant or provide for the grant of a tenancy for the duration of the war shall have effect as if it granted or provided for the grant of a tenancy for a term of ten years, subject to a right exercisable either by the landlord or the tenant to determine the tenancy, if the war ends before the expiration of that term, by at least one month's notice in writing given after the end of the war.

For the purposes of construction subsect. (2) of that section defines the use of the expression "the duration of the war" as follows:

> In this section the expression "the duration of the war," in relation to any agreement, means a period which, on the proper construction of the words used in the agreement, whatever they may be, ends with, or within, a specified time after, one of the following events: (*a*) the end of the war or of hostilities as respects all the States with which His Majesty is at war and all theatres of war; (*b*) the end of the war or of hostilities as respects any particular State or States or any particular theatre or theatres of war; (*c*) the end of the emergency mentioned in the Emergency Powers (Defence) Act, 1939, or of the period for which that Act or any Regulation, order or power thereunder is in force or of the emergency mentioned in any other Act of the present Parliament; (*d*) the end of the emergency (not defined by reference to any Act of Parliament) occasioned by the war or hostilities, whether as respects all the said States and all theatres of war or as respects any particular State or States or any particular theatre or theatres of war; (*e*) any event likely to occur on or in connection with any of the events aforesaid; and any reference in this section (other than this subsection) to the end of the war shall, in relation to any agreement, be construed as referring to the end of such one of the aforesaid periods as is appropriate to that agreement.

One of the difficulties in the present case is that the parties have not, on any view of this case, provided for "such one of the aforesaid periods." They have apparently considered two, if not three, of them, and what the effect of that is I may have to consider before I reach the end.

The statute goes on in sect. 2 to deal with what it calls: "Construction of tenancy agreements," and subsect. (1) of that section is of importance:

> Where any tenancy agreement uses, for the purpose of defining the term or purported term of the tenancy or for any other purpose, the expression "the war" or "hostilities" or "the emergency" or any similar expression which does not indicate whether it refers: (*a*) to the war or to hostilities as respects all the States with which His Majesty is at war and all theatres of war or, as the case may be, to the emergency occasioned thereby; or (*b*) to the war or to hostilities as respects any particular State or States or any particular theatre or theatres of war, or, as the case may be, to the emergency occasioned thereby; the expression shall be construed as referring to the war or hostilities as respects those States with which His Majesty was at war at the date when the agreement was made, or, as the case may be, to the emergency occasioned thereby, unless it is shown that the parties intended that the expression should be otherwise construed.

It is to be noted that all those expressions in subsect. (1) are in substitution for the one used.

I look at this document and I find it refers to the European war. I was invited to say that I might hold that the agreement included the Japanese war, which did not eventuate for some 2 or 3 years after this date. I find that the parties meant and intended what they said and nothing more; and, accordingly, they were dealing with the conditions on Sept. 3, 1939, when this country was at war with one state or, at any rate, with states in Europe, most of which were ultimately swallowed up by the German State. I find, accordingly, that the parties were contemplating a time when the "national emergency or European war or threatened European war" meant that they were dealing with such states as were then at war with His Majesty.

Sect. 2 (1) goes on to say this:

> The court by whom any such agreement is construed may admit any evidence which in the opinion of the court may throw light on the intention of the parties as to the meaning of the said expression.

Counsel for the defendants invited me to admit the option agreement of Mar. 1, 1939, as evidence showing the intention of the parties as to the meaning of the expression which I have just read. In my judgment it throws no light whatever on any topic which I have to consider. The words in the document of Mar. 1, "European war" are the same as in the actual agreement, and, indeed, the option agreement, except for the one little point I have mentioned in regard to the word "any," contains the form of the agreement which I have to construe. That being so, I have to come to a conclusion, first of all, as to whether this is an agreement which within sect. 1 (1) and (2), and sect. 2 (1) is an agreement for the duration of the war. The parties have on each side admitted that this is an agreement for the duration of the war, and that it is accordingly validated, so far as the duration of the term is concerned, by the statute of 1944. With that in mind I then pass on to consider two further points: (1) that notwithstanding the statute of 1944, certain parts of the *habendum* of Sept. 3, 1939, still bind the two parties, and (2) that the notice given to terminate the tenancy was one which could not be given, either because the statutory provision itself had not been obeyed or because the terms of the agreement, so far as then subsisting, were not obeyed, and, finally, that in any event the notice was a bad notice because it is said that it was not directed to the tenants at all.

I have had some doubt, and still have some doubt, as to whether the language used in this agreement brings the case within the mischief which the statute of 1944 was intended to allay, because it deals with "a threatened war" as well as "national emergency," and, secondly, because it seems to me to deal with three things and not one, which seems to be the notion contained in subsect. (2) of sect. 1, whereas the parties have argued the case before me upon the basis that the effect of the *habendum* in the tenancy agreement is that the parties have purported to create a term for the duration of the war. I propose to deal with it on that basis.

I think that possibly this statute, which is intended to preserve and give effect to what the parties were intending to do, should be given a wide construction, and accordingly I shall attempt to deal with the matter upon broad lines, and not too meticulously. Both counsel practically invited me to deal with this agreement upon the terms that the statute of 1944 applies to it. That being so, the question is: Has the statute not merely substituted another term for the term which the parties thought they were creating, but has it got rid of that part of the original term or the conditions of the original term which provided for a time for its determination, namely, "until such national emergency or war shall have been terminated by the signing of terms of peace or such other declaration by the Government that the national emergency no longer exists."

Counsel for the defendants says there is nothing in the statute which prevents that part of the *habendum* continuing in force, and he says that there never has been a signing of terms of peace—that is admitted—and that there never has been a declaration by the Government, whatever that expression may mean, that the national emergency no longer exists, and, accordingly, notwithstanding that the term is still a good term by virtue of the Act of 1944, the landlord, the plaintiff, is unable to take advantage of the provisions of subsect. (1) of sect. 1 and give a notice when the war ends to put an end to the statutory term of 10 years.

Again I think I must construe this statute benevolently, and I think that the words which I have read: "until such national emergency" and so on, are a part of the language used in order to express the intention of the parties that this was to be for the duration of the war. Supposing somebody else should take a different view and form a different opinion from me about that, then I have to consider the meaning of the words "or such other declaration by the Government that the national emergency no longer exists." One of the difficulties here is the word "other," because the signing of the terms of peace is not a declaration by the Government, and I do not understand what value I am to give to the word "other." I do not think I can give the word any meaning, grammatically, there, and I have to examine whether there is a declaration by the Government that the national emergency no longer exists.

That brings me to consideration, first of all of subsect. (2) of sect. 2 under which:

> His Majesty may by Order in Council declare what date is to be treated for the purposes of any tenancy agreement as (*a*) the date of the end of the war . . .

and whether the agreement is to be construed in accordance with an Order in Council, as the end of that subsection says:

> . . . unless the context requires, or it is shown by admissible evidence, that it should be otherwise construed.

I put that in this order because something happened under that subsection which is relied upon by counsel for the plaintiff, not merely for the purpose of the application but also for the purpose of looking to see whether there has been a declaration by the Government that the national emergency no longer exists, if the defendants' rights are governed, and only so by the document, for the purpose of this agreement.

On June 11, 1945, His Majesty made an Order in Council (The Tenancy Agreements (End of the War in Europe) Order, 1945), under subsect. 2 of sect. 2, and the operative part of that Order is as follows:

> For the purpose of the construction of any tenancy agreement, the ninth day of May, nineteen hundred and forty five, shall . . . be treated as the date of the end of the war and of hostilities as respects each and all of the States in Europe with which His Majesty has been at war at any time since the third day of September, nineteen hundred and thirty-nine, and of the emergency (not being defined by any Act of Parliament) occasioned thereby.

If the statute applies fully, as I think it does, to this tenancy agreement, that is sufficient to reach the situation that on May 9, 1945, and thereafter, it was possible for the landlord to serve the notice which he has served in order to bring to an end the notional term of 10 years. But counsel for the plaintiff, as I have said, uses it also for another purpose, and he says that when that is promulgated by the Government of the day it becomes "a declaration by the Government" within the terms of the agreement that the national emergency no longer exists, and for that purpose he put in evidence a statement by the then Lord Chancellor calling attention to the Order in Council, and he says that that amounts to a declaration by the Government. I feel a difficulty about that construction, and I am unable to accept it as a declaration by the Government. It looks to me as being no more than what it purports to be, namely, an expression of the desire of the Lord Chancellor to draw the attention of landlords and tenants and their advisers to the Order in Council having been made.

I think counsel for the plaintiff was on rather firmer ground when he referred to a statement made by the then Prime Minister, Mr. Churchill, in a broadcast message on May 8, 1945, in which he announced that the act of unconditional surrender by the enemy was signed at 2.41 a.m., on May 7, to be ratified in Berlin on May 8. The Prime Minister of the day plainly was declaring that the national emergency and state of war with the enemy in Germany—the German war—had come to an end. It may be said that a statement by the Prime Minister of the day is not a declaration by the Government. I do not think, for the purposes of this agreement, I ought to read " a declaration by the Government," as meaning something which is a joint and several *dementi* of each and all members of the Cabinet, or, perhaps more absurdly, a joint and several *dementi* by all those people, including under-secretaries and all the rest of them, who may be said broadly speaking, to be in the Government. I think a declaration by the Prime Minister, not as an individual but as Prime Minister, on these lines ought to be taken as a declaration by the Government. What follows upon it I do not know. Everybody regarded the war as at an end, and the state of emergency, not being one which is defined by any Act of Parliament in particular, as having come to an end. The matter is by no means easy of decision : I hope it will not be thought that I have decided it hastily, but it seems to me, having regard to what these parties were trying to do, and having regard to the substitution of the term of 10 years for the duration in the statute of 1944, subject to the statutory conditions, that I ought to read this as a declaration of the Government, as being satisfied by what the Prime Minister of the day said, and by the promulgation of the Order in Council in addition, which was after June 11, 1945. That is how the case strikes me, and that is my decision upon that part of it.

It is now necessary that I should go on to deal with what the plaintiff says in regard to this notional period of 10 years being brought to an end—the statutory substituted term of 10 years. I must just refer once again to the terms of the statute : " if the war ends before the expiration of that term " the landlord, subject to a right exercisable by the landlord or the tenant, can determine the tenancy by at least one month's notice in writing given after the end of the war, and that means in one case after May 9, or in the other case after June 11. Has the plaintiff effectually done that ?

I should now state some further facts. On Feb. 14, 1945, the plaintiff's solicitors wrote to the defendants' solicitors a letter in which this passage occurs :

> In view of the state of affairs in Europe at the present time it seems not unreasonable to anticipate that in the near future the war in Europe will have ended and our client has, therefore, asked us to write to say that he will expect possession of Marks Barn at the earliest time it is possible to obtain it under the terms of the agreement. We write you so that the school will have ample notice to consider its position and to look out for fresh premises.

That was acknowledged and nothing more happened.

On May 17, the plaintiff's solicitors wrote again, a letter in which this passage occurs :

> On Feb. 14 last, we wrote you giving you notice that on the termination of the war in Europe our client would expect possession of the above property in accordance with the terms of the agreement. The Government made the declaration that the national emergency in Europe was over on the 8th inst., and our clients are now entitled to possession and arrangements should be made by you to give up possession immediately.

On May 22 the defendants' solicitors reply and they say :

> We have not seen any such declaration but we have observed in the Press an announcement that the Prime Minister has called attention to the proposed Order in Council in regard to the matter which so far as we are aware has not yet been issued.

On June 15 the plaintiff's solicitors write again and say :

> The position has now been clarified by an Order in Council and it seems clear, and we have been so advised, that our clients are now entitled to terminate the agreement with the school by giving one month's notice. We have, therefore, sent a notice to quit to the school and we enclose a copy for your use.

On the same day another letter was sent to the directors of Beaufront, Ltd., by the plaintiff's solicitors, enclosing the notice to quit in question.

I will abstain for the moment from referring to the notice to quit, but the notice was acknowledged and the letter was acknowledged by the defendants' solicitors in a further letter of June 18, 1945, in which the defendants' solicitors say this:

> We are in receipt of your letter of the 15th inst., enclosing copy of notice to quit. The registered office of the company is now Marks Barn, Crewkerne and a notice addressed there will be regarded as due service. We can only repeat that our clients are doing everything that is humanly possible to secure other premises.

I ought to add that a member of the firm of the defendants' solicitors is one of the directors on the defendants' board, and it is quite plain that the notice in question was brought to the attention at least of that director, and it is not suggested it was not brought to the attention of any of the other directors. Indeed, the notice itself now comes out of the custody of the defendants' solicitors, and the point that they take is that the notice is no notice at all; in other words, it is a bad notice, and the reason they say it is a bad notice is because the addressees of the notice are the directors of Beaufront, Ltd., and not Beaufront, Ltd. Indeed, counsel for the defendants says if it had been addressed to the secretary of Beaufront, Ltd., it would have been a bad notice, and the question which I have to determine is: Is a notice in that form a good notice or a bad notice?

It is quite plain that notices of this sort are really documents of title; they are unilateral in one sense, and certainly not consensual documents. They have the object of bringing to an end, if valid, an interest in the land, which is an estate in the land, a term in the land enjoyed by the tenant, and I think they have to be looked at with strictness in order to see whether they are actually in compliance with the rule which is illustrated by the decision of the Court of Appeal in *Hankey* v. *Clavering* (2).

In the course of the judgment in that case LORD GREENE, M.R., said this ([1942] 2 K.B. 326, at pp. 329, 330; [1942] 2 All E.R. 311, at pp. 313, 314):

> Notices of this kind are documents of a technical nature, technical because they are not consensual documents, but, if they are in proper form, they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They must on their face and on a fair and reasonable construction do what the lease provides that they are to do.

I do not think it makes any difference for this purpose that this provision is contained in the statute which creates what I call a substituted or statutory term. The judgment continues:

> It is perfectly true that in construing such a document, as in construing all documents, the court in a case of ambiguity will lean in favour of reading the document in such a way as to give it validity, but I dissent entirely from the proposition that, where a document is clear and specific, but inaccurate on some matter, such as that of date, it is possible to ignore the inaccuracy and substitute the correct date or other particular because it appears that the error was inserted by a slip.

I direct myself in accordance with that decision, and the question which I have to determine is primarily a question of construction. There is no doubt that a notice to quit when given by a landlord should be given to the proper person, that is to the immediate tenant of the giver or his executor or assignee, and not to a mere under-tenant: see FOA ON LANDLORD AND TENANT, 6th Edn., p. 673. At p. 765 the author goes on to say:

> A notice to a corporation should be addressed to the corporation . . . An omission, however, to address a notice to quit is cured if notice is proved to have been delivered to the proper person.

and for that he cites *Doe* v. *Wrightman* (3). He then goes on to deal with an error in the Christian name of the person and says:

> A mistake in the Christian name of the person (a tenant) to whom it was given was held to be cured by his having kept the notice without objection, there being no other tenant of the name on the property of which the premises demised form part.

That is *Doe* v. *Spiller* (4). That was a mere *falsa demonstratio*.

Before I can determine the point I think I must look a little more closely at the rest of the notice. After being addressed to the directors of Beaufront, Ltd., it goes on to say: "Registered office formerly at Beaufront, Camberley, Surrey, but now at Marks Barn, Crewkerne, Somerset. As solicitors and agents for " -the landlord—" we hereby give you one month's notice to quit and deliver up possession of the furnished dwelling-house," etc. Counsel for the defendants says "you" means the directors, and he says when the document goes on to say "together with the ground thereto belonging and which you occupy," that is again a reference to the directors. But the document does not stop there; it says "which you occupy and enjoy under the terms of an agreement dated Sept. 3, 1939." Now there is no other objection to this notice to quit at all. It is precise in form. The length of time is right. The agreement was Sept. 3, 1939, and the only dubiety in the matter at all arises from the use of the word "you" when the document starts by being addressed to the directors. Now a limited company must, of course, act through agents. If it had been addressed to Beaufront, Ltd., the document would still have had to be delivered to an agent or else sent through the post to the registered office of the company, and there have been dealt with by an agent. I think that is within the language used by Lord Greene, M.R., in *Hankey* v. *Clavering* (2)—that in a case of ambiguity the court will favour the reading of the document in such a way as to give it validity—I ought to construe this as being validly a notice to terminate the tenancy of the limited company under the agreement of Sept. 3, 1939, as altered by sect. 1 of the statute of 1944. It was obviously so treated by the defendants' solicitors. The correspondence which I have here shows quite plainly they knew all about it. They knew it was coming. They had been warned about the declaration by the Prime Minister of May 8; they had been warned of the Order in Council, and it seems to me that any solicitor looking at this document would see that while, perhaps unfortunately for the plaintiff, it is addressed to the directors, it is only addressed to them, not in their capacity as tenants, not as parties to the agreement of Sept. 3, but as being the persons acting on behalf of the limited company.

It seems to me that the fair construction of this document is that it is a notice to the limited company. The plaintiff in this case is entitled to succeed and is entitled to the order for possession for which he asks.

There will be judgment for the plaintiff with costs.

Judgment for the plaintiff with costs.

Solicitors: *Woodcock, Ryland & Co.*, agents for *Louch, Willmott & Clarke*, Langport (for the plaintiff); *Reid Sharman & Co.*, agents for *Thomas Dodds & Son*, Newcastle-upon-Tyne (for the defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

SZALATNAY-STACHO *v.* FINK.

[King's Bench Division (Henn Collins, J.), November 19, 20, 21, 22, 23, 28, December 7, 19, 1945.]

Libel—Privilege—Absolute privilege—Official communications on State matters—Level of such communications—Conflict of laws.

Conflict of Laws—Libel—Privilege—Official communications on State matters.

The defendant, who was chief military prosecutor in the Czechoslovak army, forwarded to the Military Office of the President of the Czechoslovak Republic, then in England, a number of written statements, by Czechoslovak soldiers, concerning the activities of the plaintiff while Czechoslovak diplomatic representative in Egypt. In a covering letter he formulated against the plaintiff, charges of serious criminal offences, of gross disloyalty to his country and of being wholly unfit to be employed in the Czechoslovak diplomatic service. In an action by the plaintiff for libel it was contended on behalf of the defendant that the communication was absolutely privileged either as being a step in the proceedings of a military tribunal or as being an act of state, and, in the alternative, that the defendant acted without malice on an occasion of qualified privilege:—

Held: (i) as the communication had nothing to do with any disciplinary matter and did not touch or concern any matter over which any military tribunal had, by Czechoslovak law, any jurisdiction, it was not a step in the proceedings of a military tribunal.

(ii) passing as it did at a lower level than that between Ministers of the Crown it would not, in English law be absolutely privileged.

Chatterton v. *Secretary of State for India* (1) *applied.*

(iii) by the comity of nations the court should extend to the communication the same protection as the Czechoslovak courts would afford, and as no action would lie in those courts against the defendant, a state official acting as such, the communication was absolutely privileged.

Hart v. *Gumpach* (2) *applied.*

[**EDITORIAL NOTE.** It is well established that absolute privilege from proceedings for libel, where the document in question is an act of state, does not exist where the communication passes between persons at a lower level than that of ministers. It was indicated, however, in *Hart* v. *Gumpach* (2) that it is contrary to the comity of nations, and therefore against the public interests of this country, to entertain a suit involving an inquiry into reports made by an officer in the service of a foreign state to the Government of that State, provided that such communications are entitled to absolute protection by the law of that State. In this case it is proved as a fact that the document would be so protected by Czech law, and the judge accordingly holds that the defence of absolute privilege succeeds, by virtue of the principle laid down in *Caldwell* v. *Vanvlissengen* (1851), 9 Hare 415, the headnote of which is as follows: "If in any case, the rights of foreigners out of their own country are governed by their own laws, it is not by force of those laws themselves, but by the law of the country in which they may be, adopting those laws as part of its own law for the purpose of regulating such rights."

AS TO ABSOLUTE PRIVILEGE OF OFFICIAL COMMUNICATIONS ON STATE MATTERS, see HALSBURY, Hailsham Edn., Vol. 20, p. 468, para. 568; and FOR CASES, see DIGEST, Vol. 32, pp. 111, 113, Nos. 1428, 1429, 1444.

AS TO PRIVILEGED OCCASION, see HALSBURY, Hailsham Edn., Vol. 20, p. 846, para. 568; and FOR CASES, see DIGEST, Vol. 32, pp. 110, 111, Nos. 1426-1429.

AS TO APPLICATION OF FOREIGN LAW, see HALSBURY, Hailsham Edn., Vol. 6, p. 195, paras. 235, 236; and FOR CASES, see DIGEST, Vol. 11, pp. 307-309, Nos. 9-17.]

Cases referred to:

*(1) *Chatterton* v. *Secretary of State for India*, [1895] 2 Q.B. 189; 32 Digest 111, *1428*; 64 L.J.Q.B. 676; 72 L.T. 858.

*(2) *Hart* v. *Gumpach* (1873), L.R. 4 P.C. 439; 32 Digest 112, *1444*; 42 L.J.P.C. 25.

ACTION for libel. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *J. Foster* for the plaintiff.

G. O. Slade, K.C., and *Arthian Davies* for the defendant.

Cur. adv. vult.

HENN COLLINS, J.: The plaintiff is a Czechoslovakian national, and complains of the publication in England by a fellow national of defamatory matter, charging the plaintiff with serious criminal offences and of gross disloyalty to his country, and with being wholly unfit to be employed in the Czechoslovak diplomatic service. The charges relate to a time when the plaintiff was the Czechoslovak diplomatic representative in Egypt. It is not material to particularise the charges made against him any further because there is no plea of justification in this action, which proceeds upon the footing that none of the charges are well-founded. The publication is admitted, and the sole defence is privilege, either absolute or qualified.

The matter complained of takes the form of a letter, with its enclosures, addressed by the defendant, who was the Chief Military Prosecutor in the Czech army—a position which corresponds roughly with our Judge Advocate General—to the Military Office of the President of the Czech Republic. The letter transmitted a number of written statements from several Czech soldiers touching the activities of the plaintiff in Egypt while he was upon diplomatic service there. By far the greater part of those statements consists of hearsay, but a small part of them deals with matters within the knowledge of those making the statements.

The covering letter was in these terms. It is headed with letters which in the Czech language indicate "Confidential," and is dated Nov. 17, 1941:

Re Dr. Szalatnay-Stacho—accusation, [and then there is a reference to enclosures]. The Military Office of the President of the Republic, London. The General Prosecutor received on several occasions information from members of the Czechoslovak Army in England regarding the activity of the Czechoslovak Envoy in Cairo, Dr. Szalatnay-Stacho. The above-named being a civil person, the General Prosecutor could not institute criminal proceedings and has, therefore, ordered administrative examinations of all persons who could elucidate the question. The contentions of Corporal Milos Kuna, which are supported in particular by the statement of Lieutenant Colonel Josef Bartik as regards the opinion of the French and English Intelligence Service of the above-named Czechoslovak Envoy, are so grave that the General Prosecutor considered it his duty to bring the matter to the notice of the President of the Republic. The Envoy, Dr. Szalatnay-Stacho is accused of the following . . .

and then follow four numbered paragraphs each of which sets out one or more sections of the Czechoslovak criminal law which it is alleged have been contravened. I do not propose to read those paragraphs nor the documents which are fully set out in the statement of claim.

Whether the statement that the plaintiff " is accused of " the crimes set out in the numbered paragraphs is to be taken as the defendant's formulation of the offences which the statements tend to support, if they are accepted as true, or whether it is to be taken as a statement of charges made by the defendant, is immaterial upon the question of absolute privilege, with which I now propose to deal.

Absolute privilege is claimed for what may conveniently be called the " Dossier " either as being an act of state, or as being a step in the proceedings of a military tribunal. If I am to judge the communication by our standards, then in my view it is neither an act of state, nor a step in the proceedings of a military tribunal to which the protection of absolute privilege would attach. It was not a step in the proceedings of a military tribunal because this communication had nothing to do with any disciplinary matter, and did not touch or concern any matter over which any military tribunal had by Czech law any jurisdiction ; and this privilege is conferred for the preservation of military discipline and administration. I think the defendant's letter of Nov. 17, 1941, which is the letter complained of, and his letter dated Mar. 22, 1944, set out the position very fairly. It was because, as military prosecutor, he had no jurisdiction, that, rightly or wrongly, he took the step he did, and reported to the office of the President.

Still less, perhaps, do I think the dossier would be protected as an act of state. In my judgment that protection is afforded only to communications passing at a higher level, so to speak, than this one. I take the passage in FRASER ON LIBEL, 6th Edn., p. 197, as my standard. It was approved in *Chatterton* v. *Secretary of State for India* (1) ((1895) 2 Q.B. 189, at p. 191), in these terms, by LORD ESHER :

> I shall not go through the authorities which have been cited. In all of them the law seems to have been stated to the same effect, and it seems to me to be accurately summed up in FRASER ON THE LAW OF LIBEL AND SLANDER, where he says (6th Edn., p. 197), after stating that no action lies in respect of a defamatory statement in a report made in the course of military or naval duty. " For reasons of public policy the same protection would, no doubt, be given to anything in the nature of an act of state, *e.g.*, to every communication relating to state matters made by one minister to another, or to the Crown." I adopt that paragraph as stating the law correctly.

There is no authority, so far as I am aware, which indicates that communications passing at a lower level than those between Ministers require this exceptional protection.

But that does not dispose of the question of absolute privilege, because I find that in Czech law, which for me is a question of fact, this communication could not have founded any action, civil or criminal. I am not quite sure how far the experts in law who have been called before me differed upon this question, if at all, but if and so far as there was any difference I accept the categorical statement of Dr. Hartmann that the provisions of the Imperial Decree of 1806, No. 758, make such an action as the present inconceivable in Czechoslovakia, because the defendant was a state official, and acting as such. The fact that he had by Czech law, no official cognisance of the matters in hand is not, I think, a material consideration upon this aspect of the case. If he was, in fact, exceeding his official duty, and in some respects he certainly was, the plaintiff's remedy is to call in question the excess by some other form of procedure. In passing I may mention that the plaintiff appears to have done this, and without success. All the circumstances in which the defendant acted, and all the criticisms of his action had been put to Dr. Hartmann, and his answer, to which I have referred, was given in the light of those circumstances.

That raises the question whether by the comity of nations, His Majesty's courts should extend to communications such as this, passing between Czech nationals, on Czech affairs, the same protection as their own domestic courts would afford. It is, of course, only by comity that protection could be afforded, even to the acts of state of a foreign government, for we, here, have no direct interest in the good government of any foreign power, however friendly—but equally, of course, we have an indirect interest ; and it has been indicated in *Hart* v. *Gumbach* (2) ((1873) L.R. 4 P.C. 439, at p. 465), that in some circumstances it may be against the public interests of this country to entertain a suit involving an inquiry into reports made by an officer in the service of a foreign state to the government of that state, and that one of those circumstances would be the fact that such a communication would be protected in the foreign state. That, as I have found, is the case with this communication.

It is proper in this case to apply the doctrine which the Privy Council thought it might be proper to apply in the very circumstances which have arisen here. If the comity of nations is ever to be applied, it should surely be applied where the document in question was published in this country only because the foreign government, being our allies, were our guests while their unhappy country was occupied by our common enemy. I, therefore, think I ought to apply it, and to hold that this dossier is absolutely privileged.

The fact that by the general Czech law no action would have lain in Czechoslovakia at the suit of the plaintiff against the defendant, even if he had not been a state official, for lack of pecuniary loss, or special damage, as we should call it, has, of course, no bearing upon the question of absolute privilege, and I have disregarded it in this relation.

That really disposes of the action, but in case it is carried further, I think I ought to express my view upon the question of qualified privilege, and malice. As I understand the argument for the plaintiff, there are two grounds upon which I ought to hold that the occasion was not privileged. First, that there was no duty, right or interest in the defendant to make the communication, or if there was, that there was no corresponding duty, right or interest in the recipient to receive it. And, second, that extraneous matter was introduced which went beyond anything which the duty, right or interest, if there were any, could reasonably require.

If and so far as this second ground lies apart from the question of malice, I do not think there is anything in it. The statements which the letter covered may not have been adequate to support all the charges which the defendant's letter formulated, and the charges may be referred to or based upon a wrong and misread paragraph of the laws. These are, no doubt, matters material on the question whether malice should be inferred, but I do not find one word in the documents which does not touch or concern the matter in hand. So far, therefore, as concerns excess of the occasion, if I may so label this contention, I hold the occasion privileged.

The first ground, the absence of reciprocal duty, right or interest, presents more difficulty, for though the question whether an occasion is privileged is one of law, its foundation in this case, namely, the duties, rights and interests of sender and recipients, rests upon Czech law—a question of fact for me—upon which there was no little difference of opinion between the experts. It is never easy to project one's self, so to speak, into another system of law, and forsaking all notions derived from English law, to surrender one's mind to it without reserve. And it is the more difficult when the system refers all duties, rights and interests to the text of formal written laws, and such appears to be the Czecho-Slovakian system. If there is any residual outside the written law I am told it is small, and for the present purposes immaterial.

I must, therefore, address my mind to the written law, and while avoiding all temptation myself to construe it, or rather the English translations of it, resolve as best I can the questions of fact which arise from the differing views of the experts. Dealing, then, for the moment solely with the question of reciprocal duties, rights and interests, I find that the defendant had a duty, as a citizen, which was certainly no less because of his official capacity, to hand on the information contained in the statements attached to his covering letter of Nov. 17, 1941.

The defendant was under a duty to hand on this information to authority—

there is no definite article in the Czech language—and there was strong controversy as to who, in the then existing circumstances (for there was not, in Nov., 1941, a full complement of Ministers) was indicated by "authority." The conclusion I have come to is that while a Minister is primarily indicated the President of the Republic falls within the description; and that the defendant, though he could have performed his duty in another way, was discharging an obligation in a legitimate way by addressing himself to the President.

There was controversy also as to whether the President had an interest in receiving the communication. I think this was in substance the same controversy as arose about the meaning of "authority." It was said, among other arguments, that the President, since he had no executive authority in criminal matters, except to pardon or remit sentences, was not "authority" within the meaning of the law in question; but as I find that he was, I accept Dr. Hartmann's opinion that the President could at least transmit the matter to an appropriate department of state, and had an interest in receiving it for that purpose, if for no other. It seems to me that since the defendant discharged his duty in addressing the President, the President must have had a correlative interest or duty to receive the information. Whether, having received it, the President had or had not thereupon any duty or executive power, does not seem to me to touch the question.

"But," the plaintiff contends, "even if the President was a proper recipient of the dossier, the Military Office or Chancellery of the President was not." There is nothing, in my judgment, in this contention. The Office or Chancellery is merely the President's secretariat, and the division of it into civil and military branches, merely a matter of internal office management. The Office, Chancellery or Secretariat, by whatever name it should be called, is the *alter ego* of the President for the receipt of matters directed to the President in his official capacity, and the inevitable channel for all official communications to him. The defendant's letter was, in fact marked "confidential" so as to insure that it should go directly to responsible officers, and not to some mere clerk in the office. I, therefore, hold the occasion to have been one of qualified privilege.

Lastly, as to malice. In the sense of any personal ill-will, it is out of the case. The parties had never met or had any dealings. The malice must, therefore, be of some synthetic kind, if I may use the expression. When all is said and done, the word "malice" indicates a state of mind, and the question I have to answer is: Given the occasion, was the defendant using it in singleness of mind in pursuance of his duty, or was he not? That is a question of fact, to be deduced from all the circumstances.

Much of the criticism of the defendant's conduct was to the effect that in his official capacity he had nothing whatever to do with offences by civilians, and that to use the machinery which his office provided for getting further statements from a witness, was to travel altogether outside his province. But one must remember that the information came to him in his official capacity, probably because the informants were soldiers, and that thereupon it became incumbent upon him to hand it on to a proper quarter. If in those circumstances he used the machinery at his disposal to see whether the witnesses adhered to their stories, and to see whether they could be checked by others, ought one to infer some indirect motive? His doing so may have involved a technical mistake, but it seems to me to have been a most natural one for a man in the defendant's position to have made, and I am satisfied it was made in all honesty of purpose.

Again, it is said that the defendant formulated charges which the material before him did not warrant. In the first place, I do not read the covering letter as doing more than formulating the charges which, in the view of the writer, the attached statements tended to support. He may have been wrong in law in thinking that the evidence, if accepted, proved or tended to prove offences under the laws which he cited, and, indeed, in one or more instances I think he was wrong, but again I think he was quite honestly mistaken, and that he was neither adding to nor attempting to add to the facts which the statements disclosed.

It was urged, too, that the statements disclosed were rumour, tittle-tattle, and that to formulate any charge upon them was reckless. This argument has some attraction for a mind trained in a system which rigidly excludes hearsay; but that is not the Czech system. Hearsay is as freely admitted in Czech law as direct evidence. Its weight is a matter for the tribunal before whom it is adduced. It would, therefore, have been quite wrong for the defendant to disregard or exclude matter grounded upon hearsay to which any degree of credence could have been given; and the more so because he had taken some steps to check it. He was not adjudicating, but forwarding materials upon which others might or might not act, and in doing so I find no indication that the defendant was actuated by any indirect motive.

The other criticisms of the defendant's conduct, from which I was invited to find malice, were really variants of those I have already dealt with, and I do not propose to set them out in further detail. First and last I have to ask myself whether or not the defendant was acting in good faith in the sense I have already indicated; and I am convinced that he was.

In the result, therefore, there will be judgment for the defendant with costs.

Judgment for the defendant with costs.

Solicitors: *Dehn & Lauderdale* (for the plaintiff); *Blyth, Dutton & Co.* (for the defendant).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

GREEN *v.* GREEN.

[Probate, Divorce and Admiralty Division (Jones, J.), December 20, 1945.]

Divorce—Desertion—Continuation of desertion—Non-cohabitation clause—Subsequent deletion of clause—Previous period of desertion added to period subsequent to deletion of clause—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 6 (3).

The parties were married in 1920 and lived together until Oct., 1927. Earlier in that year the respondent had informed the petitioner that he was not prepared to live with her any longer and suggested separation by deed. The petitioner refused. In Oct., 1927, the respondent told the petitioner to leave the house and she went to live with her parents. In Jan., 1930, the petitioner obtained from the magistrates an order for maintenance which contained the usual non-cohabitation clause. In Jan., 1944, on the application of the petitioner the non-cohabitation clause was struck out from the maintenance order. A year later the petitioner presented a petition for dissolution of marriage on the ground of the respondent's desertion. The parties had not resumed cohabitation since Oct., 1927:—

Held: under the Matrimonial Causes Act, 1937, s. 6 (3), the period of 2 years' desertion which elapsed before the maintenance order was obtained could be used by the petitioner as if it had elapsed immediately before the presentation of the petition; and as that period, added to the period of 1 year's desertion which had elapsed since the non-cohabitation clause had been deleted from the maintenance order, made up the statutory period of 3 years' desertion, the petitioner was entitled to a decree.

[**EDITORIAL NOTE.** It was held in *Gatward* v. *Gatward* ([1942] 1 All E.R. 476) that desertion is not automatically reconstituted on deletion of a non-cohabitation clause. In the case under consideration the conduct of the husband after the deletion of the clause showed an intention to continue the desertion and, moreover, the wife alleged that the clause had been inserted in error, against her wishes. The court accordingly allows the periods of desertion before and after the currency of the non-cohabitation clause to be added together in order to bring the aggregate period up to the statutory three years.

As to Non-cohabitation Clause in Magistrates' Order, see HALSBURY, Hailsham Edn., Vol. 10, p. 659, para. 969; and for Cases, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Case referred to:

(1) *Mackenzie* v. *Mackenzie*, [1940] 1 All E.R. 256; Digest Supp.; [1940] P. 81; 109 L.J.P. 9; 162 L.T. 228.

Petition by the wife for dissolution of her marriage on the ground of the husband's desertion. The facts are fully set out in the judgment.

Acton Pile for the petitioner.

Jones, J.: The parties in this case were married on Oct. 2, 1920, and they lived together until Oct. 1927. Before that, in Aug., 1927, the respondent had told the petitioner that he was not going to give her any more money for her maintenance, and if she wanted any more she would have to take the matter to court; and then there was a letter written by some solicitors on his behalf to her father, saying that he was not prepared to live with her any longer and suggesting that a separation agreement should be executed. Apparently her father was in favour of the execution of the separation deed, but she showed no desire to be separated from her husband and she refused to enter into an agreement. In Oct., he told her to leave the house, and she went to her parents. He then, she believes, gave up the house and went away, and she heard no more of him. She did not take any steps against him for maintenance because she was living with her parents, and a period from Oct., 1927, to Jan., 1930, passed during which I find he had deserted her. He made no attempts to ask her to resume the matrimonial life, nor, indeed, did he take any notice of her at all. Then in Jan., 1930, she took out a summons for maintenance, and an order was made, and in this order there appears a clause which provides that the applicant be no longer bound to cohabit with her husband, the defendant. The petitioner says she had no desire for any such order, and it would not appear there was any necessity for any such order, because she had not objected in any way up to then to living with her husband; she had not alleged, for instance, persistent cruelty and asked to be protected from him; what she wanted, as I find, was to resume life with him; and, therefore, this paragraph that she be no longer bound to cohabit with her husband seems to be most unsuitable, and I have very little doubt it was inserted by mistake. But that does not make any difference, according to the decision of the Court of Appeal in *Mackenzie* v. *Mackenzie* (1), as I read it. It appears to me to be laid down quite clearly that provided the clause appears in the order it is binding. I think it might be possible to show that the minutes of the justices contained an order to a different effect, for the purpose of showing that this particular copy of the order was not correct, but that has not been done in this case, and, therefore, I feel bound to hold that during the period that this order was in force, that is to say, during the period during which the clause to which I have referred was effective, there was no desertion of the petitioner by the respondent. That period was from Jan., 1930, until Jan., 1944, when she made an application to the justices and asked them to vary the order by deleting the non-cohabitation clause, and that was done.

Counsel for the petitioner relies on the Matrimonial Causes Act, 1937, s. 6 (3), which provides as follows:

> For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for [a separation order—I think I can shorten it like that] shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

Now I hold that to mean this, that the period of desertion which elapsed before this order was obtained can be used by the petitioner as if it had elapsed immediately before the presentation of the petition upon which she is relying at the present time. That period was a period of 2 years and 2 months, from Oct., 1927, to Jan., 1930. Since the non-cohabitation clause was removed from the order, which remains still in force, there has been a period of a year, during which I find that the respondent has continued to desert the petitioner. He would have notice of the application to delete this clause, and, therefore, if he had wanted to do so, he could have made a suggestion to her about resuming their matrimonial life, but he has not done so.

In those circumstances, therefore, I have come to the conclusion that the right course is to add to that period of 1 year which has passed immediately before the presentation of this petition the period of 2 years and 2 months which elapsed before the application for the order in 1930. That makes a period of 3 years and 2 months, and I hold that that period of 3 years and 2 months is a period of 3 years immediately preceding the presentation of the petition.

In those circumstances, therefore, as the parties have not resumed cohabitation, I find that that subsection applies to this case. I am satisfied that otherwise the case is proved, and, therefore, I pronounce a decree nisi.

Decree nisi with costs.

Solicitors: *W. W. Box & Co* (for the petitioner).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

THE MINISTER OF PENSIONS *v.* WALTON.

[King's Bench Division (Denning, J.), January 29, 1946.]

Emergency Legislation—Compensation—Civil defence volunteer—Injuries sustained while proceeding to place of duty—Whether arising out of and in the course of performance of duty—Application of decisions under Workmen's Compensation Act—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *s.* 8 (1).

The appellant was a full-time member of the National Fire Service. On Sept. 5, 1943, while he was cycling, by a direct route, from his home to his place of duty, two dogs ran into the front wheel of his bicycle. He was thrown off and sustained severe physical injuries. There was at the time no enemy incident in progress, no air-raid warning and no alert had been sounded. It was a condition of the appellant's employment that when off duty he was never to leave the borough without permission from his chief officer :—

Held : (i) the cases decided under the Workmen's Compensation Act were in point and could properly be treated as giving guidance in considering the provisions of the Personal Injuries (Emergency Provisions) Act, 1939.

(ii) the accident occurred in the appellant's own time ; he was free to go at any time he liked and choose his own route to the place where he was to sign on for duty ; therefore the injury did not arise out of and in the course of the performance by a volunteer of his duty and, consequently, was not a war service injury within the definition in the Personal Injuries (Emergency Provisions) Act, 1939, s. 8 (1).

Alderman v. *Great Western Ry. Co.* (1) *applied.*

[**EDITORIAL NOTE.** The words " out of and in the course of " the performance of duty in the Personal Injuries (Emergency Provisions) Act, 1939, appear to have been taken from the workmen's compensation legislation, and decisions under those Acts are, therefore, relevant in deciding cases of war injury. It has been held in such cases that the test is whether the workman at the time of the accident was doing something in discharge of his duty and no distinction can be made because the injured man is a volunteer in the civil defence service. The case may be compared with *Re Drake* ([1945] 1 All E.R. 576), another N.F.S. case decided by reference to the workmen's compensation cases involving locality risk.

For the Personal Injuries (Emergency Provisions) Act, 1939, s. 8 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1065.]

Case referred to :

*(1) *Alderman* v. *Great Western Ry. Co.*, [1937] 2 All E.R. 408 ; Digest Supp. ; [1937] A.C. 454 ; 106 L.J.K.B. 335 ; 156 L.T. 441.

Appeal from a decision of a Pensions Appeal Tribunal. The facts are fully set out in the judgment.

C. L. Henderson, K.C., and *Hon. H. L. Parker* for the appellant.

Denning, J. : This is an appeal by the Minister of Pensions against the decision of the Pensions Appeal Tribunal in the case of the respondent, who was a full-time member of the National Fire Service.

The point of law which has to be decided in this case is as to whether he sustained a war service injury such as to entitle him to a payment under the Personal Injuries (Emergency Provisions) Act, 1939. By sect. 8 (1) of the Act :

> " War service injury " in relation to a civil defence volunteer, means any physical injury which the Minister certifies to have been shown to his satisfaction to have arisen out of and in the course of the performance by the volunteer of his duties as a member of the civil defence organisation to which he belonged at the time when the injury was sustained, and (except in the case of a war injury) not to have arisen out of and in the course of his employment in any other capacity.

The respondent was a member of an organisation known as the National Fire Service, and at 8.50 a.m., on Sunday, Sept. 5, 1943, he was proceeding on his pedal cycle from his home in Newport to his place of duty, in order to report for duty at 9 a.m., for his normal period of duty, when at the bottom of the road where he lives two dogs ran from a garden into the road right into the front wheel of his bicycle. He was thrown off and dislocated his right shoulder and fractured some other bone, thereby sustaining physical injuries.

The question is whether they were war service injuries. There was no enemy incident in progress, no air-raid warning, and no alert had been sounded, and further, he had not reached his station to sign on. He was proceeding to duty at the time of the accident by a direct route between his home and his place of duty. It was a condition of his employment that when off duty he was never to leave the borough without special permission from his chief officer.

The Tribunal found that it was a war service injury. They had in mind a decision under the Workmen's Compensation Act which might have indicated a different result, but they held that there were differences and that they ought to consider the case on its own merits, and they found in favour of the respondent.

Although there are certain differences between the words of the Workmen's Compensation Act and the words of the Personal Injuries (Emergency Provisions) Act, 1939, those are differences in relation to the words "physical injury" or "personal injury." In this case that question does not arise. The material question is whether the injury "arose out of and in the course of the performance by the volunteer of his duties" as a member of the civil defence organisation. Those words in my opinion have the same significance as those in the Workmen's Compensation Act from which they are clearly taken. The only alteration is one which is necessary from the fact that instead of being in "employment" he is a "volunteer." The word "employment" in the Workmen's Compensation Act has been said in many cases on that Act to relate to the performance by the workman of his duties. So here the words of the statute, "performance by the volunteer of his duties" express a similar meaning, with the appropriate difference in language consequent on the fact that this man was a volunteer (that is, a member of a civil defence organisation) and not in employment as a workman.

I hold, therefore, that the cases decided under the Workmen's Compensation Act are in point and can properly be treated as giving guidance in considering the provisions of this Act. Applying those cases it is quite plain that in this case the injury cannot be said to have arisen out of and in the course of the performance by the volunteer of his duties. This accident occurred in his own time, he was free to go at any time he liked and choose his own route to the place where he was to sign on. The case of *Alderman* v. *Great Western Ry. Co.* (1) shows that the proper decision in this case is that this injury did not arise out of and in the course of the performance by a volunteer of his duty.

The appeal must, therefore, be allowed.

Appeal allowed.

Solicitor: *Treasury Solicitor* (for the appellant.)

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

NOTE.

AINLEY *v.* AINLEY.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Bucknill, L.JJ.), January 30, 1946.]

An appeal by the petitioner from the decision of BARNARD, J., dated Jan. 16, 1945, and reported in [1945] 1 All E.R. 265, was allowed, the court holding that the case was covered by the decision in *Beard* v. *Beard*, [1945] 2 All E.R. 306.

Geoffrey Veale for the appellant.

Solicitors: *Jaques & Co.*, agents for *Moore, Shepherd & Whitley*, Halifax (for the appellant).

JONES *v.* THE MINISTER OF PENSIONS.

[King's Bench Division (Denning, J.), January 11, 21, 1946.]

Royal Forces—Army—Pension—Disease arising during and aggravated by war service—Death hastened by aggravation—Failure to report sick—Test whether course taken direct consequence of war service—Royal Warrant concerning Retired Pay, Pensions, etc., Dec., 1943 (*Cmd.* 6489), *art.* 4 (1) (*b*) (ii).

A hardworking army officer, with a strong sense of duty, was examined, while on leave in the spring of 1942, by his own medical attendant, who found him suffering from digestive disturbance and in a state of general overtiredness. The medical attendant advised him to report sick and to obtain a period of sick leave, but he refused to do so, and carried on until July, 1943, when the same medical attendant discovered a mass in the officer's abdomen and forced him to report sick. Cancer was diagnosed and the condition then found to be incurable. The officer died 3½ months later. The disease was not noted in a medical report on the commencement of his war service. The widow claimed for a pension under the Royal Warrant concerning Retired Pay, Pensions, etc., Dec., 1943, art. 4 (1) (*b*) (ii), on the grounds that the disease arose during war service and was aggravated by it and that death was hastened by that aggravation of it. The tribunal accepted the view that if the officer had reported sick in the spring of 1942 it would have had the result of prolonging his life, and rejected the claim on the ground that the officer's war service could not be held responsible for something which was entirely within his own control:—

Held: (i) the test was not whether the course adopted by the officer was within his own control but whether it was a direct consequence of his war service, which depended on whether it was reasonable.

(ii) in the circumstances the officer could not be said to have acted unreasonably. His war service was, therefore, the cause of his carrying on and not reporting sick, which delayed the treatment of the disease and so aggravated it and hastened his death.

(iii) the case fell within art 4 (1) (*b*) (ii) of the Royal Warrant and the widow was entitled to succeed.

[**EDITORIAL NOTE.** It is held, with reference to a claim for a pension, that the question whether a course taken is the direct consequence of war service depends upon whether it was reasonable. There is no absolute test of what is reasonable, which depends upon the circumstances in each case, as is shown by cases dealing with the voluntary assumption of risk, such as *Harwood* v. *Haynes* (1).

For the Pensions Appeal Tribunals Act, 1943, s. 6 (2), see HALSBURY'S STATUTES, Vol. 36, p. 487.]

Cases referred to:

(1) *Haynes* v. *Harwood*, [1935] 1 K.B. 146; Digest Supp.; 104 L.J.K.B. 63; 151 L.T. 121.

(2) *Steele* v. *Robert George & Co., Ltd.*, [1942] 1 All E.R. 447; [1942] A.C. 497; 111 L.J.P.C. 9; 167 L.T. 1.

Appeal from the rejection by a Pensions Appeal Tribunal of a claim, by a widow, for a pension in respect of the death of her husband, an army officer, during war service. The facts are fully set out in the judgment of Denning, J.

T. F. Southall for the appellant.

Hon. H. L. Parker for the respondent.

Cur. adv. vult.

Denning, J.: Capt. J. R. Jones died of cancer on Dec. 9, 1943, during war service, and his widow now claims that she is entitled to a pension under Royal Warrant concerning Retired Pay, Pensions, etc., Dec. 1943 (Cmd. 6489), art. 4. She does not suggest that the disease was itself attributable to war service, but she claims that it arose during war service and was aggravated by it, and that his death was hastened by that aggravation of it, thus bringing the case within art. 4 (1) (*b*) (ii) of the warrant.

The disease was not noted in a medical report on the commencement of his war service. She is, therefore, entitled to a pension unless the evidence shows that the conditions set out in that article are not fulfilled.

The findings of the Tribunal show that Capt. Jones was an officer with a very strong sense of duty and a very hard worker. His usual hours of duty were from 9 a.m. until 6.30 p.m. on six days of the week. In the spring of 1942 Capt. Jones, while on leave, was examined by his own medical attendant who found him suffering from digestive disturbance and in a state of general overtiredness, and advised him to report sick and have a period of sick leave; but he refused to do so. He was devoted to his duty and would not report sick when he should have done so. He carried on for more than a year until at last in July, 1943, the same medical attendant discovered a mass in Capt. Jones' abdomen and forced him to report sick and go into the hospital. Cancer was diagnosed and the condition was then found to be inoperable. He died 3½ months later.

If Capt. Jones had reported sick in the spring of 1942, when his medical attendant had urged him to do so, operative treatment at that time might have had the result of prolonging his life. There is no finding that if he had reported sick in the spring of 1942 cancer would have been diagnosed and operative treatment undertaken, but inasmuch as under the Royal Warrant the benefit of any reasonable doubt is to be given to the claimant, I think it must be taken, for the purposes of the case, that if he had reported sick at the time, it would have had the result of prolonging his life. The Tribunal appear to have accepted this view, because they rejected the claim, not on the ground that his failure to report sick did not hasten his death, but on the ground that his war service could not be held responsible for something which was entirely within his own control. They deduced a conclusion adverse to the claimant from his failure to report sick before July, 1943, and ask whether they were wrong in law in so doing.

In my opinion the Tribunal adopted a wrong test. The test is not whether the course taken was within his own control, but whether it was a direct consequence of his war service, and that depends on whether it was reasonable. If he acted unreasonably the aggravation of his illness would not be due to his war service but to his unreasonableness; but if he acted reasonably it would be attributable to his war service. For instance, a man's duties may be of such importance or he may be so irreplaceable that it may be reasonable for him to carry on in spite of his doctor's advice, and in that case the consequent deterioration in his health would be due to war service; but if he is doing work which someone else could quite well do, it might be unreasonable for him to disregard the doctor's advice.

This test of reasonableness in determining causation is supported by the cases about the voluntary assumption of risk, such as *Haynes* v. *Harwood* (1), and those about a workman undergoing or refusing to undergo an operation, such as *Steele* v. *Robert George & Co., Ltd.* (2).

Applying this test, the question becomes whether the evidence shows that Capt. Jones acted unreasonably, the benefit of any reasonable doubt being given to the claimant. To that question the findings seem to me to permit of only one answer. Here was an overtired man faced with a decision to carry on with his war work or to report sick. He was a hard worker and his strong sense of duty impelled him to carry on. That cannot be counted unreasonable. His war service was, therefore, the cause of his carrying on and not reporting sick. That delayed the treatment of the disease and so aggravated it and hastened his death.

I answer the second question in the case by holding that the Tribunal was wrong in law. The first question does not arise. I allow the appeal with costs.

Appeal allowed with costs.

Solicitors: *William Easton & Sons* (for the appellant); *Treasury Solicitor* (for the respondent.)

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

Re LITT'S WILL TRUSTS, PARRY *v.* COOPER.

[Court of Appeal (Lord Greene, M.R., Morton and Bucknill, L.JJ.), January 23, 1946.]

Wills—Construction—Rule in Lassence v. *Tierney—Life interests with remainder to issue and accruer clause on failure of issue—Last survivor dying without issue—Rule in Lassence* v. *Tierney applied to accrued shares—Last survivor absolutely entitled.*

A testator gave his residuary estate as to one share to a son absolutely and as to four other shares to his other four children. In the latter case, the gift to each child was absolute in the first instance but was settled by a subsequent clause on the child in question and that child's children, with a provision for a surviving spouse. There followed this accruer clause: "And I declare that in case any child of mine shall not have any child who under the trust in default of appointment hereinbefore contained attains a vested interest in the share of such child of mine and in the case of any daughter of mine not leaving any husband her surviving who shall be living at the time of such failure of such daughter's issue then subject to the trusts powers and provisions herein declared and contained concerning the same share and to every or any exercise of any such powers such child's share and any additional share or shares in the trust fund or otherwise which may accrue or be added thereto by virtue of this present proviso and the income thereof shall go and accrue to such of my children as shall be living at the death of such child of mine and to the children or child then living of any then deceased child of mine and if more than one in equal shares but so that the children of any then deceased child of mine shall take equally between them under this clause the share only which their parent would have taken if he or she had been then living and so that the share which shall accrue to any child of mine other than [the child whose share was given absolutely and not settled] shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning his or her original share or as near thereto as circumstances will admit." In the events which happened, one share vested in a surviving spouse absolutely and the other three shares were finally vested in the testator's last surviving child who died a widow without having had a child. The question was whether the accrued shares vested in her absolutely or whether they passed on her death to the personal representatives of the deceased children from whom they had accrued:—

Held: upon the true construction of the accruer clause, the accruing shares were given, in the first instance, absolutely to the child to whom they accrued with a subsequent engrafting of trusts in favour of that child's children. The rule in *Lassence* v. *Tierney* (1) therefore applied and, the trusts in favour of that child's children having failed, the accrued shares vested absolutely in the last survivor.

[**EDITORIAL NOTE.** It has apparently never been decided whether the rule in *Lassence* v. *Tierney* (1) applies to an accruer clause, but Lord Greene, M.R., holds that there is no logical reason why a trust engrafted upon an absolute interest should not, among such trusts, include a further absolute interest, which in its turn is subject to settlement. The court holds, therefore, on a consideration of all the provisions of the will, that the rule does apply to such a clause.

As to the Rule in *Lassence* v. *Tierney*, see HALSBURY, Hailsham Edn., Vol. 34, p. 214, para. 270; and for Cases, see DIGEST, Vol. 44, pp. 554-556, Nos. 3714-3724, and Vol. 43, pp. 643-645, Nos. 790-799.]

Cases referred to:

*(1) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; 43 Digest 643, *790*; 2 H. & Tw. 115; 15 L.T.O.S. 557.

*(2) *Hancock* v. *Watson*, [1902] A.C. 14; 43 Digest 644, *792*; 71 L.J.Ch. 149; 85 L.T. 729.

Appeal by the defendant Reginald West Fovargue from an order of Sir John Bennett, Vice-Chancellor of the County Palatine Court of Lancaster, dated Oct. 15, 1945. The facts and the relevant clauses of the testator's will are fully set out in the judgment of Lord Greene, M.R.

D. L. Jenkins, K.C., and *W. Lyon Blease* for the appellant.

J. Neville Gray, K.C., and *G. Maddocks* for the respondent Percy Singleton Cooper.

Edward Ackroyd for the respondent William Henry Parry.

LORD GREENE, M.R.: This appeal raises a short question of construction on the will of George Litt, who died on Dec. 23, 1907. The question relates to the rule which is often inaccurately called the rule in *Lassence* v. *Tierney* (1), and the question raised by the appeal relates to the application of that rule to an accruer clause. I must confess that I am surprised to find that a question of this kind has not appeared anywhere in the books, because accruer clauses are very common, and one would have thought that similar questions would have arisen on other wills. However, we have no assistance from earlier cases in this respect.

The testator by his will devised and bequeathed his residuary estate to his trustees with the usual administration directions upon trust to divide it into thirty-five equal shares, and to hold eight of such equal shares in trust for his son John Graves Litt, as to another eight thirty-fifths in trust for his son Henry Villiers Litt, another eight thirty-fifths in trust for his daughter Mrs. Harding, another three thirty-fifths in trust for his daughter Mrs. St. George, and as to the remaining eight thirty-fifths in trust for his daughter Nina Litt, afterwards Mrs. Nina Hedley. He then made provision for substituting for any child of his who was dead at his death the issue of such child. Cl. 10 provided that the share of the trust fund thereinbefore expressed to be given to each of his children other than Henry Villiers should not vest absolutely in such child, but should be retained upon the following trusts. Then in cl. 11 he set out the trusts. There are trusts for investment, and then trusts during the life of each child to pay the income of his or her share to him or her. By cl. 12, after the death of the child the share and the future income was to be held on trust for the children of such child as the child should appoint. and, in default of and subject to appointment, in trust for all the children of such child attaining 21 or, in the case of daughters, marrying. Then there is a hotchpot clause, and a declaration that the share of a daughter not having a child but leaving a surviving husband should go to the husband.

Pausing there, it is quite clear—and nobody suggests the contrary—that there is an original absolute gift to each child with trusts engrafted upon it in the case of all of them except Henry Villiers Litt, who takes his share absolutely without any provisions for settlement of it. The rule, so called, in *Lassence* v. *Tierney* (1) applies, therefore, to each of the shares of those other children in this sense, that, if the engrafted trusts fail or come to an end without the share being finally disposed of under them, the original gift in favour of the child would prevail, and that child's estate would take absolutely. The rule in its most modern statement is to be found in *Hancock* v. *Watson* (2), in the speech of LORD DAVEY. It is to the following effect ([1902] A.C. 14, at p. 22):

> . . . if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be.

I have summarised the provisions of these engrafted trusts down to and including cl. 15 of the will, but they do not end there because there is a provision in cl. 16 which has given rise to the present question. It is a provision of accruer in relation to the share of any child who does not have a child attaining a vested interest. These directions for accruer are just as much part of the trusts engrafted on the original gift of the share as are the trusts in favour of the children of the child. Cl. 16 is as follows:

> And I declare that in case any child of mine shall not have any child who under the trust in default of appointment hereinbefore contained attains a vested interest in the share of such child of mine and in the case of any daughter of mine not leaving any husband her surviving who shall be living at the time of such failure of such daughter's issue then subject to the trusts powers and provisions herein declared and contained concerning the same share and to every or any exercise of any such powers such child's share and any additional share or shares in the trust fund or otherwise which may accrue or be added thereto by virtue of this present proviso and the income thereof shall go and accrue to such of my children as shall be living at the death of such child of mine and to the children or child then living of any then deceased child of mine

> and if more than one in equal shares but so that the children of any then deceased child of mine shall take equally between them under this clause the share only which their parent would have taken if he or she had been then living and so that the share which shall accrue to any child of mine other than the said Henry Villiers Litt shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning his or her original share or as near thereto as circumstances will admit.

In order to see how the present question arises, it is necessary to say a word about the testator's children. He left five children surviving him. The first to die was Henry Villiers Litt, who died on Nov. 20, 1921, without having had a child. He, under the will, took an absolute share in any event because no trusts were engrafted upon the gift in his favour. The next to die was John Graves Litt, who died on June 5, 1931, without ever having been married. Accordingly, in his case, the engrafted trusts in favour of his children never took effect, and the accruer clause, cl. 16, operated upon his share. One-third of his share accordingly accrued to each of the other three surviving children. The next to die was Mrs. Harding. She died on June 16, 1931, without having had a child, but leaving a surviving husband, who accordingly. under cl. 15, took her original share, and under cl. 16 took her accruing share. The next to die was Mrs. St. George, who died on Nov. 1, 1932, a widow, having had only one child, who died in infancy. Accordingly the original three thirty-fifths which she had, and the one-third of John Graves Litt's eight thirty-fifths went to the sole surviving child, Mrs. Hedley. Mrs. Hedley, therefore, at the time of her death was enjoying, not merely her own original eight thirty-fifths, but one-third of John Graves Litt's eight thirty-fifths which she took directly by accruer when he died, and also Mrs. St. George's three thirty-fifths, and that share of John Graves Litt's eight thirty-fifths which Mrs. St. George had taken by accruer.

The question raised in this appeal relates to those accruing interests which Mrs. Hedley enjoyed. There is no question that with regard to her original share, she having left no children and there being nobody to take under the accruer clause, it remained vested in her under the rule in *Lassence* v. *Tierney* (1). What is said is that these accruing shares, accruing directly or indirectly to her, do not vest in her legal personal representative, but remain subject to the original absolute gift contained in the earlier part of the will in favour of the child whose original share they represent ; in other words, that those accruing shares go back, as to part to the estate of John Graves Litt, whose legal personal representative is before us, and in part to the estate of Mrs. St. George, whose legal personal representative is also before us. It is argued, on the other hand, that the Vice-Chancellor, who accepted the argument I have just mentioned, was wrong, and that under cl. 16 itself the *Lassence* v. *Tierney* (1) rule falls to be applied, by reason of the fact that the gift of accruing shares is a gift which is itself, in the first instance, an absolute gift to the child to whom those accruing shares accrue, and that that absolute gift, in its turn, has engrafted upon it a trust in favour of the children of the child which has failed, and, therefore, the absolute gift remains. In other words, it is said that, when the trusts engrafted on the original shares of the child are examined, it is found that one of the trusts consists of a direction for accruer, and that the direction for accruer itself creates an absolute interest, in the first instance, in favour of the person to whom the share accrues, and that on that absolute interest trusts are engrafted which have failed, and, accordingly, that absolute interest remains.

It is pointed out that the case is rather an unusual one, in that in two different places in the will, if the appellants are right, there will be found expressed in different language what I may call two *Lassence* v. *Tierney* (1) clauses, *i.e.*, clauses which, on their true construction, amount to absolute gifts in favour of a beneficiary with trusts engrafted upon them. It is suggested that to find such a thing is unusual, and, therefore, we should not construe the language so as to produce that result. I do not myself feel that difficulty. I can see no logical reason whatsoever why a trust engrafted upon an absolute interest should not, among the trusts which are so engrafted, include a further absolute interest, which in its turn is subject to settlement. If that be the true construction, the rule in *Lassence* v. *Tierney* (1), in my opinion, will apply at that stage. The whole controversy here, as always in these cases, turns on the question whether, on the true construction of cl. 16, the accruing shares are to be read as given, in the first instance, absolutely to the child to whom they accrue with a subsequent engrafting of trusts in favour of that child's children, or whether the only gift in favour of the child to whom a share accrues is to be found in the trusts by which the accruing share is settled. In my opinion, the rule in *Lassence* v. *Tierney* (1) does apply to cl. 16. Nobody can pretend that the case is free from difficulty, but I have formed a clear conclusion as to the way in which it should be decided.

I must now look at cl. 16 and analyse some of its language. With regard to the direction for accruer, after providing for the case of default by reason of which the accruer is to take effect, the testator says :

> . . . such child's share and any additional share or shares in the trust fund or otherwise which may accrue or be added thereto by virtue of this present proviso and the income thereof shall go and accrue to such of my children as shall be living at the death of such child of mine . . .

Pausing there for a moment, the language used appears to me to be perfectly apt to express an absolute gift. The direction is not that the accruing share is to accrue to the original share, but that it is to accrue to the then living children. It is in terms the share and the income thereof. The testator, therefore, is disposing, not merely of income in favour of the surviving children, but also of capital.

The next clause is a substitutional clause. It says :

> . . . and to the children or child then living of any then deceased child of mine and if more than one in equal shares . . .

That really is analogous to or corresponds with, although not in terms the same as, the original substitutional clause in respect of the original gift under cl. 10. It goes on as follows :

> . . . but so that the children of any then deceased child of mine shall take equally between them under this clause the share only which their parent would have taken if he or she had been then living . . .

In those words I find a strong indication that the accruing share is intended to be given, in the first instance, absolutely to the child to whom it accrues, for this reason : the interest to which the children of a then deceased child are substituted is expressed to be the share which their parent would have taken if then living. If, on the true construction of this clause, the provisions for accruer are to be read as merely a trust for the surviving children for their respective lives with a remainder to their children, *i.e.*, if it is to be read as though there is no gift to a child to whom a share accrues other than is to be found in the trusts relating to the share and settling it, then all that the child would take would be the income of a share. It would never have any interest in the capital of a share. Nevertheless, the testator in this substitutional clause speaks of the share which the parent would have taken. If the rule in *Lassence* v. *Tierney* (1) does not apply, the accurate language to have used would have been, I think, not the share which the parent would have taken, but the share, the income of which the parent would have taken, because *ex hypothesi* the parent never would have taken any share in the capital.

The clause then goes on :

> . . . and so that the share which shall accrue to any child of mine other than the said Henry Villiers Litt shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning his or her original share or as near thereto as circumstances will admit.

It is to be observed that if the *Lassence* v. *Tierney* (1) rule applies, those are the trusts engrafted on the accrued share. If the rule does not apply, then those are the trusts which affect the share in such a way as not to cut down an original absolute interest, but to make it clear that no such interest was intended, and that the child to whom the share was accruing was only intended to have the life interest. In point of position in the clause, these trusts come after the paragraph which I have just been discussing, the substitutional clause which refers to the share which the parent would have taken. In this very provision itself there is another indication, I think, that the view which I am expressing is the right one. It is this : Henry Villiers Litt took his original share absolutely ; it was not settled under the original gift. Therefore he had naturally to be excluded from these directions for settlement. But it is to be observed that his share is referred to, and the share of the other children is referred to, by precisely the same phrase, *viz.*, "the share which shall accrue to any child of mine." In the case of Henry Villiers Litt, the accruing share was unquestionably a share in capital which he took absolutely, and exactly the same language is used to describe the share which goes to other children, which it is said is not an absolute gift at all.

Taking all those matters into consideration, and giving the best construction that I can to this clause, I am of opinion that the decision of the Vice-Chancellor was wrong, and that the rule in *Lassence* v. *Tierney* (1) applies to the accrued shares which, accordingly, go to the estate of Mrs. Hedley, and not to the estates of her brother and sister.

Morton, L.J.: The decision of this appeal turns upon the construction of cl. 16 of the testator's will, although, of course, that clause must be read having regard to the will as a whole. It seems to me that the opening words of cl. 16 which refer to "such child's share and any additional share or shares in the trust fund or otherwise which may accrue or be added thereto by virtue of this present proviso and the income thereof" were clearly dealing with capital as well as income. That could not be disputed. Then the clause continues:

> . . . shall go and accrue to such of my children as shall be living at the death of such child of mine and to the children or child then living of any then deceased child of mine and if more than one in equal shares . . .

Pausing at that point, there could not be, I apprehend, the slightest doubt that that is an absolute gift to the children living at the death of the child in question, and to the children or child then living of a deceased child of the testator, both children and grandchildren taking absolutely. If the clause had stopped there, I apprehend that the division would probably have been *per capita*. Then comes what I may call the first qualifying clause, which is in the following terms:

> . . . but so that the children of any then deceased child of mine shall take equally between them under this clause the share only which their parent would have taken if he or she had been then living . . .

That has the effect of making the division clearly a stirpital division, and, as my Lord has said, the reference to the share which their parents would have taken fortifies the conclusion (which one would have come to, I think, at first sight without these words) that the gift so far is an absolute one. Then the clause proceeds:

> . . . and so that the share which shall accrue to any child of mine other than the said Henry Villiers Litt shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning his or her original share or as near thereto as circumstances will admit.

There again that second qualifying clause supports the view that there is an absolute original gift. Henry Villiers Litt takes absolutely not because of anything which follows subsequently, but because he is excluded from the engrafted trusts which are put upon the shares of the other children.

Regarding this clause by itself, I should not have felt any doubt that it is precisely the sort of clause which is referred to in *Hancock* v. *Watson* (2). There is, as I see it, an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed upon that absolute gift. The words "but so that," and the words "and so that" seem to me quite indistinguishable from such words as "provided always that" and "and provided further that." They are suitable words to introduce the engrafting of trusts upon a gift which is in terms absolute. The only reason of any force which I think could be advanced for giving them some other meaning in this particular will is that cl. 16 is part of the trusts engrafted upon the original gift to the testator's five children. That is quite true, but, for my part, I can see no reason why the engrafted trusts should not contain another trust of the kind which is generally referred to as a *Lassence* v. *Tierney* (1) trust, and I think that the engrafted trusts in the present case do contain such a trust.

If I may take, for example, the share of John Graves Litt and trace it through shortly, when John Graves Litt died one-third of his eight thirty-fifths of the residue went to Mrs. Harding for life, and I need not say more about that because, as Mrs. Harding left a husband, her surviving share passed to him. Then in the case of Mrs. St. George, there was, as I read cl. 16, an absolute gift to her, in the first instance, but the gift of accrued shares from John Graves Litt was cut down by the words which follow. It was undoubtedly cut down, and the one-third of John Graves Litt's eight thirty-fifths which passed to Mrs. St. George passed on to Mrs. Hedley. In my view, that fraction, whose career I have been tracing, came to rest finally at the point to which it was taken by these trusts. It came to Mrs. Hedley absolutely under cl. 16. Trusts were engrafted upon that absolute interest which failed, because Mrs. Hedley died a widow without ever having had a child, and that fraction of the estate of the testator remained at home in Mrs. Hedley's estate.

It is certainly strange that no case appears to have been reported of a similiar kind to the present case, but I can arrive at no other conclusion but that cl. 16 is a *Lassence* v. *Tierney* (1) clause, just as much as is the clause containing the original gift with the engrafted trusts set out in cl. 10. The result must be, in my view, that this appeal must succeed and an appropriate declaration must be made.

BUCKNILL, L.J.: I agree.

Appeal allowed.

Solicitors: *Simpson, North, Harley & Co.*, agents for *Raper & Fovargue*, Battle (for the appellant); *Layton & Co.*, and *Duncan, Oakshott, Morris-Jones & Holden*, Liverpool (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re "L." HOTEL CO., LTD. AND LANGHAM HOTEL CO., LTD.

[CHANCERY DIVISION (Uthwatt, J.), December 11, 1945.]

Companies—Practice—Reconstruction—Transfer of property and liabilities to another company—Form of order—Companies Act, 1929 (*c.* 23), *s.* 154—*R.S.C., Ord.* 53B, *r.* 13—*Appendices to R.S.C.*, 1883, *App. L., No.* 37.

Where an application is made to the court under the Companies Act, 1929, s. 154, for an order transferring the property and liabilities of the transferor company to the transferee company, the order should not contain any limitation showing that it cannot have the effect of transferring a purely personal contract, because such an order can only transfer such property as could be transferred by an act *inter partes*. Where the order is one transferring all the property of the transferor company, it is not legally necessary to specify all the various properties of the company in schedules to the order. R.S.C., Ord. 53B, r. 13, which authorises the use of the scheduled form of order, is permissive and not mandatory.

[**EDITORIAL NOTE.** This is a point of practice in regard to an order transferring property of a company. It is unnecessary to burden such an order with a full specification of all the properties of the company, and equally unnecessary to negative the transfer of property such as personal contracts which cannot be transferred *inter partes*.

FOR R.S.C., ORD. 53B, r. 13, and APPENDIX L, No. 37, see YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1044 and 2836.]

Case referred to:

*(1) *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; [1940] A.C. 1014; Digest Supp.; 109 L.J.K.B. 865; 163 L.T. 343.

APPLICATION by adjourned summons, under the Companies Act, 1929, s. 154, for an order transferring the property of the Langham Hotel Co., Ltd., to the "L" Hotel Co., Ltd., pursuant to a scheme sanctioned by the court for the reconstruction of the Langham Hotel Co., Ltd. The summons asked for an order (i) that the undertaking and all the properties, rights and powers of the transferor company be transferred, pursuant to the Companies Act, 1929, s. 154 (2) to the transferee company, and (ii) that all the debts, liabilities and duties of the transferor company, other than its indebtedness in respect of certain debenture stock, be (pursuant to that section) transferred to the transferee company. The following questions were raised as to the form of the order: (i) whether or not there should appear in the order some limitation showing that the order could not have the effect of transferring a purely personal contract; (ii) whether the use of the form of order authorised by R.S.C., Ord. 53B, r. 13, was mandatory or permissive.

W. Gordon Brown for the applicants, "L" Hotel, Co., Ltd.

Uthwatt, J.: This is an application under the Companies Act, 1929, s. 154, for an order vesting the property of the old company (in the Act referred to as the "transferor company") in the transferee company, and two questions are raised as to the form of the order.

As to the first question, it is clear that since the decision of the House of Lords in *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.* (1), an order made under this section in perfectly general terms transfers all the property and all the liabilities of the transferor company to the transferee company, but does not operate to transfer purely personal contracts. At the root of that decision lies the undoubted principle that there is transferred, by virtue of a vesting order made under the section, only such property as could be transferred by an act *inter partes.* The point raised by the registrar (and properly raised, I think, as it is a matter of general practice and it is right that the practice should be correct) is whether or not there should appear in the order some limitation which shows that the order cannot have the effect of transferring a purely personal contract. I am clearly of opinion that it is neither necessary nor desirable that there should appear in the order any such exception. The order works according to law when expressed in general terms. Why enter upon a statement as to what the effect of the order in a particular case, or particular classes of cases, is understood to be? I see no reason whatever.

The second question is in regard to R.S.C., Ord. 53b, r. 13, which authorises the use of the scheduled form of order transferring property and liabilities under the section: [see R.S.C., App. L. No. 37]. R.S.C. Ord. 53b, r. 13, is merely permissive and its value lies, I think, in the fact that it gives practitioners a guide as to the class of order which may properly be made; but it certainly is not mandatory upon the court that that form of order should be used, nor, indeed, is it directory. The language of the rule is permissive. The general line which the scheduled form of order follows is that it provides for the specification in schedules of the freehold property, the leasehold property, and stocks and debentures and other choses in action of the transferor company.

Two observations may be made upon that form of order. First, compliance with it entails a considerable amount of work; and secondly, even when it has been complied with, no useful purpose has been effected, because the form of the order transfers all the property of the company. What, therefore, is the point of specifying some of it? It can only have an indirect business effect in the sense that it may be convenient to the company to have recorded in the order the more important pieces of property which it claims to own. The statement that those properties are transferred by the order does not transfer them if, in fact, the company has no title in them, and can only transfer them for such right and interest as the company may possess. So, legally, there is no need to put any class of property at all in the order in a case such as the present. Apart from that, I cannot see any use whatsoever in detailing the various properties of the company in the schedule.

Solicitors: *Slaughter & May* (for the applicants).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

NOTE.

OFFICE CLEANING SERVICES, LTD. *v.* WESTMINSTER WINDOW AND GENERAL CLEANERS, LTD.

[House of Lords (Lord Wright, Lord Porter, Lord Simonds and Lord Goddard), November 26, 27, 28, 1945.]

An appeal by the plaintiffs from the decision of the Court of Appeal, dated July 28, 1944, and reported in [1944] 2 All E.R., p. 269, was dismissed.

R. Burrell, K.C., and *J. Mould* for the appellants.

F. W. Beney, K.C., and *L. M. Minty* for the respondents.

Solicitors: *Maltz, Mitchell & Co.* (for the appellants); *Hardcastle, Sanders & Co.* (for the respondents).

Re PARROTT'S WILL TRUSTS, COX *v.* PARROTT.

[CHANCERY DIVISION (Vaisey, J.), January 18, 1946.]

Wills—Construction—Conditions—Validity—Gift on condition that donee should "by deed poll assume" a different Christian name—Gift over if condition not fulfilled—Condition void for impossibility—Donee absolutely entitled to gift.

By his will the testator gave his residuary estate, subject to the life interest of his wife, to C., on condition that C. should "by deed poll assume" a certain name, which would involve C. changing not merely his surname but his Christian name. There was a gift over in the event of C. not complying with this condition :—

HELD : (i) the condition was impossible to fulfil, because a Christian name could not be altered by deed poll.

(ii) the condition also failed for uncertainty, because there was no indication as to what the testator meant by "assume."

(iii) C. was absolutely entitled in reversion expectant on the death of the testator's widow, and was under no obligation to assume any name.

[**EDITORIAL NOTE.** There is little authority on the point, but it appears to be well established that a Christian name cannot be changed by deed poll. Whether this consists of one word or several there is strictly only one Christian name, and the name which may now be added on adoption is in a somewhat anomalous position. The Christian name being given at baptism, and being a matter primarily relating to the church membership of the holder, it can, on the authority of LORD COKE, be changed at confirmation if the bishop finds good and sufficient reason. The only other method of change is, presumably, by Act of Parliament.

AS TO CHANGE OF CHRISTIAN NAME, see HALSBURY, Hailsham Edn., Vol. 23, pp. 555, 556, para. 811 ; and FOR CASES, see DIGEST, Vol. 35, p. 703, No. 30 and p. 704, No. 32.]

Case referred to :

(1) *Re Fry, Reynolds* v. *Denne*, [1945] 2 All E.R. 205 ; [1945] Ch. 348 ; 173 L.T. 282.

ADJOURNED SUMMONS to determine certain questions arising under the will of Walter Parrott. The facts and the relevant clauses of the will are fully set out in the judgment.

E. J. Heckscher for the plaintiff.
C. G. A. Cowan for the trustee.
E. J. T. Bagshawe for the defendant Mrs. Foreman.
R. C.-H. Horne for the testator's daughter.

VAISEY, J. : I have in this case to ascertain the meaning and effect (if any) of certain conditions imposed, or sought to be imposed, by the will of the testator Walter Parrott upon the reversionary residuary bequest therein contained in favour of the plaintiff, Tim Harington Spencer Cox.

The will is dated June 16, 1934. By cl. 1, the testator appointed General Sir Charles Harington and his (the testator's) wife, the defendant Mary Louisa Cotton Parrott, executors and trustees. By cl. 2, he made a disposition of certain chattels in favour (in the events which happened) of the plaintiff, whom he throughout the will describes as "Tim Spencer Cox." Under cl. 8, his residuary estate was to be held in trust (*a*) to pay out of the income thereof £150 per annum for the plaintiff's maintenance, education and benefit during his minority, and (*b*) subject to such payment, to pay such income "free of duty" (whatever that may mean) to the testator's wife during her life.

Cl. 9 of the will is as follows :

> Subject to the life interest of my said wife in the income of my residuary estate and to the payment of the £150 per annum hereinbefore mentioned I direct my trustees to stand possessed of the capital and income of my residuary estate in trust for the said Tim Spencer Cox if and when he shall attain the age of 21 years and provided he shall within 6 months from the date of my death or his attaining the age of 21 years by deed poll assume the name of Walter Tim Spencer Parrott and provided he shall assume take or otherwise use my family crest and coat of arms interspersed with the crest and coat of arms of the Burgoyne family the baronetage of which was created in 1641 and which became extinct on the death of the tenth and last baronet Sir John Montagu Burgoyne in 1921.

The final clause of the will is cl. 10, which is in these terms :

> In the event of the said Tim Spencer Cox not attaining the age of 21 years and (*sic*) not complying with the conditions of cl. 9 hereof then I direct my executors and trustees

to stand possessed of both the capital and income of my residuary estate in trust for such of the daughters of my brother G. L. Parrott as shall be living at the death of the said Tim Spencer Cox in equal shares.

On July 19, 1934, the testator made a codicil to his will which is not material to the questions which now arise. He died on June 21, 1938, and his will and codicil were on Aug. 5, 1938, duly proved by the widow, the other executor having renounced probate. The plaintiff attained the age of 21 years on Aug. 9, 1945, down to which date the £150 was duly applied for his maintenance, education and benefit.

The first question is whether the plaintiff, in order to establish his title to the testator's residuary estate, must within six months from his attaining the age of 21 years, *i.e.*, on or before Feb. 9, 1946, "by deed poll assume the name of Walter Tim Spencer Parrott." What do those words mean ? In my judgment, they express the testator's intention that the plaintiff should take the name of Walter Tim Spencer Parrott in lieu of and substitution for his present name of Tim Harington Spencer Cox in a two-fold sense, *i.e.*, first that his compound baptismal name of Tim Harington Spencer was to be abandoned in favour of and replaced by the new compound name of Walter Tim Spencer, and secondly that his surname Cox was to be altered to the surname Parrott. There would be no difficulty about the second part of the change, but I hold that the first part is impossible. Nobody can alter or part with a Christian name by deed poll. It would not, in my judgment, be right to attribute to the testator so fantastic and absurd an intention as that the plaintiff should assume the name of Walter Tim Spencer Parrott as a compound surname either in lieu of or in addition to his patronymic Cox, nor would the court hold that his doing so would comply with the provision in the will. That is not what the testator meant him to do.

The law in this matter is, I think, accurately summed up in Davidson's Precedents and Forms in Conveyancing, 3rd Edn., Vol. III, Pt. I, where, dealing with the subject of provisions requiring a legatee to take the name of a testator, it is said, in the footnote on pp. 361, 362 :

> When the legatee is of a different Christian name from the testator, he cannot, of course, part with his own Christian name, nor can he take that of the testator, except as part of a compound surname consisting of the Christian name and surname of the testator.

Apart from the impossibility of fulfilling the condition as I interpret it, there are other points of uncertainty about it. What is meant by the word "assume"? Nothing is said as to any subsequent user of the assumed name, or as to the duration of any such user, and it may well be that the condition fails on the ground of uncertainty in addition to its being, as I hold, impossible.

There are only two, or at most three, ways in which a Christian name may be legally changed : (i) it must be assumed by the omnicompetence of an Act of Parliament, as, *e.g.*, the Baines Name Act, 1907 ; (ii) at confirmation, as explained in Phillimore's Ecclesiastical Law, 2nd Edn., Vol. 1, p. 517, where the following passage from Coke's Institutions I, p. 3, is cited :

> If a man be baptised by the name of Thomas, and after, at his confirmation by the bishop, he is named John, he may purchase by the name of his confirmation. And this was the case of Sir Francis Gawdie, Chief Justice of the Court of Common Pleas, whose name by baptism was Thomas, and his name of confirmation Francis ; and that name of Francis, by the advice of all the judges, *in anno* 36 Hen. VIII, he did bear, and after used in all his purchases and grants.

In Burn's Ecclesiastical Law, 9th Edn., Vol. II, p. 10, the accuracy of the view that this is still the law is questioned, on the ground that :

> . . . upon review of the liturgy at King Charles the Second's restoration, the office of confirmation is altered as to this point, for now the bishop doth not pronounce the name of the person confirmed, and, therefore, cannot alter it.

This, however, was a mistake, as is pointed out in Phillimore's Ecclesiastical Law, Vol. I, p. 517, where it is said :

> But Lord Coke's authority cannot be set aside in this way. He had before him at the time when he thus laid down the law the confirmation services of Edward and Elizabeth, which are not, as might be inferred from the remark of Dr. Burn, different in this respect from that of Charles the Second. There seems to be no reason to impugn the authority of the precedent cited by Lord Coke.

Cases in which the precedent has been followed are mentioned in Phillimore's Ecclesiastical Law, and there are records of others in Notes and Queries, 4th Series, Vol. VI, p. 17, and 7th Series, Vol. II, p. 77 ; besides which I know that bishops have in recent years, on quite a number of occasions, exercised this power, and there is a recognition of their right to do so in the directions given with reference to the Adoption of Children (High Court) Rules, 1926, printed in the Yearly Practice of the Supreme Court, 1940, p. 2345, in which it is said :

> The names set out in the certificate of baptism cannot be altered except if the child be confirmed.

The bishop's power is discretionary, and is only exercised for what he regards as a good and sufficient reason. It is said to have originated in the need for getting rid of *lasciva nomina*, *i.e.*, names possessing some improper connotation which had been given in baptism incautiously, or had subsequently acquired such a connotation. A third method by which a Christian name may in a sense be altered is under the power to add a name when a child is adopted : [see Yearly Practice of the Supreme Court, 1940, p. 2345]. But the precise quality of such an added name is, I think, open to some doubt, for no one can in strictness possess more than one Christian name, whether it consists of one word or of several, and this method may perhaps be regarded as anomalous.

[Vaisey, J., then dealt with the second of the two provisoes in cl. 9, holding that the time limit of six months did not apply to it, and that it was void for uncertainty in that the operation of " interspersing " one crest and coat of arms with another crest and coat of arms is unknown in heraldry and incapable of performance, and proceeded :]

There is further uncertainty in cl. 10 of the will. To make any sense of it at all, I should have to change the word " and " into the word " or," and I think that some words must have been left out by mistake. The will is in many respects very carelessly drawn, and, while I need not in this case rest my decision upon any ground of public policy, as in *Re Fry* (1), I cannot think that the court would wish to assist so inartistic an attempt to interfere with a man's name, the one thing which inalienably belongs to him and is the label which indicates his identity. I will declare that the plaintiff is now absolutely entitled in reversion expectant on the death of the testator's widow, that he is under no obligation to assume any name or to assume take or otherwise use any crest or coat of arms, and that cl. 10 of the will, in the events which have happened, is no longer capable of having any operation. The costs of all parties as between solicitor and client will come out of the trust estate.

Declaration accordingly.

Solicitors : *Summerhays & Co.* (for the plaintiff) ; *Golding, Hargrove & Palmer* (for the defendants other than the testator's daughter) ; *M. T. Turner & Co.* (for the testator's daughter).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

Re STAPLETON, STAPLETON *v.* STAPLETON AND OTHERS.

[Chancery Division (Roxburgh, J.), January 14, 15, 1946.]

Wills—Contingent interest in income of residuary estate—Direction to accumulate intermediate income—Intermediate income not available for maintenance during minority—Trustee Act, 1925 (*c.* 19), *ss.* 31 (1), (3), 69 (2).

Infants—Maintenance—Statutory power of maintenance—Contingent interest in income of residuary estate—Direction to accumulate intermediate income—Statutory power not available—Trustee Act, 1925 (*c.* 19), *ss.* 31 (1), (3), 69 (2).

By his will the testator provided that out of the income of his residuary trust fund £200 a year should be paid to his wife while a widow and the balance should be accumulated. He further provided that, on the death or remarriage of the wife, such income should fall into the residuary estate and the income of the residuary trust fund should then be paid to his daughters O. and J. equally during their lives and to the survivor of them. The testator was survived by his wife and the daughters O. and J., who were infants. The question to be determined was whether, after paying the widow £200 a year, the trustees were authorised, under the Trustee Act, 1925, s. 31, to apply the surplus income of the residuary estate for the maintenance of the infants. By subsect. (3) of sect. 31, that section applied, in the case of contingent interest, " only if the limitation or trust carries the intermediate income " :—

Held : since the will contained a specific direction to accumulate the surplus income of the residuary estate the trustees had no power under the Trustee Act, 1925, s. 31, to apply such income for the maintenance of the infants.

Re Reade-Revell (4) *followed.*

[**EDITORIAL NOTE.** It was held in *Re Reade-Revell* (4) that where there is an express trust for accumulation there is no power under the Trustee Act, 1925, s. 31, to apply surplus income for the maintenance of infants. Roxburgh, J., follows this decision, holding that it was not decided upon the special words of the will in that case as showing a contrary intention to sect. 31 within the meaning of sect. 69 of the Act. *Re Leng* (6) is distinguished as there was there an implied, not an express, trust to accumulate and Simonds, J., was able to hold that maintenance could be allowed.

As to Maintenance out of Intermediate Income, see HALSBURY, Hailsham Edn., Vol. 17, p. 644, para. 1358, and Vol. 14, pp. 352, 353, para. 661 ; and for Cases, see DIGEST, Supp. ; Executors, Nos. 5251 a-d, and Infants, 1058 b.]

Cases referred to :

*(1) *Re Collins, Collins* v. *Collins* (1886), 32 Ch.D. 229 ; 28 Digest 223, *825* ; 55 L.J.Ch. 672 ; 55 L.T. 21.

*(2) *Re Boulter, Capital & Counties Bank* v. *Boulter*, [1918] 2 Ch. 40 ; 23 Digest 452, *5250* ; 87 L.J.Ch. 385 ; 118 L.T. 783.

(3) *Re Judkin's Trusts* (1884), 25 Ch.D. 743 ; 23 Digest 409, *4805* ; 53 L.J.Ch. 496 ; 50 L.T. 200.

*(4) *Re Reade-Revell, Crellin* v. *Melling*, [1930] 1 Ch. 52 ; Digest Supp. ; 99 L.J.Ch. 136 ; 142 L.T. 177.

(5) *Re Raine, Tyerman* v. *Stansfield*, [1929] 1 Ch. 716 ; Digest Supp. ; 98 L.J.Ch. 244 ; 141 L.T. 25.

*(6) *Re Leng, Dodsworth* v. *Leng*, [1938] 3 All E.R. 181 ; [1938] Ch. 821 ; Digest Supp. ; 108 L.J.Ch. 65 ; 159 L.T. 355.

Adjourned Summons to determine a question arising under the will of William Charles Stapleton. The facts and the relevant provisions of the will are fully set out in the judgment.

J. W. Brunyate for the plaintiffs.

G. C. D. S. Dunbar for the first defendant.

C. Montgomery White for the remaining defendants.

Roxburgh, J. : In this case the testator, William Charles Stapleton, died on Nov. 27, 1943, leaving a widow surviving and three children, namely the two infant plaintiffs, Olga Mary Stapleton and Josephine Stapleton, and the defendant Mrs. Beryl Fanny Blood. The applicants are the two infant children ; and the defendants are the widow, the two trustees of the will (namely, Florus William John Mason and the National Provincial Bank, Ltd.), and one of the testator's children, Mrs. Beryl Fanny Blood.

The question that I have to decide is whether the surplus income of the testator's residuary estate which remained after paying an annual sum to the widow should be applied for the maintenance of the infant plaintiffs, under the Trustee Act, 1925, s. 31.

The testator, after appointing executors and trustees, bequeathed small legacies to the executor, Mason, and to a domestic servant, and all his furniture and certain chattels to his wife absolutely. Then he devised the house in which he resided to his trustees upon trust to permit his wife to reside there during her widowhood rent free, and there is a provision that :

> . . . she shall provide a home for my infant children during their respective minorities and after her death or remarriage whichever shall first happen the same shall fall into and form part of my residuary estate.

Then he devised all the residue of his real estate and bequeathed the residue of his personal estate to his trustees on trust for sale, calling in and conversion ; after payment of his debts and funeral expenses, they were to invest the residue and from and out of the income to pay £200 a year to his wife during her widowhood, and to stand possessed of the balance of the income received from the residuary trust fund and hold it upon trust to accumulate the same during the widowhood of his wife ; and such income after the death or remarriage of the wife was to fall into and form part of his residuary estate. Cl. 7 says :

> From and after the death or remarriage of my said wife I direct my trustees to pay the income of my residuary trust fund unto and equally between my two children Olga Mary Stapleton and Josephine Stapleton during their lives or the survivor of them.

The interests of these infant plaintiffs are, admittedly, contingent interests, and therefore the Trustee Act, 1925, s. 31, according to subsect. (3), only applies "if the limitation or trust carries the intermediate income." Moreover, by sect. 69 (2) of the Act of 1925, sect. 31 applies "if and so far only as a contrary intention is not expressed" in the will.

Counsel for the plaintiffs has addressed to me a very powerful argument based upon *Re Collins* (1), and also upon *Re Boulter* (2). He extracts from *Re Collins* (1) the proposition that the courts do not regard a direction to accumulate income as necessarily inconsistent with an intention to allow maintenance ; and he relies on *Re Boulter* (2) for the proposition that, under the Conveyancing Act, 1881, s. 43, the statutory power was available when the income would go along with the capital if, and when, the capital vested. In *Re Boulter* (2) YOUNGER, J., said ([1918] 2 Ch. 40, at p. 47) :

> The result of sect. 43, as above indicated, is thus stated by MR. WOLSTENHOLME [WOLSTENHOLME AND TURNER'S CONVEYANCING ACTS, 3rd Edn., p. 95] in terms which, as KAY, J., in *Re Judkin's Trusts* (3) said, appear to be an accurate statement of its effect : "Where the income will go along with the capital if and when the capital vests, then the income is applicable under the section for the benefit of the infant, otherwise not."

Counsel for the plaintiffs further argues that the introduction in the Trustee Act, 1925, s. 31, of words which are not to be found in the Conveyancing Act, 1881, s. 43, (*viz.*, the words which I have already referred to, "if the limitation or trust carries the intermediate income") cannot have restricted the ambit of the statutory power of maintenance which existed before that Act came into force.

I consider myself absolved from expressing any judgment, or even opinion, upon the accuracy or otherwise of the argument of counsel for the plaintiffs. In fact, I have not pursued it to its full length, because I feel bound by the decision of CLAUSON, J., in *Re Reade-Revell* (4), the headnote in which is as follows :

> A testatrix, who died after the commencement of the Trustee Act, 1925, by her will directed the trustees thereof to set apart a specific sum, to accumulate and capitalise the income thereof, until A. should attain the age of 21 years ; and, if A. should attain that age, then to pay to her the income of that sum during her life and after her death to hold the capital sum in trust for her children : *Held*, that, as the trust for A., for a contingent interest for her life, did not carry the intermediate income, the trustees had, upon the proper construction of the Trustee Act, 1925, s. 31, no power to apply that income towards A.'s maintenance.

It is perfectly true, as counsel for the plaintiffs pointed out to me, that there were in that will certain provisions for the maintenance and support of the infant there in question, upon which CLAUSON, J., might have rested his judgment. I mention that to show that I have not lost sight of that submission, because, in my opinion, he did not rest his judgment upon those provisions. What CLAUSON, J., said was this ([1930] 1 Ch. 52, at p. 55) :

> In the present case the legacy of £40,000 is held in trust to pay the income to the infant for her life contingently upon her attaining the age of 21 years. By virtue of sect. 31 the trustees may during the period of the infant's minority apply towards her maintenance the income of the property, provided the trust carries the intermediate income : see sect. 31 (3). Here, there is in the will an express direction to the trustees to accumulate the income during the minority of the contingent life tenant and to add that income to the capital sum.

Then come words which, in my opinion, are vital :

> The result of that direction must be that the contingent interest of the infant, being limited to an interest in the income of the fund as it stands when she attains 21, does not carry the intermediate income of the property. It was contended that as the £40,000 trust legacy carries interest as from a year after the death of the testatrix there is here a trust which carries the intermediate income within the meaning of the subsection—namely, the trust of the legacy in favour of the infant and her children

and the ultimate remaindermen in default of her children. But in my judgment upon the proper construction of the language of the subsection, the trust therein referred to is, to apply that language to the present case, the trust which creates the contingent life interest in favour of the infant. That is a trust which does not carry the intermediate income on account of the direction for accumulation.

In my opinion, that decision is as directly applicable to the case before me as any decision on another will could be. I am satisfied that CLAUSON, J., did not rest his decision upon the special words in that will to which counsel for the plaintiffs called my attention. He did not refer to them at all, and he has used language which, in my opinion, excludes any suggestion that he relied upon them. Moreover, I am quite certain that he decided the case not upon sect. 69 (2) of the 1925 Act, but upon sect. 31 (3). Nowhere in his judgment did he refer to sect. 69. Although *Re Collins* (1) and *Re Boulter* (2) were apparently not cited to him, *Re Raine* (5) was, and there is a reference in *Re Raine* (5) to *Re Boulter* (2); but that reference does not incorporate expressly those passages in *Re Boulter* (2) which are most material in the present case, and I am inclined to assume that those material passages were not brought to the attention of CLAUSON, J. But none of those things, in my judgment, justify me in treating the question as being at large. In my opinion, I am bound by the decision of CLAUSON, J.

In *Re Leng* (6) SIMONDS, J., was considering a case where there was no express trust for accumulation, but an implied trust, the details of which are not material to this case. In the course of his judgment, where he reached the conclusion that, notwithstanding the implied trust for accumulation, maintenance could be allowed, SIMONDS, J., referred to *Re Reade-Revell* (4) and said ([1938] 3 All E.R. 181, at p. 182):

> In that case, the judge had to consider a case where there was a legacy of £40,000 given by the testatrix upon trust to pay the income to her husband during his life, and, after his death, until the beneficiary should attain the age of 21 years to accumulate the income, to add the income so accumulated to *corpus*, and to pay the income of that capital fund to the beneficiary for her life. Having, as I say, that disposition to consider, he held that it was not possible to maintain the beneficiary out of the intermediate income until she attained the age of 21 years. The judge came to that conclusion by reason of the fact that in that will there was a specific direction to accumulate, [I desire to stress that sentence because that is what we have in the present case] and he held that, having regard to that direction, it was impossible that the child should be maintained during her infancy. He did not, as I understand it, intend to decide that the old law, then well-established, in regard to the maintenance of infants out of intermediate income where those infants would, upon attaining the age of 21 years, be entitled to the income of the trust fund, was abrogated. I think he decided that case upon the particular language of the instrument which he had to construe, and I do not feel that it is an authority which binds me to hold that in the present case the infants are not maintainable out of the intermediate income, which would eventually go to increase the capital of the shares to which they will, upon attaining 21, become entitled.

I think that where SIMONDS J., referred to "the particular language of the instrument" he was referring to the specific directions to accumulate. But, however that may be, SIMONDS, J., was not dealing with a specific direction to accumulate, and he found himself able to distinguish *Re Reade-Revell* (4). I am dealing with a specific direction to accumulate, and I find it quite impossible to distinguish *Re Reade-Revell* (4), by which I consider myself to be bound.

I shall, therefore, declare that the statutory power conferred by the Trustee Act, 1925, s. 31, is not available in the present case.

Declaration accordingly.

Solicitors: *Bridges, Sawtell & Co.* (for all parties).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Re JACKSON, DAY *v.* ATKIN.

[CHANCERY DIVISION (Vaisey, J.), January 24, 1946.]

Wills—Construction—Gift of £50 *a year—" This sum to be applied " for donee's " maintenance and schooling until she attains the age of* 21 *"—" To be derived from interest of my shares in War Loan* 1917 *"—Duration of annuity.*

By his will, the testator gave to his adopted daughter, E. " a sum of £50 sterling per annum this sum to be applied for her maintenance and schooling until she attains the age of 21 years and to be derived from interest of my shares in (War Loan 1917)." He then gave the remainder of his personal estate, including his shares in " War Loan 1917 " and other shares, to A.B. and directed her, out of the proceeds of those shares, to pay 10*s.* weekly to his mother " for the rest of my mother's life." From the testator's death until E. attained the age of 21, £50 a year had been applied for her maintenance and schooling, but, since she became 21, no payment had been made in respect of the annual sum. It was contended by the personal representatives of A.B. that, on the true construction of the will, the annual sum ceased to be payable after E. attained the age of 21. On behalf of E., it was contended that, since the testator had stated that the sum was to be derived from the interest of his shares in " War Loan 1917," the gift of £50 a year must be regarded as a gift of the income of a portion of that fund, and it was, therefore, a perpetual annuity :—

HELD : (i) upon the true construction of the will, the gift to E. of £50 a year was an absolute gift in the first instance and the words that followed, " to be applied for her maintenance and schooling until she attains the age of 21 " were merely a direction as to how the money should be applied during E.'s minority.

(ii) the fact that the testator had stated that the sum should be derived from the interest of his shares in " War Loan 1917 " could not be regarded as an indication that the testator had intended to make a gift of the income of a portion of that fund. The gift could not, therefore, be construed as a perpetual annuity.

(iii) E. was entitled to the sum of £50 per annum during her life.

[**EDITORIAL NOTE.** Annuities are frequently given for maintenance and education, and these may, on a true construction of the will, cease when the annuitant reaches majority. In this case, however, it is held, in view of all the circumstances, that the testator did not intend to leave the annuitant unprovided for, and it is accordingly construed as a gift for life.

AS TO DURATION OF ANNUITY, see HALSBURY, Hailsham Edn., Vol. 28, pp. 195-199, paras. 358-364 ; and FOR CASES, see DIGEST, Vol. 39, pp. 135-139, Nos. 292-336, and pp. 140, 141, Nos. 345-352.]

Cases referred to :

(1) *Bent* v. *Cullen* (1871), 6 Ch. App. 235 ; 39 Digest 137, *308* ; 40 L.J.Ch. 250.

(2) *Re Morgan, Morgan* v. *Morgan*, [1893] 3 Ch. 222 ; 39 Digest 137, *310* ; 62 L.J.Ch. 789 ; 69 L.T. 407.

ADJOURNED SUMMONS to determine a question arising under the will of Alfred Reed Jackson. The facts and the relevant provisions of the will are fully set out in the judgment.

J. V. Nesbitt for the executor.

J. F. Bowyer for Mrs. Atkin.

Hon. Denys B. Buckley for the Midland Bank, Ltd., the personal representative of Mrs. Bagley.

VAISEY, J. : In this case I have to decide what is, according to the true construction of the will of Alfred Reed Jackson, the quality of an annuity of £50, or, to speak with greater precision, the quality of a bequest of a sum of £50 sterling per annum. The testator was not a draftsman but a master mariner and I have before me the original will which he signed on Sept. 9, 1917. It consists partly of print and partly of manuscript in the testator's own handwriting. He first revokes all previous wills and appoints one Day, an inspector of police, and Mrs. Bagley, whom he describes as one who was known as his wife, to be executors of the will. Then he proceeds to add what all testators do who make use of printed forms ; he directs that his debts, funeral and testamentary expenses shall be paid.

There then follows in print these six words : " I give devise and bequeath unto." At that point the testator resumes his pen and he inserts these words :

> . . . my adopted daughter Eveline Mary Bemross to be hereafter known as Eveline Mary Jackson a sum of £50 sterling per annum this sum to be applied for her maintenance and schooling until she attains the age of 21 years and to be derived from interest of my shares in (War Loan 1917) to Annie Mary Bagley the remainder of my money namely, cash in bank (L.C. & Midland, Hull) shares in War Loan 1917, shares in Selfridges & Co., shares in General Electric Light Company and shares in Eagle Oil Transport Company. Out of the proceeds of these shares Annie Mary Bagley must pay to my mother Hannah Jackson the sum of 10*s*. weekly for the rest of my mother's life.

Then he gives £500 to his brother on the death of Mrs. Bagley. Then he appoints Mrs. Bagley to be the guardian of his adopted daughter and says that the child is to reside with her :

> . . . except under exceptional circumstances arising that may render this course derogatory to the child.

Finally he gives his household furniture to Mrs. Bagley. There is a proper attestation clause and two witnesses, and the will, which, as I have said, is dated Sept. 9, 1917, six weeks or so before the testator's death on Oct. 31, 1917, was apparently admitted to probate on May 29, 1918.

The testator, apart from his very proper wish to provide for his mother and to give some substantial bequest to his brother, had evidently two persons in the world for whom he entertained a feeling of affection. One was, if I may so describe her, his adopted wife, and the other his adopted daughter. I can draw no sort of conclusion as to which of those two ladies stood first in his regard or as to whether he wished to benefit one to the prejudice of the other, and I have simply to look at the words which he has used. It may be said that when he wished to limit the gift to a person for life he knew how to do it because there was the direction that Mrs. Bagley should pay to the testator's mother 10*s*. weekly for the rest of her life. That, I think, is an indication that he did know how to create a life interest, and it stands against other considerations in favour of the view, which has been submitted to me by Mrs. Bagley's personal representative, that this annual sum of £50 ceased to be payable when this young lady, who is now Mrs. Atkin, attained the age of 21 years, on Aug. 29, 1938. It is not disputed that the £50 a year was applied for her maintenance and schooling as from the testator's death until that date ; but, since the attainment by Mrs. Atkin of her majority, nothing has been paid in respect of the annual sum. The question now arises whether that sum continued thereafter or whether it ceased altogether on the attainment by Mrs. Atkin of her majority.

Now it is to be observed that this is a gift, devise and bequest to Mrs. Atkin of £50 sterling per annum, and at that point there is either a full stop, or, at any rate, some kind of a period mark, which prohibits me from omitting to make some pause at that particular juncture. Then he says :

> . . . this sum to be applied for her maintenance and schooling until she attains the age of 21 years and to be derived from [etc.]

If this had been a gift of £50 sterling per annum to be applied for her maintenance and schooling until she attained the age of 21 years, I think I should have come to the conclusion that, after she attained the age of 21 years, there was nothing more in the gift, that the gift would have been satisfied by the payment being made down to, but not beyond, that date. But here I find an absolute gift to the lady of £50 sterling per annum ; and the separated direction that the sum is " to be applied for her maintenance and schooling until she attains the age of 21 " is, in my judgment, merely a direction to the executors of Mrs. Bagley that, while the lady is under the disadvantage of minority and therefore unable to give a receipt for that which is given to her, the £50 is not to be accumulated or held up or paid to her notwithstanding infancy, but is to be applied for her maintenance and schooling until she attains the age of 21 and so becomes entitled to give a receipt for that which she has been given.

In my opinion, the view that this was a gift until 21 and not beyond is a view which the words of the will do not warrant. I pay very little attention to questions of possible caprice or anything of that kind. At the same time, I do not think one ought altogether to overlook the fact that the testator must be assumed to have taken the view that he had towards the adopted daughter some, if not all, of the obligations of parenthood. I venture to think it is more likely that he would have wished to make some provision for her for life rather than that he should have contemplated that, as soon as she attained her majority, she should be, so far as he was concerned, absolutely without resources.

It was argued by counsel for Mrs. Atkin that this was not merely a life annuity, but an annuity which was perpetual. On that he cited *Bent* v. *Cullen* (1), and *Re Morgan*, *Morgan* v. *Morgan* (2). He invited me to regard this as a case in which the reference to the " War Loan 1917 " must be treated as a definite gift of the income of a part of the fund, and not merely as an income charged upon the fund. I am not quite certain, however, that it is either of those things. I incline to the view that the words " to be derived from interest of my shares in War Loan " are nothing more than a direction to his executors as to a good way, or possibly the best way (or, it may be, in the testator's opinion the most appropriate way) of providing for this £50. I think the principle is very well settled that, if this had been a gift of the income of part of a fund, it would have been perpetual : if it was a gift of an annuity charged on a fund, it would, *prima facie*, be for life : I am not quite sure, however, how far that principle is applicable to the present case.

I base my judgment upon the fact that he has given £50 sterling a year to his adopted daughter and has superadded to that absolute gift a mere direction that, until she was in a position to give a receipt for this annual sum, it should be utilised for her benefit in the way of maintenance and education. In the result, therefore, I come to the conclusion, and will declare, that, upon the true construction of the will, the sum of £50 per annum thereby bequeathed to the defendant Mrs. Atkin continues to be payable to her during her life and that the arrears from the time when she attained her majority must be raised and paid. The costs of all parties as between solicitor and client will be paid out of the fund in the trustees' hands.

Declaration accordingly.

Solicitors : *Pritchard, Sons, Partington & Holland*, (for all parties other than the Midland Bank, Ltd.) ; *Bell, Brodrick & Gray* (for the Midland Bank, Ltd.)

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Re GREYCAINE, LTD.

[CHANCERY DIVISION (Lord Uthwatt, sitting as an additional judge of the Chancery Division), November 26, 30, December 3, 7, 10, 1945, January 30, 1946.]

Companies—Receivers—Remuneration—Receiver appointed at agreed remuneration by trustees of trust deeds securing debentures—Compulsory winding up—Application by liquidator for remuneration of receiver to be fixed by the court—Jurisdiction of the court—Law of Property Act, 1925 (*c.* 20), *ss.* 101 (1) (iii), (3), 109 (6)—*Companies Act*, 1929 (*c.* 23), *s.* 309.

Under trust deeds securing debentures issued by a company, the trustee was empowered in certain events to appoint a receiver at a remuneration payable out of the mortgaged premises at a rate not exceeding that allowed by the Law of Property Act, 1925, s. 109, but the amount to which the percentage was to be applied was not stated. In 1936, a receiver was appointed by the trustee and, contrary to the provisions of the Law of Property Act, 1925, s. 109, he was authorised to retain, out of the mortgaged premises and moneys to be received, all costs and charges, as well as commission at the rate of 5 per cent. of the gross amount of all moneys received. In 1937, an additional receiver was appointed. The company's works having been destroyed by enemy action in 1940, in 1941 the remaining stock and plant were sold. In 1944, an order was made for the compulsory winding up of the company. The receivership was still on foot and the total sums received by the receivers amounted to almost a million pounds, about three-quarters of which represented trading receipts. On May 25, 1945, the liquidator applied to the court, under the Companies Act, 1929, s. 309, to fix the remuneration of the receivers. Two questions were raised as to the construction of sect. 309: (i) whether the court had any jurisdiction where a receiver had been appointed at an agreed remuneration; (ii) whether an order could be made which covered the past, or whether the jurisdiction could be exercised only in respect to the future. In regard to the first question, it was contended on behalf of the receivers that sect. 309 only applied where there had been no effective agreement as to a receiver's remuneration:—

HELD: (i) since sect. 309 applied only where a receiver had been appointed and his remuneration would, normally, have been expressly agreed, the court had jurisdiction under the section to fix the remuneration of a receiver even where he had been appointed at an agreed remuneration.

(ii) the jurisdiction of the court could only be exercised in respect to the future, because the jurisdiction given by the section was not to fix the amount payable, but the amount "to be paid." The object of the section was to enable the court, on the application of the liquidator, to regulate the course of business as regards a receiver's remuneration after a winding up had begun; it was not intended to enable the court to re-open matters that had been duly carried out before an application under the section had been made.

[**EDITORIAL NOTE.** Sect. 309 of the Companies Act, 1929, contained a new provision whereby the court may, on the application of a liquidator, fix the remuneration of a receiver appointed under powers contained in any instrument. It is now held that this power of the court overrides any agreement as to remuneration made at the time of appointment, but does not extend to granting remuneration at a different rate to that agreed for the period previous to the order of the court.

FOR APPLICATION OF LIQUIDATOR TO FIX REMUNERATION OF RECEIVER, see HALSBURY, Hailsham Edn., Vol. 5, p. 516, para. 837.]

MOTIONS to discharge an order of the registrar made on an application to the court under the Companies Act, 1929, s. 309. The facts are fully set out in the judgment.

H. Wynn-Parry, K.C., and *V. R. Aronson* for the liquidator.

J. W. Brunyate for Bernard Harry Brigham, the receiver.

C. W. Turner for the personal representative of John Wilcock, the additional receiver.

Cur. adv. vult.

LORD UTHWATT: By virtue of deeds dated July 8, 1929, and Nov. 16, 1934, Greycaine, Ltd., a company incorporated under the Companies Acts, charged its undertaking to a trustee as security for moneys payable under debentures issued by the company. The deeds provided that in certain events the trustee might appoint a receiver of the mortgaged property, the trustee being empowered to invest the receiver with such powers and discretions as he might think expedient. The provision made as to the receiver's remuneration was as follows:

> The remuneration of such receiver shall be payable out of the mortgaged premises and shall be at such rate not exceeding that provided in the Law of Property Act, 1925, s. 109, as the trustee may from time to time determine.

On Nov. 20, 1936, Brigham, called in the deed "the receivers," was duly appointed receiver by the trustee and by the terms of the appointment the receiver agreed to act as receiver, and the following provision was made as to his remuneration:

> The trustee authorises the receivers to retain out of the mortgaged premises and/or the moneys to be received by the receivers hereunder: (*a*) for their remuneration a commission at the rate of 5 per cent. of the gross amount of all moneys received by them; (*b*) all costs charges and expenses reasonably and properly incurred by them in the exercise of their powers as receivers.

On Apr. 8, 1937, Wilcock was appointed an additional receiver. On Mar. 8, 1944, an order was made for the compulsory winding up of the company. On Oct. 30, 1944, Wilcock died.

The business of the company was carried on by the receivers from 1936 to 1940. In 1940 the works of the company was destroyed by enemy action and in 1941 the remaining stock and plant were sold for over £100,000. The receivership is still on foot, as other assets remain to be got in. The total sums received by the receivers were little short of a million pounds, approximately three-quarters of this sum representing trading receipts. The 5 per cent. specified in the instrument of appointment when applied to the receipts works out at a very large sum, and the receivers have out of the moneys come to their hands retained their remuneration. On May 29, 1945, the liquidator took out a summons under the Companies Act, 1929, s. 309, to which Brigham and the legal personal representatives of Wilcock were made respondents, asking the court to fix the remuneration of Brigham and Wilcock as receivers. Sect. 309 runs as follows :

> The court may, on an application made to the court by the liquidator of a company, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver or manager of the property of the company, and may from time to time, on an application made either by the liquidator or by the receiver or manager, vary or amend any order so made.

On that summons the registrar made the following order on Oct. 23, 1945, after reciting the order to wind up and an order dated June 7, 1945, for delivery of accounts by Brigham, and certain affidavits :

> It is ordered that the remuneration of the said Bernard Harry Brigham and Frederick Wilcock deceased as such receivers as aforesaid be and the same is hereby allowed at the sum of £15,000.

The matter comes before me on motions to discharge that order. The order is obviously unsatisfactory in form, but it is common ground that it was intended to operate as an order determining the total remuneration properly payable to the receivers in respect of the period beginning with the commencement of the receivership until a recent date. The registrar has informed the court that he intended to apply a scale in which receipts were taken into account, and, presumably, the period covered ends with the date of the last receipt taken into computation. To this there must be added that the registrar informed the court that he had made a slip in working out the scale he had in mind.

In these circumstances, the normal course would be to discharge the order and remit the matter back for reconsideration by the registrar without further ado ; but the parties desire to have decided by the court two questions of construction of sect. 309 of the 1929 Act, which were raised before the Registrar. The first question is whether the court has any jurisdiction at all where a receiver has been appointed at an agreed remuneration ; the second is whether an order can be made which covers the past, or whether only the future can be dealt with. I propose to deal with these questions so far as raised by the facts of this particular case. I propose to assume that the receivers were duly appointed and that some remuneration was duly allotted to the receivers on a percentage basis applicable to receipts as they come in. I observe only in passing that, in the trust deeds, the amount to which the percentage was to be applied was left to inference and that in the appointment, contrary to the provisions of the Law of Property Act, 1925, s. 109, the receivers were to be entitled to expenses as well as commission.

In considering sect. 309 of the 1929 Act, there are various matters which should be borne in mind. The first is that, under the Law of Property Act, 1925, s. 101 (1) (iii), there is, subject to any contrary intention expressed in a mortgage deed, given to a mortgagee of any property power " to appoint a receiver of the income of the mortgaged property " (and in certain exceptional cases, where the property is of the nature of income, a receiver of the property itself)—the power being capable [under subsect. (3)] of extension or variation. Sect. 109 (6) of the 1925 Act contains a consequential provision as to the remuneration of a receiver so appointed. Save in rare cases, securities given by a company registered under the Companies Acts fall within the term " mortgage deed " as defined in the Act of 1925. Secondly, in the case of trust deeds securing debentures or debenture stock and in the case of debentures not supported by a trust deed, it is, and has for many years been, the common practice to give to the trustees, in the first case, and to a debenture holder, in the latter case, power to appoint a receiver of the mortgaged property itself. The practice has been to deal with the receiver's remuneration in terms. In the case of trust deeds, the usual provision was, and is, that the trustees may fix his remuneration subject in certain cases to a limitation. In the case of debentures, the provisions of the Law of Property Act, 1925, or its predecessor, the Conveyancing

Act, 1881, were, and are, incorporated with certain variations. The common method of fixing remuneration is by reference to a percentage based on the value of receipts from transactions into which the receiver from time to time enters and, so far as I am aware, the commercial practice is that the amount or scale of remuneration is agreed when the receiver is appointed. Powers wider than those implied by the Acts—*e.g.*, powers of sale or carrying on a business—were, and are, usually given to receivers appointed under a debenture and, where there is a trust deed, the practice has been either to give these powers to the receiver or to enable the trustees to delegate to him all or any of the powers and discretions as to sale and otherwise given to the trustees under the terms of the deed. The result is not satisfactory. In any negotiation as to the terms of a security, the question of the receiver's remuneration is hardly likely to be discussed at all. Common form is adopted. The effect of the application of statutory provisions, designed to deal with the case where the receiver is receiver of income only, to a case where the receiver may also deal with the corpus is not a matter which the persons concerned are likely to have in mind. Again, it would be difficult, perhaps impossible, to upset an exercise in good faith by the trustees of their power to fix remuneration. Lastly, remuneration assessed by reference to the value of transactions may or may not work fairly. Logically, the value of the property dealt with is irrelevant (though in practice one may be driven to it) if the end sought to be achieved is fair reward for skill and labour. One further matter may be mentioned. One usually finds, where debentures are outstanding, that the appointment of a receiver precedes the commencement of a winding up. It is, I think, legitimate to approach the construction of sect. 309 with these considerations in mind.

As regards the first question, I have no doubt. Sect. 309 applies only where a receiver " has been appointed," and, normally, his remuneration will have been expressly agreed. To hold that the section applied only where there was no effective agreement as to remuneration would be to disregard entirely the position which required to be dealt with and to reduce the ambit of the section to a microscopic quantity. That microscopic quantity would be ascertained in this way: " Fix " is said to mean " make certain what is not certain." There may be cases where there is no provision in operation. The receiver in such a case would be entitled to be remunerated on a *quantum meruit* basis; and the function of the section is to give the court, in its winding up jurisdiction, power to fix the amount in fact payable. This argument disregards reality. The grammatical meaning is clear; and no absurdity or departure from the intent of the legislation, as appearing in the section, is involved in adhering to it. " Fix " means fix, operative agreement or not. Just as under the Companies Act, 1929, s. 79, the liquidator and creditors have rights which override the company's bargain, so, under this section, the liquidator has rights denied to the company.

There is more substance in the second point raised. It was argued that, as the discretion given to the court was a judicial discretion, there was no reason why sect. 309 should not be widely construed. The court would be bound to take into account all the surrounding circumstances, including, in particular, the fact that services had been rendered on the basis of a bargain duly made, and the further fact, if it were the fact, that the agreed remuneration referable to those services had been duly satisfied. No injustice would arise. This may be true, but it is not an argument directed to the construction of the section. In my opinion, the jurisdiction can be exercised only as respects the future. The jurisdiction is not to fix the amount payable, but the amount " to be paid," and these words point to regulating the course of events in the future, not to the possibility of reviewing the past. The section, to my mind, is directed to enabling the court, on the application of the liquidator, to regulate the course of business as regards a receiver's remuneration once a winding up has begun, and not to enabling the court, when a winding up has begun, to re-open matters that have been duly carried out before an application under the section has been made.

It is not necessary for the purposes of the particular case before me to define the construction more closely. The parties here are not concerned with the question whether " remuneration to be paid " means remuneration to be paid in the future, whenever the services were rendered, or remuneration to be paid as respects future services. I propose to express no opinion upon that point. Nor, again, are they concerned with the question whether what I have called the future means the date of the application or the date of the order, but it is, in my view, clear that the date of the application is the material date.

Whether I am right or wrong in my construction of the section, the order, in view of the registrar's slip, must be discharged. With a view to enabling the matter to be effectively considered by the Court of Appeal, I propose to remit the matter to the registrar, with a direction—the form of which is dictated by the particular facts of the case—that any order made by him is not to relate to remuneration which, pursuant to the terms of the trust deed and the instrument appointing the receivers, has, prior to the date of the liquidator's application, accrued payable to the receivers.

Order discharged. Matter remitted to the registrar to be reconsidered in accordance with the direction given.

Solicitors: *Cosmo Cran & Co.* (for the liquidator); *F. C. Hampshire*, Harpenden (for the receiver); *Roney & Co.* (for the personal representative of the additional receiver).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

Re FOSTER, COOMBER *v.* GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE MAINTENANCE AND EDUCATION OF EXPOSED AND DESERTED YOUNG CHILDREN AND OTHERS.

[CHANCERY DIVISION (Romer, J.), November 23, December 21, 1945.]

Wills—Construction—" The residue of my estate to be divided equally " between testator's brother and sisters " during their lifetime "—" After their death to be evenly distributed " between testator's nephews and nieces—Implied gift to survivors or survivor of first takers—Second takers to take per capita on death of last survivor of first takers.

By his will, the testator, after making certain pecuniary and specific bequests, gave: " The residue of my estate to be divided equally between my brother and my four sisters during their lifetime but after their death to be evenly distributed between my nephews and nieces." The testator died a widower without parent or issue. The brother and the four sisters mentioned in the will were his only brother and sisters. They were all five living at his death, but the brother had died subsequently. There were seven nephews and nieces. The question was whether, on the brother's death, the one-fifth share of income which he had enjoyed during his life passed to the sisters or to the nephews and nieces. It was contended on behalf of the nephews and nieces that, by reason of the rule applied in *Re Hutchinson's Trusts* (2), the brother's share passed to the nephews and nieces immediately on his death:—

HELD: (i) upon the true construction of the will, the testator intended his residuary estate to pass as an entirety, and not in successive shares, to the nephews and nieces *per capita*, after the brother and all the sisters had died.

(ii) the application of the rule in *Re Hutchinson's Trusts* (2) was not imperative where, on the true construction of the will in question, the gift to the second takers was *per capita* and not *per stirpes*. The rule could, moreover, be displaced by a sufficiently clear indication in the will of the testator's intention that the estate or fund in question, when passing to the second takers, was to pass to them as one entirety or mass. The rule, therefore, did not imperatively apply to the gift in question.

(iii) the income of the testator's residuary estate was divisible equally between the testator's four sisters, and the survivors or survivor of them for the time being. On the death of the last survivor, the whole capital of the estate would be distributable amongst the testator's nephews and nieces.

[**EDITORIAL NOTE.** The court in this case refuses to apply the rule adopted in *Re Hutchinson's Trusts* (2), where a gift over to children after the death of their parents "share and share alike" was construed as a gift after the respective deaths of the parents to the respective children. This involves reading in the word "respective" twice, and it is held that where the words of the will permit, such a gift is to be read as a gift to the children *per capita* and not *per stirpes* after the death of the last survivor of the parents.

As to Implication of Gift to Survivors, see HALSBURY, Hailsham Edn., Vol. 44, pp. 431, 432, para. 478; and for Cases, see DIGEST, Vol. 44, pp. 1212—1215, Nos. 10480-10506.]

Cases referred to:

*(1) *Abrey* v. *Newman* (1853), 16 Beav. 431; 44 Digest 995, *8533*; 22 L.J.Ch. 627.

*(2) *Re Hutchinson's Trusts* (1882), 21 Ch.D. 811; 44 Digest 1003, *8602*; 51 L.J.Ch. 924; 47 L.T. 573.

*(3) *Re Browne's Will Trusts, Landon* v. *Brown*, [1915] 1 Ch. 690; 44 Digest 1215, *10506*; 84 L.J.Ch. 623; 113 L.T. 39.

*(4) *Re Errington, Gibbs* v. *Lassam*, [1927] 1 Ch. 421; 44 Digest 997, *8544*; 96 L.J.Ch. 345; 136 L.T. 764.

*(5) *Re Telfair, Garrioch* v. *Barclay* (1902), 86 L.T. 496; 44 Digest 1215, *10503*.

*(6) *Re Ragdale, Public Trustee* v. *Tuffill*, [1934] Ch. 352; Digest Supp.; 103 L.J.Ch. 181; 150 L.T. 459.

(7) *Re Riall, Westminster Bank, Ltd.* v. *Harrison*, [1939] 3 All E.R. 657; Digest Supp.

Adjourned Summons to determine a question arising under the will of Thomas Oliphant Foster. The facts and the relevant clause of the will are fully set out in the judgment.

G. D. Johnston for the trustee.

P. J. Sykes for the testator's sisters.

C. W. Turner for the nephews and nieces (children of the testator's sisters) and the personal representative of a deceased nephew.

C. A. J. Bonner for the daughter of the deceased brother.

Cur. adv. vult.

Romer, J.: By his will dated Oct. 14, 1936, the testator, Thomas Oliphant Foster, devised and bequeathed all his real and personal estate to his executors therein named, subject to the payment of his funeral and testamentary expenses and debts. After making certain pecuniary and specific bequests, the testator expressed himself as follows:

> The residue of my estate to be divided equally between my brother and my four sisters during their lifetime but after their death to be evenly distributed between my nephews and nieces.

The testator died on Mar. 12, 1942. He was a widower without parent or issue and he left him surviving one brother and four sisters. The originating summons which is now before me was taken out on Sept. 9, 1942, and raised certain questions of construction, most of which were decided in Dec., 1942, by Simonds, J., as he then was. Question 1 (*c*) of the summons, which is the question which I have now to decide, is in the following terms:

> Whether the income of the residuary estate is divisible equally between the testator's brother and four sisters and the survivors and survivor of them for the time being and on the death of the last survivor the whole capital is distributable amongst the testator's nephews and nieces or whether as and when each brother and sister of the testator dies the capital producing his or her share of the income becomes distributable amongst his or her children or alternatively amongst all the testator's nephews and nieces or whether on such death the income previously payable to such deceased brother or sister becomes undisposed of until the death of the last survivor of the brother and sisters or how otherwise the plaintiff ought to deal with the income and capital of the said residuary estate.

At the time when the matter was before Lord Simonds, the testator's brother and four sisters were all alive and the order which he made was confined, so far as the above question is concerned, to a declaration that the income of the residuary estate of the testator was divisible equally between the testator's brother and four sisters during their joint lives. The rest of the question was directed to stand over, with liberty to apply. Since this order was made, the testator's brother, Frederick Boswall Foster, has died, his death occurring on July 17, 1943. The summons was accordingly restored for argument and decision on question 1 (*c*). The testator had seven nephews and nieces who were represented before me, as also were the testator's next of kin and other interested parties.

Unaided by authority, I should come to the conclusion that, on the true construction of the testator's residuary disposition which I have read, the gift to the nephews and nieces was not intended to take effect until the death of the survivor of the testator's brother and four sisters, and that, until that event occurred, the brother and sisters for the time being alive would share the income equally between them and that the survivor would take the whole income for the remainder of his or her life. The reasons that would lead me to this conclusion are as follows. It is clear, in the first place, that, as each brother and sister dies, his or her interest in the estate ceases. It is equally clear that the interest of all of them does not cease with the death of one. Accordingly, I read "during their lifetime" as meaning "during their respective lives." Having created these interests, the testator then turns his attention to the passing of a particular subject-matter at a particular point of time. What, then, is the subject-matter and what is the point of time? The subject-matter would appear to be that which the testator has already described at the beginning of the disposition, *viz.*, "the residue of my estate." That is an expression which, if taken by itself, can mean only one thing, *viz.*, the estate as a whole. Then what is the point of time at which the estate as a whole is to go to the nephews and nieces? It is expressed to be after the death of the brother and sisters. I should have thought that it would be difficult to say that that point of time had been reached while one or more of the brother and sisters were still alive, and that it could not be said to have arrived until all of them were dead. It is suggested, however, that the *prima facie* conclusions which I have indicated, both as to the subject-matter of the ultimate gift and as to the time when it was to take effect, are erroneous having regard to the authorities relating to this kind of disposition which are to be found in the reports. These authorities it is argued, demonstrate that, as each brother and sister dies, the aliquot share of income set free by his or her death becomes payable thenceforth to the nephews and nieces who, but for the still subsisting income interests of such of the other first takers as survive, would immediately become entitled to payment of an aliquot share of capital. In other words, it is said that the gift to the nephews and nieces which follows the disposition in favour of the brother and sisters should read in some such sense as "but after their respective deaths their respective shares of or interests in the residue of my estate are to be evenly distributed between my nephews and nieces."

I will refer now to the authorities, some of which are not easily reconcilable. *Abrey* v. *Newman* (1) was a decision of SIR JOHN ROMILLY, M.R. In that case:

> The testator, after having given certain personal estate to his wife for life, proceeded as follows: "All the above-named property to be equally divided between Benjamin James and his wife Ann James, and Charles Abrey and his wife, for the period of their natural lives, after which, to be equally divided between their children; that is to say, the children of Benjamin James and Charles Abrey above-mentioned."

SIR JOHN ROMILLY's decision involved the view that the words "after which" meant "after their respective deaths." Benjamin James and Ann his wife had both died, leaving children; the wife of Charles Abrey was also dead leaving children surviving her by Charles Abrey, who was still alive. The judge, after observing, first, that the share given to Benjamin and Ann was given, in the first instance, to the parent and the gift afterwards was to take effect on the death of that parent, and, secondly, that it was not possible to read "their children" as "their respective children" because of the subsequent words "that is to say, the children of Benjamin James and Charles Abrey," held that upon the death of Benjamin James and his wife their share was divisible *per capita* amongst the children of Benjamin James and of Charles Abrey.

Re Hutchinson's Trusts (2) was a decision of KAY, J., In that case:

> A testatrix bequeathed personalty in trust for A.B. for life, and after his decease for his issue, and on failure of his issue to F.H.S. and R.S. share and share alike, "and after the decease of the said F.H.S. and R.S. to their children share and share alike, and to their heirs for ever." F.H.S. died without having had issue, R.S. survived him and died leaving children, and A.B., who survived them both, died without issue.

The judge found himself constrained by the authorities, and contrary to the inclination of his own mind, to construe the bequest as "a gift after the respective deaths of F.H.S. and R.S. to their respective children," with the result that, as there had been:

> . . . an absolute gift to each cf them in the first instance only cut down in favour of his children, in the events which happened the fund was divisible in moieties between the representatives of F.H.S., and the children of R.S.

Kay, J., after reviewing the relevant cases which had been decided down to that time, expressed himself as follows, (21 Ch.D. 811, at p. 816):

> The balance of authority seems to me, therefore, to show that there has been laid down what I must consider rather an artificial rule, a rule which I suppose has considerable advantages, if both the tenants for life, or the persons to whom the interest was first given have children; but in this case one of them has died before the other without issue; and the question is, under those circumstances, how the gift is to be construed. I think I am bound by authority to say that the words "after the decease of the said [F.H.S.] and his brother [H.S.]," mean after their respective deaths, or after the decease of each of them, and that there is a disposition of the share of each which was an absolute interest in the first instance upon his death. Now what is the disposition? It is to their children. Well, following the decisions, and considerably assisted, I must say, by an argument which Mr. Hastings used, and which I adopt, that in that place this must mean their respective children, because there could not possibly be any child who could say I am the child of both, I am bound to read "after the death" as meaning "after the death of each," and "to their children" as "to their respective children." I admit the force of Mr. Hastings's argument on that part of the gift; and I think these authorities have laid down a rule of construction which I am bound to follow; therefore, I so decide.

The judge arrived at this decision notwithstanding that, as he pointed out (21 Ch.D. 811, at p. 814), it involved "the addition at least of the word 'respective,' once, if not more than once," to the language which the testatrix had actually used.

In *Re Browne's Will Trusts* (3) Sargant, J., had to consider a disposition by a testator of an estate to trustees:

> . . . "upon trust to pay the income thereof to each of such of my said six nieces as shall be living . . . at the time of" the death of "the survivor of my said wife and son, for and during the respective lives of my said nieces, and, from and after the decease of my said six nieces, to stand possessed of my said trust estate and the income thereof," upon trust for such children of the testator's son as should be living at the son's death. Three only of the six nieces survived the testator's widow and son, and these three were all living. The son left one child him surviving: *Held*, that as each niece died, her share of the income did not belong to her legal personal representative until the death of the last surviving niece, and did not go over to the surviving nieces or niece, and that there was not an intestacy as to such share of income until the death of the last surviving niece; but that, as each niece died, her share of income went immediately to the remainderman, the son's child.

Sargant, J., after pointing out that four possible constructions had been argued before him, said that the real difficulty lay between two of them, *viz.*, whether the income went equally between the survivors or survivor of the nieces for the time being or whether on the death of each niece the ultimate gift to the remainderman took effect in respect of her share. The judge, after referring to certain authorities, including *Re Hutchinson's Trusts* (2), came to the conclusion that the latter of these two constructions was the right one. He read the words "from and after the decease of my said six nieces" as meaning "from and after the decease of my said six nieces respectively" or "from and after the deceases of my said six nieces." He was assisted to this interpretation by the precision of the preceding words "during the respective lives of my said nieces" and by the rule of construction ([1915] 1 Ch. 690, at p. 695):

> . . . that such words as "from and after the decease" are proper words of remainder and are often merely equivalent to "subject to" or "on the cesser of" the preceding interests.

It is to be observed that in this case the donee in remainder was not the child of any of the tenants for life who took preceding interests in income.

In *Re Errington* (4):

> The testator gave the income of the one-third part of his residuary estate to his daughter E. for her own absolute use and benefit, and from and after her decease such one-third part was to be divisible between his daughters J.G. and S.L., or "if dead between their issue share and share alike." J.G. died in the lifetime of E., leaving issue: *Held*, that on the death of E. the issue of J.G. took a moiety of the one-third part of the testator's residuary estate in equal shares *per capita*.

In the course of his judgment, ROMER, J., said ([1927] 1 Ch. 421, at pp. 425, 426) :

> There is a rule of construction referred to by KAY, J., in *Re Hutchinson's Trusts* (2) which is so binding that KAY, J., felt, in the case before him, compelled to give effect to it, although but for the authorities laying down that rule of construction he would have decided differently. The rule, stated in its simplest way, is this : Where a testator gives the income of his estate to two people, A. and B., for their lives and follows that gift by a direction that at their death, or at their deaths, or at or after the death or deaths of A. and B. the property is to go to their issue, the court does not construe the gift as a gift only to take effect on the death of both in favour of the issue of both, but construes it as a gift, to take effect on the death of each, of the share to the income of which the deceased was entitled, to the issue of the deceased. So that in the simple cases to which I refer, on the death of A. leaving issue, the issue of A. would take one-half notwithstanding the fact that B. still was living. On the death of B., B.'s issue in the same way would take the share in which B. had a life interest. Now, it is true that the cases in which that rule has been applied were cases of original gifts. But I see no reason at all why the rule should not equally apply to cases of substitutional gifts. The rule admittedly applies, as was laid down by KAY, J., where there is a gift to A. and B., not expressly for life, but a gift to A. and B., followed by an original gift in favour of the issue of A. and B. expressed to take effect in the event of the deaths or on the deaths of A. and B. In such a case KAY, J., held that on the death of one his issue took his share. I myself see no difference between that case and a gift to A. and B. with a substitutional gift in favour of their issue to take effect in the event of their deaths. I think in such a case the court ought to construe the gift as a gift to A. and B., with a substitutional gift to A.'s share in favour of his issue, and B.'s share in favour of his issue. It is a rule which appears to me to be one that has this supreme merit, a merit that not all rules of construction possess, that in the vast majority of cases it gives effect to the intention of the testator.

I must now refer to three cases in which a different view was taken as to the effect of gifts of a similar character to those which were before the court in the cases I have cited. The first is *Re Telfair* (5), a decision of FARWELL, J., There a testator gave the income of his residuary estate to E.W.G. and H.H.G. " in equal parts—that is to say, that they shall each receive the half amount of the interest during their natural lives." After " their deaths " the income was given to one of his wife's nieces for life and after her death to another of his wife's nieces for life ; and after the death of the latter niece the *corpus* was given to a charitable institution. E.W.G. died leaving the testator's widow her surviving. The widow then died and the question for the court was whether H.H.G. was entitled during her life to the whole of the income of the residuary estate. FARWELL, J., decided that she was. In his view, different generations were provided for by the will in due order and he found that the whole estate was to go over on the death of both E.W.G. and H.H.G. There was an implied gift to the survivor of them, he said, and the wife's nieces took only subject to their interests. The judge thought that the testator intended that the survivor of E.W.G. and H.H.G. should take the whole income for her life and that the entire interest was given after the deaths of both.

In *Re Ragdale* (6) :

> A testator devised and bequeathed the residue of his estate to the Public Trustee upon trust for sale and conversion and to pay one-half of the net income arising from the fund so created to R. and the other half to T., and " from and after their decease " to pay the principal as well as the income to a [hospital fund]. R. predeceased the testator. The question arose whether there was an intestacy as regards R.'s share, and if not, whether it was payable, both capital and income, to the charity or whether R.'s share of income was payable to T. for her life.

Re Telfair (5) and *Re Browne's Will Trusts* (3) were cited to FARWELL, J., before whom the case came, but not, apparently, *Re Hutchinson's Trusts* (2) nor *Re Errington* (4). FARWELL, J., after observing that he had to construe the will on the language used and ascertain the intention from that language, expressed himself as follows ([1934] 1 Ch. 352, at p. 355) :

> I think I can find in the language of the will two possible alternatives : one in favour of the hospital fund to take immediately, the other that the survivor of the ladies takes the disputed half-share of the income for her life. On the one side if I prefer the hospital fund I have to read " after their decease " as " after their respective deaths " ; on the other I have to read into the will that which is not in the will. In my opinion, on the true interpretation of the will, the testator did not intend that the hospital fund should take till both ladies were dead, and so I cannot read " after their decease " as " after their respective decease."

Looking to all the terms of the will, FARWELL, J., came to the conclusion that the hospital did not take until the death of T., and that T. was entitled to the disputed half-share of the income for her life.

The last case to which I need refer is *Re Riall* (7). In that case :

> The testatrix directed her trustees, after payment of certain legacies, to divide the balance of her residuary estate into two equal parts and to pay the income from one moiety to one of her two sisters for life, and, after her death, to pay the income of that moiety to that sister's husband (who, however, predeceased the testatrix). The income of the other moiety was given to her other sister for life. On the death of the last survivor of the life tenants, the residuary estate was to be divided among a number of charitable institutions. The trusts of the first moiety having determined on the death of the first sister, the question arose whether cross-remainders could be implied so as to entitle the surviving life tenant during the remainder of her life to the income to which the deceased life tenant had been entitled, or whether during this period such income passed to the charitable institutions or passed as on an intestacy.

The case was heard by SIMONDS, J., and amongst the cases cited to him were *Re Telfair* (5) and *Re Ragdale* (6), but not, apparently, *Re Hutchinson's Trusts* (2), *Re Browne's Will Trusts* (3), nor *Re Errington* (4). In the view of SIMONDS, J., the position was governed by the decision of FARWELL, J., in *Re Ragdale* (6). He came to the conclusion that the testatrix's intention was that the tenants for life should receive the whole income from the residuary estate until the death of the last survivor of them and that only then should the charitable institutions mentioned in the will become entitled to their shares in the capital of the residue. He accordingly held that the released income ought to be paid to the surviving life tenant during the remainder of her life.

In the present case, the first takers are the only brother and sisters that the testator had and it accordingly follows that the second takers, the testator's nephews and nieces, are necessarily the issue of the first. Certain admissions were rightly made before me during the course of the argument. In the first place, it was admitted that there was no intestacy arising by reason of the death of the testator's brother, whatever else might be the true destination of the income which he had enjoyed or of the share of the estate which produced it. Secondly, it was conceded that whatever benefits the nephews and nieces take they take as a class *per capita*, and not under a stirpital distribution ; and, thirdly, it was admitted that the nephews and nieces must, in any event, await the deaths of all the testator's sisters before becoming entitled to a payment of capital. Accordingly, the alternative constructions between which I must choose are, on the one hand, that the testator's sisters take between them the one-fifth share of income which their brother enjoyed during his lifetime and, on the other hand, that such share of income passed on the brother's death immediately to the nephews and nieces. As I have indicated earlier, my inclination is in favour of the former construction unless I am compelled, by reason of what I may call the rule in *Re Hutchinson's Trusts* (2), to adopt the latter.

Upon a consideration of the cases to which I have referred, I have come to the following conclusions as to the proper application of this rule : (i) it applies in general where the gift to the second takers, being issue of the first takers, can fairly be construed as a gift to them *per stirpes* ; (ii) its application is not imperative where the second takers are either not issue of the first takers at all or, being such issue, the gift in their favour is, on construction, a gift to them *per capita* ; and (iii) the rule may be displaced by a sufficiently clear indication of intention on the part of the testator, to be gathered from the will as a whole, that the estate or fund in question, when passing to the second takers, is to pass to them as one entirety or mass. I am aware that there may be some inconsistency between the second and third qualifications to the rule which I have mentioned and the decisions in such cases as *Abrey* v. *Newman* (1) and *Re Browne's Will Trusts* (3). Nevertheless, such qualifications appear to me to be compatible, on the one hand, with the statement of the general rule by ROMER, J., in *Re Errington* (4), and, on the other hand, with the decisions in *Re Telfair* (5), *Re Ragdale* (6) and *Re Riall* (7), in none of which was the rule applied. Moreover, a too rigid application of the rule would in many cases destroy what ROMER, J., recognised as its general merit, *viz.*, that it gives effect to the probable intention of testators. I have earlier indicated that my own view of the will now before me is that the testator intended his residuary estate to go over as an entirety, and not in successive shares, to the nephews and nieces at a given time; and it is, moreover, clear that they take *per capita* and not *per stirpes*.

In my judgment, accordingly, the case is not one to which the rule imperatively applies and I am free to decide, as I do decide, that the income of the testator's residuary estate is divisible equally between the testator's four sisters, and the survivors or suvivor of them for the time being, and on the death of the last survivor the whole capital of the estate will be distributable amongst the testator's nephews and nieces; and I will make a declaration accordingly.

Declaration accordingly. Costs as between solicitor and client to be paid out of the estate.

Solicitors: *Wetherfield, Baines & Baines* (for all parties excepting the personal representative of the deceased nephew); *Radcliffes & Co.* (for the personal representative of the deceased nephew.)

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

NORMAN *v.* KING.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Bucknill, L.JJ.), February 1, 1946.]

County Courts—Appeal—Misdirection—Onus of proof—Judge's note ambiguous —Benefit of doubt.

On an appeal from a decision of a county court judge on the ground of misdirection it is for the appellant to satisfy the court that the judge did in fact misdirect himself. If the court is left in any doubt it should adopt a benevolent construction of the judge's language so as to support his judgment.

[**EDITORIAL NOTE.** This is a short point dealing with the onus of proof on appeal from the decision of a county court judge on the ground of misdirection.

AS TO APPEALS FROM COUNTY COURTS ON GROUNDS OF MISDIRECTION, see HALSBURY, Hailsham Edn., Vol. 8, pp. 378, 386, paras. 812, 822; and FOR CASES, see DIGEST, Vol. 13, pp. 528, 541, Nos. 795-797, 937.]

APPEAL by the employer from an award of His Honour DEPUTY JUDGE TURNER, made at Bletchley and Leighton Buzzard County Court and dated Oct. 1, 1945. The facts are fully set out in the judgment of LORD GREENE, M.R.

F. W. Beney, K.C., and *J. P. Stimson* for the appellant.

L. A. Blundell for the respondent.

LORD GREENE, M.R.: The appellant appeals against an award in favour of the respondent on the ground that the arbitrator misdirected himself on the vital question as to whether the respondent was a workman in the employment of the appellant within the meaning of the Workmen's Compensation Act. Counsel for the appellant contends that the arbitrator directed himself by limiting his consideration to one matter only, namely, the evidence of the alleged acts of control exercised in respect of the hedging work on which the man was engaged at the time of the accident. He says that the circumstances to which exclusively the judge directed his mind were quite neutral in character and consistent with the man's position being that of an independent contractor. He, however, admits, and rightly admits—I do not see how he could have avoided admitting it—that on the whole of the evidence it would have been possible for the arbitrator to come to the same conclusion, but he said that it was a matter for him and not for us to decide; and accordingly, if he had in fact misdirected himself, the proper course to take was to send the whole matter back for reconsideration.

At the time of the accident the respondent was engaged in laying and trimming hedges on the appellant's farm. By occupation the respondent appears to have been a man who engaged himself—and I use that expression for the moment in a neutral sense—to farmers for a variety of jobs. He was, obviously, one of those skilled men that one finds in the country who can do all sorts of work about a farm. He was, apparently, a skilled thatcher, a skilled hedger, he could mow and he could thresh. In the course of a continuous period of work on behalf of the appellant he actually performed for the appellant all those things. He started thatching ricks. He then, apparently, went on to mow some clover. He then went to lay the hedges and, while he was engaged in the task of laying hedges, which naturally took some time, he was diverted, apparently by amicable arrangement, certainly on one occasion when the appellant was short-handed, to help in the threshing, and I am not sure that there were not diversions of other kinds. His method of remuneration varied according to the work that he was doing. He was paid, as I understand it, on a time basis for all the work except hedging and for that he was paid at the rate of £1 a pole.

The evidence as to the control exercised by the appellant, related both to control of hedging and the control of, certainly, the threshing. Counsel for the appellant says that looking at the hedging by itself the evidence as to control was not such as to justify a finding of the right to control because it was no more than that sort of control which the employer of an independent contractor exercises over his operations. With regard to that the evidence of the respondent was to this effect : " He came round frequently and when I said what was required he agreed to send it along. He suggested methods of trimming trees here and there. He—that is the appellant—said he did not want thick hedges as fields get ploughed and cows would not be there for a year or two." The appellant said : " I visited him at work from time to time. I went and told him what sort of fence I wanted in the different fields and, apart from that, I left it to him." Then, a little later on, he says : " When hedging I told him whether thick or thin and sent bushes for thickening. I told him to top certain trees and to get the hedge down." Looking at the hedging by itself, I think there is force in counsel's contention that those directions given by the appellant were consistent with the relationship being that of an independent contractor, and I will assume that that is right. Evidence as to control in respect of other operations is, I think, limited to the thatching and there it appears from the evidence of the appellant that he said this : " He is a practical man and he knows how to do the work. If he had started it in a rough way I should have told him and told him to do it differently. I went and told him to put extra pegs in the rick." There again, that perhaps does not go very far, but there is evidence that the respondent was switched, if I may use that word, from one kind of work to another kind of work, and it would have been legitimate for the arbitrator in deciding what the relationship was while the hedging work was going on to look on the whole course of those operations from beginning to end and from that conclude what the true relationship was in respect of the hedging. There was evidence, and, in my opinion, ample evidence, on which he could have found that in respect of hedging there was the relationship of master and servant, having particular reference to what is a most important test in these cases, namely, the power of control.

Counsel for the appellant points out, and points out quite properly, that there was other evidence that might point the other way. For instance, the fact that the method of remuneration for the hedging was not by time but piece and the fact that, as the respondent said and the appellant agreed, while he was hedging he was not bound to come when he did not want to come, particularly if the weather was bad. That was a matter which could have been put to the other scale by the arbitrator. But that there was evidence on which he could have found that the relationship was that of master and servant, counsel really did not dispute.

The question, therefore, boils down to this. Did the arbitrator, or did he not, misdirect himself ? It is for the appellant to satisfy us that he did misdirect himself. If we are left in doubt as to that, in my opinion his reasons must be construed in a favourable way so as to support his judgment. This court is not entitled, in my view, to scrutinise the type of concise note that we have in this case with very critical care ; it must be satisfied that there was a misdirection. If the matter is left in doubt, the court should construe the judge's language in a benevolent way so as to support his judgment.

The language of the arbitrator is not clear, but it is, to my mind, certainly very far from establishing with any certainty that he was misdirecting himself. As usually happens in these cases, the note is made presumably some time after he delivered his judgment and is very concise. It appears, typed obviously at a different time, at the bottom of his notes of the evidence in these words :

Respondent did inspect the work and gave certain directions during its progress. It was not necessary to do more as the applicant was an experienced and skilful hedger but sufficient evidence to establish that in fact respondent had the right and power to control the manner in which the applicant did the work.

I read that as meaning that the arbitrator was directing his mind to this question : " In the matter of hedging, which is the particular branch of occupation with which I am concerned, did the alleged employer have that measure of control or that type of control which, at any rate, is the most important factor in deciding whether or not the relationship of master and servant exists." That explains his reference to the hedging, and I think words like " the work " used there mean the work of hedging. In the first line, undoubtedly, he is referring to the instructions given during the progress of the work of hedging, but the controversy really turns on the last sentence and, indeed, on three or four words in it. The arbitrator says : " But sufficient evidence to establish that in fact the respondent had the right and power to control. If the arbitrator had said " but the evidence before me was sufficient to establish that fact," it would, I think have been impossible for us to have said that he had excluded from consideration the other relevant factors in the case beyond the mere evidence of directions given in respect of hedging. Those words could, I think, clearly have meant that he had applied his mind to the whole of the evidence before him and the whole of the relationship of these parties while they were concerned with one another. It would have meant that, having regard to the whole of the evidence, he had come to the conclusion that in the matter of hedging there was the necessary power of control. That could not have been attacked, but he has not said that. He has said " but sufficient evidence to establish." That may mean that the evidence of the instructions given during the progress of the hedging is sufficient to establish the power of control. It may mean that there was sufficient evidence before him that he had the power of control. Counsel for the appellant wishes us to construe his language as bearing the former meaning. What the result might have been if that former meaning had been expressed in unambiguous language is one thing, but counsel first had to satisfy us that that is what the language means. In my opinion, this phrase is ambiguous and it is, no doubt, susceptible of the meaning which counsel places on it. But that is not enough in the case of an appeal from a decision of this kind. Counsel has to satisfy us that we ought to put that meaning upon it so as to impute to the judge a misdirection. I think it would be wrong to do anything of the kind. I think that where there are two possible, and, indeed, equally possible, meanings to be attributed to his language it is the duty of this court to choose that which will support his decision and to give him, so to speak, the benefit of the doubt. Having regard to those considerations, the appeal must, in my opinion, be dismissed with costs.

MORTON, L.J. : In this case there is, in my view, ample evidence on which the deputy county court judge sitting as arbitrator could properly find that at the time of the accident the injured man was a workman within the meaning of the Workmen's Compensation Act, that is, that he was working under a contract of service, and the arbitrator has found that he was a workman. The sole ground for the appeal is that it is suggested that, according to the true construction of the judge's notes of his reasons, there was misdirection of himself on the part of the judge. For my part, I think the more natural construction of the very elliptical note which the judge has made is that he did take into account the whole of the evidence. I was inclined to read it in this way. First of all, there is the sentence " Respondent did inspect the work and gave certain instructions during its progress." That, it is said by counsel for the appellant, and said truly, might be regarded as a neutral state of affairs and not sufficient to establish the matter one way or another. The second sentence is, " It is not necessary to say more than that the applicant was an experienced and skilful hedger." That, as it seems to me, is an explanation by the county court judge of why it was that the respondent did not take any more active part in directing the work. Then come the words " but sufficient evidence to establish that in fact respondent had the right and power to control the manner in which the applicant did the work." To my mind, that sentence is clearly elliptical, something has been left out between " but " and " sufficient." I would supply the words " but there is sufficient evidence to establish that in fact respondent had the right and power to control " as being the more natural construction. Let me assume that there are two possible constructions and that there is some difficulty in determining which is right. In my view, it would not be right to conclude that the judge has addressed his mind only to the evidence which he mentions in the first sentence and has disregarded the whole of the rest of the evidence given in the case. I need not go into that evidence in detail as my Lord has already referred to certain portions of it. To my mind, the county court judge has arrived at the proper conclusion justified by the evidence, and, on the construction of his judgment as I see it, there is no ground for saying that he has misdirected himself. But even if it was open to the other construction, I myself would not feel inclined to give it in a case where there was undoubtedly at the least a doubt as to the true meaning of his notes. I agree that this appeal must be dismissed with costs.

BUCKNILL, L.J. : I agree. It seems to me that the case turns on the smallest and nicest of points, namely, the interpretation of the last sentence of the very short note of the judgment. The last sentence by itself is not grammatical and there is obviously something left out. There are two possible readings of the words ; it is either " but it is sufficient evidence " or " but there is sufficient evidence." If it is to be read as " it is " then I agree that it would mean that the judge had concluded that mere inspection and instructions were sufficient to show the relationship of master and servant. On the other hand, if one reads it " but there is sufficient evidence " then one must take into account all the evidence which was given before the judge. I think the right reading is " but there is sufficient evidence " because it seems to me reasonable to suppose that the judge would have regard to all the evidence including the work done by this man in mowing clover, threshing and so on. Also, I think, if there is a doubt as to how to read the words, one should impute rightness on the part of the judge and not wrongness. For these reasons, I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Samuel Price & Sons*, agents for *Darnell & Price*, Northampton (for the appellant) ; *Moodie, Randall, Carr & Brown*, agents for *Thornley & Boutwood*, Leighton Buzzard and Dunstable (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BAINDAIL (otherwise LAWSON) *v.* BAINDAIL

[COURT OF APPEAL (Lord Greene, M.R., Morton and Bucknill, L.JJ.), January 28, 29, 30, 1946.]

Divorce—Nullity—Marriage in England with Indian already lawfully married in India according to Hindu law—Hindu law permitting polygamy—Hindu marriage recognised as valid in English law—English ceremony of marriage a nullity.

The respondent, an Englishwoman, went through a ceremony of marriage with the appellant on May 5, 1939, at a London register office, the appellant being described in the marriage certificate as a bachelor. On May 1, 1928, the appellant had lawfully married a Hindu woman according to Hindu rites at Muthra United Provinces, India, and his Hindu wife was alive at the time of the appellant's marriage with the respondent. It was established that the appellant's Hindu marriage would be recognised by the courts of British India. The question for the determination of the court was whether, having regard to the appellant's marriage in India, the subsequent English ceremony of marriage was valid :—

HELD : the court was bound to recognise the Indian marriage as a valid marriage and an effective bar to any subsequent marriage in England.

Decision of BARNARD, J. ([1945] 2 All E.R. 374) *affirmed.*

[**EDITORIAL NOTE**. The degree of recognition to be accorded by English courts to Hindu marriages was considered by Barnard, J., in *Srini Vasan* v. *Srini Vasan* (1), in *Mehta* v. *Mehta* ([1945] 2 All E.R. 690), and in the case now reported on appeal. The Court of Appeal affirm the views expressed by Barnard, J., holding that on principle the courts are bound to recognise the Indian marriage as binding, for the purpose of proceedings for nullity of a subsequent English marriage. By marriage in India a Hindu domiciled in India acquires the status of a married man, although the marriage is not one falling within the definition laid down by Lord Penzance in *Hyde* v. *Hyde* (2), but in that case Lord Penzance clearly limited his decision to the matter with which he was immediately concerned. Similarly, Lord Greene, M.R., now limits the present decision to the circumstances involved, and refuses to express any opinion upon whether such a marriage can provide a foundation for proceedings for bigamy. → SEE R v SARWAN SIN 1963.

As to Marriages Recognised by English Law, see HALSBURY, Hailsham Edn., Vol. 6, pp. 283-285, para. 340; and for Cases, see DIGEST, Vol. 11, pp. 413-515, Nos. 800-811.]

Cases referred to:

*(1) *Srini Vasan (otherwise Clayton)* v. *Srini Vasan*, [1945] 2 All E.R. 21; [1946] P. 67; 114 L.J.P. 49; 173 L.T. 102.
*(2) *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130; 11 Digest 413, *800*; 35 L.J.P. & M. 57; 14 L.T. 188.
*(3) *Sinha (Peerage) Case* (1939), 171 Lords Journals, 350 (see p. 348 *post*].
(4) *Re Bethell, Bethell* v. *Hildyard* (1888), 38 Ch.D. 220; 11 Digest 413, *801*; 57 L.J.Ch. 487; 58 L.T. 674.
(5) *Brinkley* v. *A.-G.* (1890), 15 P.D. 76; 11 Digest 414, *803*; 59 L.J.P. 51; 62 L.T. 911.
(6) *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; 11 Digest 429, *932*; 52 L.J.P. 33; 48 L.T. 273.
(7) *R.* v. *Naguib*, [1917] 1 K.B. 359; 11 Digest 414, *802*; 86 L.J.K.B. 709; 116 L.T. 640.
(8) *Chetti* v. *Chetti*, [1909] P. 67; 11 Digest 416, *827*; *sub nom. Venugopal Chetti* v. *Venugopal Chetti*, 78 L.J.P. 23; 99 L.T. 885.
(9) *Peal* v. *Peal*, [1931] P. 97; Digest Supp.; 100 L.J.P. 69; 143 L.T. 768.
(10) *Re Bozelli's Settlement, Husey-Hunt* v. *Bozzelli*, [1902] 1 Ch. 751; 11 Digest 415, *807*; 71 L.J.Ch. 505; 86 L.T. 445.
(11) *Sottomayer* v. *De Barros* (1879), 5 P.D. 94; 11 Digest 416, *829*; 49 L.J.P. 1; 41 L.T. 281.
(12) *Ogden* v. *Ogden*, [1908] P. 46; 11 Digest 334, *228*; 77 L.J.P. 34; 97 L.T. 827.
(13) *Board* v. *Board*, [1919] A.C. 956; 16 Digest 102, *30*; 88 L.J.P.C. 165; 121 L.T. 620.
(14) *Salvesen (or Von Lorang)* v. *Administrator of Austrian Property*, [1927] A.C. 641; Digest Supp.; 96 L.J.P.C. 105; 137 L.T. 571.
(15) *Re Goodman's Trusts* (1881), 17 Ch.D. 266; 3 Digest 372, *135*; 50 L.J.Ch. 425; 44 L.T. 527.
(16) *Nachimson* v. *Nachimson*, [1930] P. 217; Digest Supp.; 99 L.J.P. 104; 143 L.T. 254.
(17) *Birtwhistle* v. *Vardill* (1840), 7 Cl. & Fin. 895; 18 Digest 6, *24*; *previous proceedings, sub nom. Doe d. Birtwhistle* v. *Vardill* (1835), 2 Cl. & Fin. 571.
(18) *Fenton* v. *Livingstone* (1859), 33 L.T.O.S. 335; 11 Digest 414, *804*.

Appeal by the respondent from a decision of Barnard, J., dated July 5, 1945, and reported ([1945] 2 All E.R. 374). The facts are fully set out in the judgment of Lord Greene, M.R.

D. N. Pritt, K.C., and *F. M. Landau* for the appellant.

G. O. Slade, K.C., and *Colin Duncan* for the respondent.

Cur. adv. vult.

Pritt, K.C.: The appellant is still domiciled in India. A polygamous marriage is not recognised in England as a marriage so as to render invalid an English marriage entered into in England in valid form.

[Counsel referred to *Srini Vasan* v. *Srini Vasan* (1), *Hyde* v. *Hyde and Woodmansee* (2), *Sinha Peerage Case* (3), *Re Bethell, Bethell* v. *Hildyard* (4), *Brinkley* v. *A.-G.* (5), *Harvey* v. *Farnie* (6), and *R.* v. *Naguib* (7).]

Slade, K.C.: By the law of England the validity of a monogamous marriage contracted here between a man domiciled abroad and a woman domiciled here is determined by (*a*) status and (*b*) capacity to marry of each of the two parties. Generally speaking status is determined by the personal law, *i.e.*, in England the *lex domicilii.*

[Counsel referred to *Chetti* v. *Chetti* (8), *Peal* v. *Peal* (9), *Re Bozelli's Settlement* (10), *Sottomayer* v. *De Barros* (11), *Ogden* v. *Odgen* (12), *Board* v. *Board* (13), *Salvesen (or Von Lorang)* v. *Administrator of Austrian Property* (14), *Harvey* v.

Farnie (6), *Re Goodman's Trusts* (15), *Sinha Peerage Case* (3), *and Nachimson* v. *Nachimson* (16).]

Lord Greene, M.R.: A good deal of ground has been traversed and a number of authorities have been cited which have, in greater or lesser degree, an indirect bearing on the precise question which we have to decide, a question which is not covered by authority. Barnard, J., pronounced in favour of the present respondent (who was the petitioner in the proceedings) a decree of nullity. In holding that he had jurisdiction to pronounce such a decree, and that in law the petitioner was entitled to it, the judge followed a previous decision of his own in *Srini Vasan* (*orse. Clayton*) v. *Srini Vasan* (1).

The appellant is a Hindu who, while resident in this country, went through a ceremony of marriage with the present respondent, an English lady. That ceremony took place on May 5, 1939, at the Holborn Registry Office. Some question was raised as to the domicil of the appellant at the time, and it is necessary to consider that question. It is clear that his domicil of origin was Indian and that there was no evidence that he had acquired a domicil of choice in this country or elsewhere. The petition contained the usual assertion that he was domiciled here at the date of the petition; that is in accordance with the rules. That, of course, has no bearing on the question what his domicil was at the date of the ceremony on May 5, 1939, and is required by the rules, no doubt, in connection with jurisdiction. On Feb. 22, 1940, a child was born to the appellant and the respondent.

It appears that this Hindu, on May 1, 1928, went through a ceremony of marriage according to his personal law—Hindu law—in India with a Hindu lady; a fact in his personal history which he did not think it necessary to reveal to the respondent. She, however, in later years discovered it and presented a petition for a decree of nullity of her marriage to the appellant on the ground that he was a married man at the time when she went through the ceremony of marriage with him. Barnard, J., took the view, both in *Srini Vasan* v. *Srini Vasan* (1) and in this case, that those facts were sufficient to entitle her to a decree. I should perhaps read his actual language with regard to the Hindu marriage. He says this ([1945] 2 All E.R. 374, at p. 375):

> I have heard the evidence in this case and I am quite satisfied, from the evidence I have had put before me, that the respondent did go through a ceremony of marriage on or about May 1, 1928, with a Hindu woman, that that marriage was according to Hindu rites and usages, and that that marriage would be regarded as a valid marriage by the courts of British India. In fact, counsel for the respondent quite frankly admitted that.

The judge was also satisfied that the Hindu wife was alive on May 5, 1939.

The point raised by the appeal is a very short one. It was said that for the purposes of a claim to a decree of nullity the existence of the Hindu marriage must be disregarded by the courts of this country on the ground that, according to our law, such a marriage is not to be regarded as a marriage at all with the consequence that on May 5, 1939, the appellant was an unmarried man and was, therefore, not debarred by any existing union from marrying the respondent. In support of that proposition a number of observations in decided cases have been cited to us. But it is to be observed that in no one of those cases was the question to which the court was addressing its observations in any way similar to the present question; it is not, in my opinion, legitimate to take those observations from their context and apply them to what is essentially a different question.

I do not propose to go through all the cases cited to us but I will take what I think has been properly described as the high-water mark, the well known decision of Lord Penzance in *Hyde* v. *Hyde* (2). The headnote starts with this general proposition:

> Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.

But that, of course, does not enable any general answer to be given to the question: "What is to be understood by 'marriage' for the purpose of the various branches of English law in which the question of marriage is relevant?" For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage, it is no doubt the case (at any rate, it has always been accepted as the case following LORD PENZANCE's decision) that the courts of this country exercising jurisdiction in matrimonial affairs do not and cannot give effect to, or dissolve, marriages which are not monogamous marriages.

If one looks at the Matrimonial Causes Act one finds the word "marriage", and one has to construe that word for the purpose of ascertaining what the jurisdiction of the English courts is in these matters. The reasons are, I should have thought, manifest to common sense, namely, that the powers conferred A on the courts for enforcing or dissolving a marriage tie, are not adapted to any form of union between a man and woman save a monogamous union. If a man by the law of his domicil is entitled to have four wives and then becomes domiciled in this country and wishes to be divorced here, nice questions would necessarily arise as to whether in consorting with the other wives he had been guilty of adultery and various questions of that kind. At any rate, rightly or wrongly, the courts have asserted that proposition and have refused to B regard a polygamous marriage as one which entitles the parties to come for matrimonial relief to the courts of this country.

Hyde v. *Hyde* (2) was a case where two parties were Mormons and had married at a time when polygamy was recognised by the Mormon State, and the question arose whether the husband was entitled to obtain a decree of divorce here. It was held that the Mormon marriage could not be regarded as a marriage for the purpose of asking the court to grant a decree of dissolution. LORD PENZANCE C says this (L.R. 1 P. & D. 130, at p. 133):

> But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered "husband" and "wife" in the sense in which these words must be interpreted in the Divorce Act. Further reflection has confirmed this doubt, and has D satisfied me that this court cannot properly exercise any jurisdiction over such unions.

It is to be noted that LORD PENZANCE was there posing the question as a question arising on the construction of the Divorce Act. At the end of his judgment he says (*ibid.*, at p. 138):

> In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy E which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided, is that as between each other they are not entitled to the remedies, the adjudication or the relief of the matrimonial law of England.

LORD PENZANCE quite clearly saw how undesirable it would be to attempt F to lay down any comprehensive rule as to the manner in which a polygamous marriage ought to be regarded by the courts of this country for purposes different from that with which he was immediately concerned. I do not feel myself bound by anything said in *Hyde* v. *Hyde* (2), or any of the other cases on which reliance was placed in this connection, to hold that, for the purposes of the present petition, the court is bound, or ought, to disregard the existence of the Hindu marriage. The problem, as it seems to me, requires to be approached *de novo* G and from quite a different angle; that was the view which the judge took and, if I may respectfully say so, I entirely agree with the decision to which he came. The question as it presents itself to my mind is simply this: On May 5, 1939, when the appellant took the respondent to the registry office was he, or was he not, a married man so as to be incapable of entering into another legitimate union?

The proposition would not be disputed that in general the status of a person H depends upon his personal law, which is the law of his domicil. By the law of the appellant's domicil at the time of his Hindu marriage he unquestionably acquired the status of a married man according to Hindu law; he was married for all the purposes of Hindu law, and he had imposed upon him the rights and obligations which that status confers under that law. That status he never lost. Nothing that happened afterwards, save the dissolution of the marriage if it be possible according to Hindu law, could deprive him of the status of a married man which he acquired under Hindu law at the time of his Hindu marriage; he was, therefore, a married man on May 5, 1939, according to Hindu law. Did that circumstance prevent him from entering into a valid marriage in this country ? It is said that it did not because, whatever Hindu law may say and whatever his position may be in India, this country will not recognise the validity of the Hindu marriage.

We are not considering in this case the question of construction of any words such as "marriage," "husband," "wife," and so forth in the Divorce Acts. We are considering whether, according to what would have been the old ecclesiastical law, the existence of the Hindu marriage formed a bar. For the purpose of that consideration, what was his status on May 5, 1939 ? Unquestionably it was that of a married man. Will that status be recognised in this country ? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognised. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicil, and in applying the law of his domicil effect would have to be given to the rights of any children of the Hindu marriage, to the rights of his Hindu widow, and for that purpose the courts of this country would be bound to recognise the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here ; one can think of other cases.

LORD MAUGHAM, L.C., who delivered the leading opinion of the Committee of Privileges in the *Sinha* (*Peerage*) *Case* (3), said this :

> On the other hand, it cannot, I think, be doubted now (notwithstanding some earlier *dicta* by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our courts, that the issue are regarded as legitimate, and that such issue can succeed to property in this country, with a possible exception which will be referred to later . . .

That was the well known exception of real estate. We have not been referred to the cases, if any, to which LORD MAUGHAM, L.C., was referring, and, in fact I do not know of any English cases ; there are cases no doubt in the Privy Council, but whether there are any purely English cases I do not know. But I do get assistance from that paragraph, quite apart from the question of authorities, as showing the way in which these problems were striking a great master of the law—if I may say so—and one particularly familiar with problems of private international law. At any rate, if he was not asserting what the law had been settled to be by decisions of the English courts he was at least expressing his own opinion and to that I would give the greatest respect. But, quite apart from that, it seems to me that the matter rests in this way : the courts of this country do for some purposes give effect to the law of the domicil as affixing or imposing a particular status on a given person. It would be wrong to say that for all purposes the law of the domicil is necessarily conclusive as to capacity arising from status. There are some things which the court of this country will not allow a person in this country to do whatever status with its consequential capacity or incapacity the law of his domicil may give him. The status of slavery would not be recognised here, nor would a variety of other things involved in status. In the case of infants where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined not by the law of the domicil but by the *lex loci*. Those are merely illustrations : I do not stop to cite authority about them. I refer to them in order to show that there cannot be any hard and fast rule relating to the application of the law of the domicil as determining status and capacity for the purpose of transactions in this country.

The practical question in this case appears to be : Will the courts of this country, in deciding upon the question of the validity of this English marriage, give effect to what was undoubtedly the status possessed by the appellant ? That question we have to decide with due regard to common sense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter. The judge set out in a striking manner some of the consequences which would flow from disregarding the Hindu marriage for present purposes. I think it is certainly a matter which we must bear in mind that the prospect of an English court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when the Privy Council might come to a precisely opposite conclusion as to the validity of such a marriage on an

Indian appeal. I do not think we can disregard that circumstance. We have to apply the law in a state of affairs in which this question of the validity of Hindu marriages is necessarily of very great practical importance, in the everyday running of our Commonwealth and Empire.

I should like to add one example to those given by the judge, which appears to me to lead conclusively to the result that in this case we are bound to say that on May 5, 1939, the status of the appellant was that of a married man such as to preclude him from entering into a valid contract of marriage in this country. The consideration which weighs with me very heavily is this: If the marriage with the respondent was a valid marriage it would have this consequence, that she is entitled to the consortium of her husband to the exclusion of any other woman, that he is entitled to the consortium of his wife, and that she is bound according to our notions of law to live with him provided he gives her a suitable home. If he decided to go back to India it would be her duty as a wife to follow him to the home that he would provide. Now assume that takes place. Directly they land in India by the law of India he is a man married to the Indian lady, and assuming that Hindu law would be the same in this respect as English law, that Hindu lady is his lawful wife in India and as such would be entitled to his consortium, and he would be entitled to insist that she should live with him and she would be entitled to insist that he should provide a home for her. The position, therefore, would be this, that this English lady would find herself compelled in India either to leave her husband or to share him with his Indian wife. What the position would be with regard to divorce in India I do not know, but if he had an Indian domicil she apparently could not divorce him in England. Whether or not she could divorce him in India because in India he was associating with a woman who under Indian law was his lawful wife I do not know and I do not stop to enquire.

Is it right that the courts of this country should give effect to a ceremony of marriage, the result of which would be to put the respondent into such a position? It seems to me that effect must be given to common sense and decency. On a question which is not covered by authority considerations of that kind must carry very great weight. On principle it seems to me that the courts are for this purpose bound to recognise the Indian marriage as a valid marriage and an effective bar to any subsequent marriage in this country. Those are the short grounds on which I think this appeal should be decided.

I may perhaps conclude by saying this, that the opinion which I have formed relates solely to the facts of the present case which are simply and solely the validity of the English marriage in the circumstances of this case. I must not be taken as suggesting that for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country. Counsel for the appellant in his reply drew an alarming picture of the effect of our decision on the law of bigamy if we were to decide against him. He having said that, I think it right to say that nothing that I have said must be taken as having the slightest bearing on the question of the law of bigamy which says under the statute "Whosoever, being married, shall marry any other person during the life of the former husband or wife . . ." On the question of whether a person is "married" within the meaning of that statute (which is a criminal statute) when he has entered into a Hindu marriage in India I am not going to express any opinion whatever. It seems to me a different question in which other considerations may well come into play. I hope sincerely that nobody will endeavour to spell out of what I have said anything to cover such a question. In the result the appeal must be dismissed.

Morton, L.J.: Agreeing as I do with the view of Lord Greene, M.R. that this appeal must be dismissed on the short ground that he has stated, I do not think that I can usefully add anything.

Bucknill, L.J.: I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Henry S. L. Polak & Co.* (for the appellant); *Haslewood, Hare & Co.*, agents for *W. H. Hadfield*, Farnham, Surrey (for the respondent.)

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

NOTE.

[Opinion of LORD MAUGHAM, L.C., dated July 25, 1939, in the proceedings before the Committee for Privileges on the petition of Aroon Kumar Sinha praying that a writ of summons to Parliament may be issued to the petitioner as Baron Sinha of Raipur.]

LORD MAUGHAM, L.C.: My Lords, by Letters Patent under the Great Seal of England, dated Feb. 14, 1919, His late Majesty George V created Sir Satyendra Prasanna Sinha, Knight, then one of his Under-Secretaries of State for India, to the state degree style dignity title and honour of Baron Sinha of Raipur in the Presidency of Bengal, and granted unto him the name state degree style dignity title and honour of Baron Sinha "to have and to hold the said name state degree style dignity title and honour unto him . . . and the heirs male of his body lawfully begotten and to be begotten." The petitioner, Aroon Kumar Sinha, claiming as heir male of the late Baron Sinha, has petitioned His Majesty to be pleased to direct a writ to be issued to him for attendance in Parliament as Baron Sinha of Raipur.

The petition was presented on Dec. 2, 1936, His Majesty was graciously pleased to refer the said petition to the House of Peers, the Attorney-General having reported to His Majesty that he was in doubt whether the evidence produced to him, if accepted, would establish a marriage entitling the petitioner to make pedigree and to establish his descent in peerage law from the first Lord Sinha. It is the duty of this Committee to determine the question whether, upon certain facts set out in the petition being proved to the satisfaction of your Lordships, the petitioner has established his descent in peerage law from the first Baron Sinha under the Letters Patent.

There is now no dispute in relation to any of the facts stated in the petition. The late Baron Sinha on May 15, 1880, intermarried with Gobinda Mohini Sinha according to the formalities prescribed by Hindu law and usage. He and his wife were at all times domiciled in the Presidency of Bengal and were members of the Hindu community at the date of the celebration of the marriage, which took place in the said Presidency. Hindu law, as your Lordships are well aware, does not forbid a plurality of wives, but the marriage in fact remained a union between the late Lord Sinha and his said wife to the exclusion of any other spouses. In other words, it was throughout, so far as actual fact is concerned, a monogamous marriage.

In 1881, Lord Sinha came to Lincoln's Inn to study law and he remained in England until 1886 when he returned to India. In that year and before the birth of the petitioner, he and his wife joined the religious sect known as the Sadharan Brahmo Samaj, and they remained members of that religious sect during the whole of their married life. One of the main tenets of the sect is monogamy and so long as the late Lord Sinha continued to be a member of the sect he could not contract a second marriage while his first wife was alive which the courts in India would recognise as valid. It is no doubt true to say that Lord Sinha could have left the Sadharan Brahmo Samaj at any time, and would then have been at liberty to contract a second marriage during the lifetime of his first wife, but it remains true that he never did leave the sect.

The petitioner was born at Calcutta on Aug. 22, 1887, and is the eldest son of the marriage. The late Lord Sinha died on Mar. 5, 1928.

The facts being so established, the only question which remains for determination is the question whether the petitioner within the meaning of the Patent is the heir male of the body of the late Lord Sinha lawfully begotten.

My Lords, it may be useful to clear the ground by some preliminary observations. We have nothing to do in this case with the jurisdiction of the Divorce Court, which for reasons not difficult to understand has adpoted the view that in that court the term "marriage" means the voluntary union for life of one man and one woman to the exclusion of all others. We are not, therefore, concerned with such cases as *Hyde* v. *Hyde* (2) and *Brinkley* v. *Attorney-General* (5). Nor are we affected by such a decision as that in *Doe d. Birtwhistle* v. *Vardill* (17), when at the date of the birth in question there was no marriage at all. The remarks of JAMES, L.J., in *Re Goodman's Trusts* (15) (17 Ch. D. 266, at pp. 298, 299) are a very clear and well expressed exposition of the result of that case, and I could not venture to improve upon it. Nor is *Fenton* v. *Livingstone*

(18) of much assistance, for in the result it was only a decision that Scottish land could not descend to the child of a marriage deemed to be incestuous and criminal in Scots law. There are other decisions which deal with the question whether the alleged marriages in these cases could be deemed to be marriages at all according to English ideas. On the other hand, it cannot, I think, be doubted now (notwithstanding some earlier *dicta* by eminent judges) that a Hindu marriage between persons domiciled in India is recognised in our court, that the issue are regarded as legitimate, and that such issue can succeed to property in this country with a possible exception which will be referred to later.

It seems desirable also clearly to state that nothing in our decision of this petition is intended to apply to a case where the petitioner is claiming as a son of a parent who has in fact married two wives, *e.g.*, a Hindu or a Mohammedan who has had a plurality of wives. It is apparent that great difficulties may arise in questions relating to the descent of a dignity where the marriage from which heirship is alleged to result is one of a polygamous character, using the word polygamous as meaning a marriage which did not forbid a plurality of wives, and where there has been in fact a plurality of wives. If sons were born of more than one of them, it might be difficult to reconcile one of these sons with English ideas of "heirship," which must be involved in the words contained in a Patent granted by the King in a well known form and dealing with a British dignity which, it will be remembered, entitles the holder to sit and vote in the House of Lords. If there were several wives, the son of a second or third wife might be the claimant to a dignity to the exclusion of a later-born son of the first wife. Our law as to heirship has provided no means for settling such questions as these. These difficulties, however, do not arise in the present case, since the late Lord Sinha not only never purports to marry any woman except Gobinda Mohini, but, after joining the Sadhasan Brahmo Samaj long before the date of the Patent, put it out of his power so to do provided that he adhered to that religion. The petitioner is, beyond doubt, the eldest son of the late Lord Sinha by his only wife, and equally beyond doubt he was lawfully begotten according to the laws of India applicable to Hindu parents. Having regard to the domicil of the parties to the marriage at the date when it was solemnised, the marriage would properly be treated as valid in this country for all purposes, except it may be the inheritance of real estate before the Law of Property Act, 1925, or the devolution of entailed interests as equitable interests before or since that date, and some other exceptional cases. The possible exception as to real estate raises a matter as to which I think your Lordships are of opinion that it would neither be right nor prudent to express an opinion. As I have said, the present question relates to the descent of a dignity conferred by the Crown on a subject resident and domiciled in India, who, according to his religion at the date of the Patent, was prohibited from forming a polygamous union. The case is without precedent in peerage law and in the absence of authority must be decided in the light of its special facts.

In the circumstances of this case, and without any pretension to decide anything but the matter in hand, I have formed the opinion, in which I believe your Lordships concur, that the petitioner, on the facts stated, has established that he is the "heir male of the body of the late Lord Sinha lawfully begotten" upon the true construction of the words contained in the Patent.

HIVAC, LTD. v. PARK ROYAL SCIENTIFIC INSTRUMENTS, LTD.

[Court of Appeal (Lord Greene, M.R., Morton and Bucknill, L.JJ.), February 4, 5, 1946.]

Master and Servant—Duty of servant—Skilled manual worker assisting trade competitor during spare time—Whether breach of duty.

Injunction—Interlocutory—Procuring breach of service contract—Servant not party to proceedings—Alternative remedy dismissal of servant—Balance of convenience.

The appellant company manufactured thermionic valves, including midget valves for incorporation in hearing aids for the deaf. The making and assembling of these midget valves required considerable skill. The respondent company, a newcomer in this particular field, manufactured not merely thermionic valves for use in hearing aids but complete hearing aids embodying thermionic valves. The appellant company had amongst its employees, five manual, though highly skilled, workmen, who had been in the company's employ for several years on a normal 5½ day week agreement subject to 24 hours notice. Sunday was a free day. Without the knowledge and consent of the appellant company, these five employees, at the invitation of two directors of the respondent company and two former employees of the appellant company, worked, on Sundays, for the respondent company, for a considerable period, at the task of assembling midget valves. There was no evidence that these five employees had made use of any confidential information. On an appeal against the refusal of an interlocutory injunction restraining the respondent company from employing or procuring these employees to be employed by them, the question for consideration was whether it was at least a *prima facie* breach of contract on the part of these employees to devote their spare time or part of it to the service of the respondent company, and, if so, whether, in the balance of convenience, the appropriate remedy was an interlocutory injunction. It was contended on behalf of the respondent company that, even if a *prima facie* case had been made out, this was not a case for an injunctione bcause, *inter alia,* in the absence of the employees in question as parties the action was not properly constituted, and that there was an alternative remedy *viz.,* dismissal of these employees for misconduct :—

Held : (i) the appellant company had made out a *prima facie* case of breach of the employees' obligation to serve them with good faith and fidelity, which was an implied term in the contract of service.

(ii) there was a sound practical reason why the employees should not be joined in the action and there was no reason why the court should not be able to decide the question satisfactorily and in their absence.

(iii) having regard to the Essential Work Order, which applied, and to the shortage of labour, it would be both difficult and unreasonable to expect the appellant company to adopt the course of dismissing these employees.

(iv) on consideration of the balance of convenience the appropriate remedy in the case was an interlocutory injunction, which should be granted.

[**EDITORIAL NOTE.** There appears to be no direct authority on the legal position arising when an employee devotes his spare time to placing his skill at the disposal of a potential competitor of his employer. Such activity, however, would seem to come within the *dictum* of A. L. Smith, L.J., when he said, in *Robb* v. *Green* (2), that there is an implied term in a contract of service that the servant undertakes to serve his master with good faith and fidelity. It is clear that a servant may not disclose confidential information obtained during the course of the employment, even after the employment has terminated. There was no such disclosure in the case under consideration, but the services rendered to the competitor were extremely likely to lead to this, and the court holds that a balance of convenience makes it a suitable case for granting an interlocutory injunction on the facts as disclosed, to restrain the employment of the servant. Under normal conditions the appropriate remedy of the employer would be the dismissal of the servant, but this is a remedy difficult to exercise in view of the Essential Work Order.

As to Duties of Servant to Master during Employment, see HALSBURY, Hailsham Edn., Vol. 22, pp. 183, 184, para. 307 ; and for Cases, see DIGEST, Vol. 34, p. 118, Nos. 893-898.]

Cases referred to:

(1) *Wessex Dairies, Ltd.* v. *Smith*, [1935] 2 K.B. 80; Digest Supp.; 104 L.J.K.B. 484; 153 L.T. 185.

(2) *Robb* v. *Green*, [1895] 2 Q.B. 315; 34 Digest 121, *928*; 64 L.J.K.B. 593; 73 L.T. 15.

(3) *Nichol* v. *Martyn* (1799), 2 Esp. 732; 34 Digest 167, *1306*.

INTERLOCUTORY APPEAL of the plaintiffs from an order of COHEN, J., dated Dec. 14, 1945, refusing to grant an interlocutory injunction restraining the defendants from employing or procuring to be employed certain employees of the plaintiffs. The facts are fully set out in the judgment of LORD GREENE, M.R.

Andrew Clark, K.C., and *G. C. D. S. Dunbar* for the appellants.

Gerald Upjohn, K.C., and *I. J. Lindner* for the respondents.

LORD GREENE, M.R.: This appeal is concerned with a branch of the law which has not as yet been fully explored. The reason why that is so I shall mention later, or, rather, what appears to me to be the reason.

The appellants, the plaintiffs in the action, are seeking to obtain an injunction against the defendants to restrain them from "employing or procuring to be employed in the service of the defendants, or any of them, any servant or employee of the plaintiff company whilst still in the service or employment of the plaintiff company so as to cause such servant or employee to commit a breach of his contract of employment or service with the plaintiff company or a breach of duty." In normal times, if it had not been for war and post-war conditions and regulations, this particular controversy probably would never have sprung up because the plaintiffs would have had in their hands the obvious remedy of discharging the employees in question and replacing them with others more trustworthy. In the present circumstances, although they have a ground of complaint, and a serious ground of complaint, against their employees, they are not disposed to get rid of them for reasons which are easily understood. The employees in question are five in number, and they are employed, and have for some years been employed, in the business of the plaintiff company who manufacture thermionic valves. The particular branch of their business concerned in the present litigation is that in which they make what are called midget valves for incorporation in what are known as hearing aids for the deaf. The valves in question are very small, and it is said in evidence that it requires considerable skill on the part of those concerned in making and assembling these valves, and, accordingly, that, until a person has been trained at the job, he is not likely to be efficient.

The five employees concerned in this case are, so far as their contractual relations with the plaintiffs are concerned, employed apparently on 24 hours' notice. There is no written contract. They are in fact manual workers, although their work is undoubtedly highly skilled. Although that appears to be the contractual nature of the service, it is affected by the Essential Work Order; I need not go into that. It is sufficient to say that the relationship of employee and employer is, to a considerable extent, from the practical point of view, stabilised by that Order. The plaintiffs are a scheduled undertaking, and their powers to get rid of their employees, even if, in present conditions, they could find persons to take their place, is very severely restricted. Accordingly it is not possible for them, or, at any rate, not practical from a business point of view, to take the action, which, one imagines, they would probably take in normal circumstances, of discharging these employees against whom they have this complaint.

The defendants are a limited company, a newcomer into this particular field, and two directors of that company, Smith and Bernhart, and a man named Raymond Davies and his wife, who were formerly in the employment of the plaintiff company, and held positions of responsibility in which skill and knowledge in this particular branch of work was required. The present motion does not attempt to seek any relief against those two persons in respect of their action in the past in working for the defendant company at a time when they were still in the employment of the plaintiffs, which apparently they did. We are concerned only with the five employees, and the possibility of there being others in the future.

The defendant company, as I have said, is a newcomer to this type of manufacture. Its main object appears to be to make, not merely thermionic valves for use in hearing aids, but complete hearing aids embodying thermionic valves. For the purpose of making such aids they themselves have taken up the work of manufacturing these midget valves.

I ought to say at this stage that in dealing with an interlocutory appeal we can, of course, only pay regard to the evidence in fact before the court which is not necessarily complete, and anything I say with regard to this case must be taken as being said on the footing of the evidence before us, and any observations I may make upon the law applicable are made in reference to the facts so far as they are before us. It may very well be, if and when this action comes for trial and the complete facts are ascertained, that a different aspect may be given to the matter. What we have to consider is whether or not a *prima facie* case is established, and, if so, whether the case is one where the appropriate remedy would be an interlocutory injunction, or whether matters should be allowed to rest until the trial.

It appears to me on the evidence, and I think the judge took the same view, that the defendant company must, for all practical purposes, be regarded as competitors of the plaintiffs. The plaintiffs, as I understand it, do not themselves make complete hearing aids, but their business of supplying valves for such aids is quite clearly likely to be affected detrimentally by the entry on the market of the defendant company as manufacturers of valves. It again appears that the defendant company could not have got, at any rate, as far as it has got in the setting up of its business and the doing of the necessary experimental work, and so forth, in making this hearing aid and the valves incorporated in it without the assistance of persons skilled in the assembly of such valves. That being so, it was clearly of the greatest importance to the defendants that they should, if possible, obtain such persons to assist them.

According to the evidence, Davies was from a comparatively early stage active in procuring the promotion of the defendant company, and he was doing that at a time when he was in a responsible position in the service of the plaintiffs. He therefore knew what the defendant company would require in the shape of skilled assistance and skilled work-people, and, according to the evidence, it was he and his wife who had the idea of inviting these five employees of the plaintiff company to come and work for the defendant company. They were, it is said, personal friends of the Davies, and it is said in their evidence that they worked for the defendant company in return for their expenses. What exactly that may mean nobody at present can tell, but one thing that is clear is that for a period—varying with each employee, but in some cases for many months—those employees were working on Sundays for the defendant company at the task of assembling midget valves for the defendant company. The whole of the time when they were doing that they were employees of the plaintiffs. That their conscience was not easy is, I think, a fair inference from the facts because they must have known what the defendant company was trying to do, and must have known, I should have thought, that the defendant company, if it succeeded in getting on its feet, would be competitors of the plaintiffs, and would affect the plaintiffs' goodwill. They nevertheless did not think it proper to inform their employers of what they were doing and ask their permission. Another matter is clear, and that is that it was on the invitation of the defendants —and I say deliberately "the defendants," meaning all of them—that these five employees came and worked for the defendant company at a time when they were in the employment of the plaintiffs. The plaintiffs after a considerable time discovered what was going on. While making their inquiries they received a very disingenuous answer from the defendant, Smith, who again showed the uneasiness of his conscience by not mentioning anything about these five employees. It is no concern of ours to comment on the question of commercial morality; all we are concerned with is the question: Has there, or has there not, been a breach of the law on the part of these defendants?

The position, summing it up, is this: the defendants secretly procured these employees of the plaintiffs to come and work for them, and to put at their disposal their skill and experience for the purpose of enabling the defendant company to get its business going and to become successful in this particular field. The defendants and the employees, on the evidence, appear quite clearly to have known exactly what they were doing, and they knew that, at any rate, it was morally reprehensible, if not legally wrong. If they had not known that it was wrong, it is not conceivable that they would not have told the plaintiffs. The actual time which these employees were bound by their contract to give to the plaintiffs appears to have been the normal 5½ days a week. There are provisions in the Essential Work Order by which, in certain circumstances, and provided certain conditions are complied with, employees who fall under that Order can be compelled to work overtime, but nothing of that sort comes into question here. The time in which these employees were working for the defendant company was unquestionably what may be described as their own spare time. The question we have to decide for the purpose of this interlocutory appeal is whether or not the five employees were committing a breach of their obligation to their employers in using their spare time for the purpose of assisting a company which they must have known was either in competition, or proposing to enter into competition, with their employers; and, if so, whether the defendants procured that breach.

I said at the beginning that a question of this kind in normal times would not have been likely to arise, for the very simple reason that these employees could have been got rid of on 24 hours' notice, and no doubt there were skilled people who could have been obtained to take their place. It may very well be that this class of question has never arisen in the past because there was no practical reason why it should. But now, in present conditions, the question has arisen, and we have to consider on the facts before us whether or not a question of importance and difficulty is raised, and what *prima facie* view the court takes of it, and whether, in the circumstances, we ought to grant an interlocutory injunction.

There is one matter which I think I can get out of the way at once. It is argued on behalf of the plaintiffs that on the evidence what may be called confidential information must have been disclosed or utilised by these five employees for the benefit of the defendant company. The judge took the view that no such case had been made out. I do not in any way differ from that view. It seems to me that, having regard particularly to the evidence of Mr. Gill, confidential information has not down to the present, at any rate, been made use of by these five employees, if, indeed, they were in possession of any such information. Of course, when one gets into the area of confidential information the law is fortunately much more certain, but once that particular element is excluded, we are in an area which has not, as I have said, been sufficiently explored.

The argument on behalf of the plaintiffs with regard to confidential information was also to the effect that, even assuming no confidential information has as yet been disclosed, and assuming there is no threat to disclose it or use it for the benefit of the defendants, it will, nevertheless, be inevitable, if those employees continue to work for the defendants, that they will put at the disposal of the defendants any confidential information which, in the course of their work for the plaintiffs, they may obtain. It is said, and said with force, that employees engaged in this particular work are bound to become acquainted with any improvements or any experiments which the plaintiffs may make in the course of their business in relation to these midget valves because they would be given the task of constructing or assembling valves for the purpose of incorporating such improvements, and so forth. That is, I think, a matter which the court cannot ignore. After all, one has to be practical in these matters, and one has to consider what the practical result will be. It may very well be said that to say that people in these circumstances can, so to speak, make a division in their minds between what is confidential and what is not, and be quite careful while they are working for the defendants to keep the confidential information locked up in some secret compartment of their minds theoretically may be all very well, but from the practical point of view has a certain unreality.

Leaving that on one side for the moment, and looking at the question from another angle, it has been said on many occasions that an employee owes a duty of fidelity to his employer. As a general proposition that is indisputable. The practical difficulty in any given case is to find exactly how far that rather vague duty of fidelity extends. *Prima facie* it seems to me on considering the authorities and the arguments that it must be a question on the facts of each particular case. I can very well understand that the obligation of fidelity, which is an implied term of the contract, may extend very much further in the case of one class of employee than it does in others. For instance, when you are dealing, as we are dealing here, with mere manual workers whose job is to work 5½ days for their employer at a specific type of work and stop their work when the hour strikes, the obligation of fidelity may be one the operation of which will have a comparatively limited scope. The law would, I think, be jealous of attempting to impose on a manual worker restrictions the real effect of which would be to prevent him utilising his spare time. He is paid for 5½ days in the week. The rest of the week is his own, and to impose upon a man, in relation to the rest of the week, some kind of obligation which really would unreasonably tie his hands and prevent him adding to his weekly money during that time would, I think, be very undesirable. On the other hand, if you have employees of a different character, you may very well find that the obligation is of a different nature. A manual worker might say : " You pay me for 5½ days work. I do 5½ days work for you. What greater obligation have I taken upon myself ? If you want in some way to limit my activities during the other day and a half of the week, you must pay me for it." In many cases that may be a very good answer. In other cases it may not be a good answer because the very nature of the work may be such as to make it quite clear that the duties of the employee to his employer cannot properly be performed if in his spare time the employee engages in certain classes of activity. One example was discussed in argument, that of a solicitor's clerk who on Sundays, it was assumed, went and worked for another firm in the same town. He might find himself embarrassed because the very client for whom he had done work while working for the other firm on the Sunday might be a client against whom clients of his main employer were conducting litigation, or something of that kind. Obviously in a case of that kind, by working for another firm he is in effect, or may be, disabling himself from performing his duties to his real employer and placing himself in an embarrassing position. I can well understand it being said : " That is a breach of the duty of fidelity to your employer because as a result of what you have done you have disabled yourself from giving to your employer that undivided attention to their business which it is your duty to do." I merely put that forward, not for the purpose of laying down the law or expressing any concluded opinion, but merely as illustrating the danger of laying down any proposition and the necessity of considering each case on its facts.

The authorities which have been cited are few, and the facts with which they were concerned differed from the facts of this particular case. For instance, the authority on which reliance was principally placed was *Wessex Dairies, Ltd.* v. *Smith* (1). There the defendant, who was a dairy roundsman, in his master's time proceeded to solicit customers of his master for the purpose of obtaining their custom in a business which he was shortly about to set up for himself. That is, I should have thought, a perfectly clear case, because he was doing it first of all in his master's time ; and in his master's time he was making use of the information which his master had placed at his disposal, namely, the identity of the various customers and their particular requirements. GREER, L.J., in the course of his judgment, did place some emphasis on the fact that the case was one in which the servant was using his master's time for the purpose of furthering his own interest. He said this ([1935] 2 K.B. 80, at p. 84) :

> . . . the defendant would nevertheless be under the ordinary implied obligation existing between master and servant—namely, that during the continuance of his employment he will act in his employers' interests and not use the time for which he is paid by the employers in furthering his own interests.

Then lower down he says this :

> During the subsistence of the contract of service and during his master's time the servant has to look after, not his own interests, but those of his master.

Then he quotes HAWKINS, J., in *Robb* v. *Green* (2). HAWKINS, J., had referred to utilisation of the hours of service by being false to the master's interests. Then at the conclusion of his judgment GREER, L.J., says :

> In this case the defendant acted contrary to his duty. During the last week of his service with the plaintiffs, while pursuing his duty by calling on customers and delivering milk to them, he tried to induce them to become his customers after his employment with the plaintiffs was terminated,

The judgment of MAUGHAM, L.J., started with the following words ([1935] 2 K.B., 80, at p. 85) :

> The claim in this case raises a question of some interest in relation to the duty of a servant to his master during the period of his employment.

He goes on and examines the earlier case of *Nichol* v. *Martyn* (3), which is not satisfactorily reported, and *Robb* v. *Green* (2), and he then says this, after looking at HAWKINS, J.'s judgment in the case, (*ibid.* at p. 88) :

> That appears to show that HAWKINS, J., did not take the view, which the other passage I read seems to indicate, that a servant can properly canvass his master's customers for himself as from a near approaching day. The question to be determined essentially depends upon the term to be implied in the ordinary case of a contract of employment in the absence of express agreement.

Then he refers to the fact that there was a reference to the duty of fidelity in the contract, but he said that he wished to decide the case on a wider ground. He quotes (*ibid.* at p. 88) a passage from A. L. SMITH, L.J., in *Robb* v. *Green* (2). where he said ([1895] 2 Q.B., 315 at p. 320) :

> I think that it is a necessary implication which must be engrafted on such a contract that the servant undertakes to serve his master with good faith and fidelity.

Then MAUGHAM, L.J., says ([1935] 2 K.B., 80, at p. 89) :

> On the other hand, it has been held that while the servant is in the employment of the master he is not justified in making a list of the master's customers . . .

That is what had been done in *Robb* v. *Green* (2). That immediately introduces a quite different set of ideas because if a servant took copies of his master's list of customers, he would be obviously committing a breach of duty in making use of something which is the master's property, namely, the list of customers, for an improper purpose, other than that for which he was employed. Then MAUGHAM, L.J. says (*ibid*) :

> Another thing to be borne in mind is that, although the servant is not entitled to make use of information which he has obtained in confidence in his master's service, he is entitled to make use of the knowledge and skill which he acquired while in that service . . .

There he is dealing with the position of the employee after the service has terminated, and is calling attention to the well known distinction between a man's skill, which is his own property, part of his own equipment, and confidential information which he has acquired during his service. Then again he points out that the facts complained of were done by the roundsman while going his round, and he said that was a deliberate canvassing at a time when the defendant was under an obligation to serve the plaintiffs with fidelity. TALBOT, J., appears to have agreed with both the judgments pronounced, and we have to consider to what extent the judgments assist us in deciding, on an interlocutory application, the proper course for this court to pursue.

I repeat again my warning that everything that I say on this matter stands, of course, to be varied and corrected when the full facts are known, but *prima facie*, it appears to me, the question we have to consider resolves itself into these elements. First of all, what was done here was done in the spare time of the employees. That leads to this : we have to consider what implication, if any, needs to be read into the contract of service with regard to the employee's use of his spare time ? Does that implication in any way restrict him, or, rather (which is the practical question here) did that implication make it a breach of duty on his part to do what he did, with the consequential result that the defendants, in persuading the employees to do what they did, procured a breach of contract ? I think the judgment of MAUGHAM, L.J., which is quite deliberately placed by him on a broad ground, does lead to this. Although the case before him was concerned with an employee who had done certain things in his employer's time, I cannot find that in his reasoning that was regarded as an essential part of the offence. I cannot read the judgment as meaning that, if the roundsman had on a Saturday afternoon, when his work was over, gone round to all these customers and canvassed them, he would have been doing something he was entitled to do. It would be a curious result if, quite apart from making use of the list of customers or his special knowledge or anything of that kind, he could set himself during his spare time deliberately to injure the goodwill of his master's business by trying to get his customers to leave him. There again the question here is not a question of getting the customers to leave the business but a question of building up a rival in business to the prejudice of the goodwill of the employer's business.

I am not ashamed to confess that in the course of the argument my mind has fluctuated considerably on this question. As I see it, the court stands in a sense between Scylla and Charybids, because it would be most unfortunate if anything we said, or any other court said, should place an undue restriction on the right of the workman, particularly a manual workman, to make use of his leisure A
for his profit. On the other hand, it would be deplorable if it were laid down that a workman could consistently with his duty to his employer, knowingly, deliberately and secretly set himself to do in his spare time something which would inflict great harm on his employer's business. I have endeavoured to raise the questions in the way that they appeal to me and, on the best consideration I can give to the matter, I think that the plaintiffs are *prima facie* right in this case. B

That being so, what is the right course for this court to pursue ? Counsel for the defendants took several points, on the assumption that a *prima facie* case was established, to suggest that it was not a case for an injunction. He said, for instance, that in the absence of the five workpeople in question the action was not properly constituted. There is no doubt that, in a way, it is unfortunate in an action complaining of procuring breach of contract, not to have before C
the court the contracting party whose breach of the contract, it is said, the defendants have procured, but the circumstances of the present case are peculiar. There is a very good practical reason why these workpeople should not be joined, and I can see no reason why the court should not be able to decide the question satisfactorily and in their absence.

Then counsel said there is no case for an injunction because if the plaintiffs are right the workpeople could be dismissed for serious misconduct. That is a D
much more difficult thing under the Essential Work Order than would appear from that bald statement, because the plaintiffs have not the last word in the matter. It would be unreasonable to expect them, in the circumstances of the shortage of labour and the difficult procedure they would have to go through, to take any such course. The times are peculiar, and it seems to me that the plaintiffs are entitled to have the position considered in the light of the circumstances as they in fact exist, and not in the light of some circumstances, which E
might have existed, in more normal times, and would have given them a remedy ready to their hand which would have made it unnecessary for them to invoke the assistance of the court.

Then counsel said, in any case there is no case for an interlocutory order. I do not think myself that any of those arguments ought to be allowed to prevail.

I conclude by saying that this is a case of deliberate and secret action by these employees, deliberate and secret action by the defendants in circum- F
stances where both the employees and the defendants must have known the exact result of what they were doing and must have realised that what they were doing was wrong, even if they did not distinguish in their minds between the question of commercial morality and legal obligation. That being so, and there being in my opinion a *prima facie* case and the balance of convenience and fairness being in favour of an injunction, I think the judge who took the other view G
came to the wrong conclusion. I should perhaps have mentioned that he did not think that, once the question of confidential information was excluded, there was sufficient left in the action of the plaintiffs' workpeople to constitute a breach of any implied obligation. It is on that point that I take a different *prima facie* view. The way the matter struck me was that *prima facie*, in the absence of direct authority on the point, he did not feel that he ought to say that the obligation of the servants in this case went as far as it was said it did. H
I have come to the opposite conclusion without expressing any final judgment on the matter, because we have not all the facts before us. I think that *prima facie* on the facts of this case, so far as they at present appear, the conclusion ought to be the opposite one. That is the extent of our difference. In my opinion, the injunction asked for should be granted.

MORTON, L.J.: I am of the same opinion, but in this somewhat unusual case I shall express my reasons for arriving at that conclusion in my own words as briefly as I can. The question arising on this motion is whether it was a breach of contract on the part of five employees of the plaintiff company to devote their spare time, or part of their spare time, to the service of the defendant company in the circumstances set out in the affidavits. If their conduct was a breach of their contract of service I think there would be no doubt that an interlocutory injunction should be granted. I cannot doubt that the whole matter was done with the knowledge and approval of the defendant company and its directors and, although in one part of his evidence Davies described these five employees as volunteers for the work, there was other evidence that invitations were issued to them by Davies or by his wife. On the other hand, if the court thinks that the breach of contract is not clear but that there is a substantial question to determine at the trial and that the plaintiffs have made out a *prima facie* case of breach of contract, then the court must consider the question of the balance of convenience.

It is clear that the five employees in question have not broken any express term of their contract of employment. It was not provided in their contract, for instance, that they should give their time exclusively to the work of the plaintiff company. What implied term, if any, has been broken ? I am content, as MAUGHAM, L.J., was content in *Wessex Dairies, Ltd.* v. *Smith* (1) ([1935] 2 K.B. 80, at p. 88), to quote from A. L. SMITH, L.J., in *Robb* v. *Green* (2) when he said ([1895] 2 Q.B. 315, at p. 320) :

> I think that it is a necessary implication which must be engrafted on such a contract [that is a contract of service] that the servant undertakes to serve his master with good faith and fidelity.

In all the circumstances of the case, have these five employees observed the obligations of good faith and fidelity ? I do not propose to recapitulate the facts, but I must start from this point, that the work done for the defendants was done in what is usually described as the employees' spare time. No cases were cited to us in which work so done was held to be a breach of the obligation of fidelity to the employer. I do not propose to express any view of such a general nature as that all work done for a firm in the same line of business as the employers in the spare time of the employees is a breach of contract, but I do say that in my view the obligation of fidelity subsists so long as the contract of service subsists, and even in his spare time an employee does owe that obligation of fidelity. In my view, a *prima facie* case of a breach of that obligation is made out in the present case and I shall refer briefly to certain points which impressed me in the course of the evidence.

In the first place, it is plain from the affidavit of Diggle in para. 5 that the plaintiff company is at the moment the only source of supply in this country of midget valves for hearing aids other than the defendant company. When I say it is clear, that is the evidence before us, although, as my Lord has said, the evidence at the trial may throw more light on the matter. I couple with that piece of evidence from Diggle the evidence of Smith, who is a director of the defendant company and is a practical man. He says in para. 2 of his affidavit : "Since the year 1925 I have been engaged in various branches of the radio engineering and valve amplifier industry and I have for several years been concerned with the manufacture of hearing aids." Then he refers to the fact that there is a limited market for hearing aids and that they have been sold in his view at too high a price and that he intends to put on the market a hearing aid at a lower price. That is a direct form of competition which is contemplated by the defendant company. Davies makes it plain that while he, Davies, was occupying the important post of production engineer at the plaintiffs' factory at Harrow he was assisting in the promoting of the defendant company and co-operating with Smith. His conduct is not before us on this occasion and I make no comment on that. There is thus in this case assistance given to a competitor whose activities would, I think, inevitably result in damage to the plaintiff company if they were successful.

In the second place, I am impressed by the secrecy which was maintained throughout the time when these employees of the plaintiff company were working for the defendant company. I think that is a pretty plain indication that the employees knew perfectly well they were breaking an implied term of their contract of employment. I do not doubt that if the plaintiff company had been asked, "Have you any objection to our doing this in our spare time ?" the answer would have been "You have no right whatever in view of your contract of service with us to do any such thing." I suspect that the employees knew that perfectly well, and that is why nothing was said about it.

In the third place, although these workmen are doing manual labour, it is manual labour of a very skilled kind and it has been, as the evidence shows, of the very greatest assistance to the defendant company in bringing their activities up to the point when they can develop their business. The circumstances are that in this particular case these men have assisted the defendant company to develop its business from the early stages to that of a competitor.

The last fact, and a very important one, which I would mention is this. It is true that it is not established on the evidence as I see it that any confidential information has passed or could have passed in the past from the employees to the defendant company, but I think it is right to say, as counsel for the plaintiffs pointed out, any improvements in the assembly of the valves which may be introduced by the plaintiff company will almost inevitably be put into operation by the defendant company through these employees. It is very difficult to conceive that if the plaintiffs were showing the employees a new and improved way of making midget valves there would be no mention and no demonstration of that whatsoever to the defendant company.

With regard to *Wessex Dairies, Ltd.* v. *Smith* (1) it is true that the operations which were objected to were carried out by the milk roundsman actually in the time when he was employed about his master's business, but for my part I think if those same operations had been carried out while he had been employed by that master in the evening or on a Saturday afternoon, they would also have been held to be a breach of his duty of fidelity. It is true that GREER, L.J., in the course of his judgment lays some emphasis upon the fact that the hours of service were utilised for these purposes, but I do not think that any member of the court throws any doubt upon the proposition that those activities would have been improper even if they had been done in the employee's spare time. Having regard to all the facts, I think the plaintiffs have made out a *prima facie* case here, and one has to consider the balance of convenience.

Looking at it from the defendants' point of view, it does not seem to me that any irreparable harm will be done to the defendant if an injunction is granted and if it should subsequently turn out at the trial that an injunction should not have been granted. Smith says in para. 5 of his affidavit: "The defendant company is now in a position to advise the Board of Trade that it will be able to obtain and execute orders, and so apply for and obtain the necessary priorities to secure skilled labour. There will be no difficulty in securing the labour although it may involve some delay, and if in the interim the defendant company is prevented from using the services of the persons mentioned in para. 11 of the affidavit of Harry Giggle, the production of the company will to some extent be handicapped." Then he goes on to say that production can be continued without the services of those persons. So much for the position of the defendants.

On the other hand, taking the position of the plaintiffs, it seems to me a most unfortunate position if the plaintiffs are compelled to have in their employment persons who week by week are assisting their rivals in the way described in the evidence. The judge suggested that the plaintiffs might impose a condition that the employees should not accept employment for any part of their time with the defendants, but I see grave difficulties in the plaintiff company achieving that result, having regard to the terms of the Essential Work Order, and for my part I do not see why they should be faced with the alternative of trying to impose such a condition and possibly losing by so doing the services of valuable workmen. I think it is an intolerable position that this should be allowed to continue.

Finally, if one looks at it from the standpoint of the five employees in question, although they are not before the court, each of them in his or her affidavit uses the same phrase, which is a curious one. "I receive payment by way of expenses for my work." I am not quite sure what that means, but I apprehend it is intended to convey the impression that they have only had their expenses paid. Under those circumstances, it does not seem to me that it will involve any hardship on those five employees if they are prevented from making use of their leisure time in doing this no doubt rather hard work and getting nothing more for it than their expenses. I cannot think that the sorrow which they might feel at being deprived of that occupation should induce the court to refuse to grant an injunction. In my opinion the appeal should be allowed and an injunction granted in the terms of the notice of motion.

BUCKNILL, L.J., agreed.

Appeal allowed; injunction granted; appellants' costs in Court of Appeal and below costs in the cause.

Solicitors: *Lawrance, Messer & Co.* (for the appellants); *Harold Benjamin* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

THE ATTORNEY-GENERAL *v.* ANGLO-AMERICAN OIL CO., LTD., THE "F. J. WOLFE."

[COURT OF APPEAL (Scott, du Parcq and Morton, L.JJ.), November 26, 27, 28, 29, 1945.]

Shipping and Navigation—Collision—Convoys meeting on a crossing course—Crossing rule—Duties and obligations—Regulations for preventing collisions at sea, rules 19, 21, 22.

In a convoy of eight columns, the E.S., a vessel laden with war cargo, was leading the third column from the port side. In a separate convoy consisting of two columns, the F.J.W. was the commodore ship leading the port column. The convoys were unlighted and were proceeding towards each other on a crossing course. That course if continued by both convoys, would bring into collision the ships in the convoy of the F.J.W. with the leading ships on the port column of the larger convoy. Under art. 19 of the collision regulations the E.S. was the give-way ship, and, though she sighted the smaller convoy from a distance of three miles, she continued on her course until she was about two cables distant from the F.J.W. The E.S. then put her wheel to starboard. The F.J.W. starboarded her wheel at about the same distance and reversed her engines, but her stem struck the E.S. on the starboard side at a right angle, and the E.S. sank in consequence:—

HELD: although the collision regulations as such did not apply, the requirements of good seamanship depended on the application of the crossing rule, as embodied in the regulations, when two different convoys of ships approached each other on a crossing course. On the facts here, the E.S., as the give-way ship, was not justified in continuing on her course, nor was the action taken by the F.J.W. premature. The blame for the collision, therefore, rested solely on the E.S.

[**EDITORIAL NOTE.** The question discussed in this case, for which there is no direct authority, is whether the regulations for preventing collisions at sea apply to vessels sailing in convoy. The Admiralty Notice of 1942 applied only to a single vessel coming into the vicinity of a convoy, and it is argued in the case under consideration that the crossing rule does not apply where both vessels are in convoy. It is held, however, that the regulations form a recognised code which all seamen observe, and that this question is really one of fact involving the test, what did the rules of good seamanship require?

AS TO THE "CROSSING RULE," see HALSBURY, Hailsham Edn., Vol. 30, pp. 746-748, paras. 967, 968; and FOR CASES, see DIGEST, Vol. 41, pp. 741-744, Nos. 5923-5954.]

Cases referred to:

(1) *The Gulf of Suez* (1920), 37 T.L.R. 60; 41 Digest 745, *5965*; *on appeal*, [1921] P. 318.

(2) *Kitano Maru S.S. Owners* v. *Otranto S.S. Owners, The Otranto*, [1931] A.C. 194; Digest Supp.; 100 L.J.P. 11; 144 L.T. 251.

(3) *Heranger S.S. Owners* v. *Diamond S.S. Owners*, [1939] A.C. 94; Digest Supp.; 108 L.J.P. 12; 160 L.T. 241.

(4) *The Scottish Musician*, [1942] P. 128; 111 L.J.P. 65; 72 Ll.L.Rep. 284.

(5) *H.M.S. Sans Pariel*, [1900] P. 267; 41 Digest 746, *5977*; 69 L.J.P. 127; 82 L.T. 606.

(6) *S.S. Albano* v. *Allan Line S.S. Co., Ltd., Union Dampfschiffsrhederei Act.* v. *S.S. Parisian*, [1907] A.C. 193; 41 Digest 742, *5935*; 76 L.J.P.C. 33; 96 L.T. 335.

(7) *The Etna*, [1908] P. 269; 41 Digest 747, *5978*; 77 L.J.P. 138; 98 L.T. 424.

APPEAL by the Crown from a decision of PILCHER, J., dated June 29, 1945, in which it was held that the loss of the E.S., a vessel laden with war cargo, by reason of a collision with a motor vessel, the F.J.W., was due solely to the fault of the E.S. The case raised the question of the duties and obligations of a ship in convoy approaching a ship in a different convoy on a crossing course.

K. S. Carpmael, K.C., and *Owen Bateson, K.C.*, for the appellant.

R. F. Hayward, K.C., and *Waldo Porges* for the respondents.

Cur. adv. vult.

SCOTT, L.J.: This appeal has involved some interesting discussion about the crossing rule where a single ship finds itself involved in what I will call a "foreign" convoy with the possible complication that that ship is also in its own convoy. It arises out of a collision in the North Atlantic near Newfoundland, on Sept. 16, 1942, at about 1.44 a.m. ship's time, equivalent to 4.44 a.m. G.M.T. The ships were the Empire Soldier and the F. J. Wolfe. The starboard side of the Empire Soldier in the way of the bridge and the stem of the F. J. Wolfe were the points of impact. The Empire Soldier sank in a short time, fortunately without loss of life, but the cargo of war stores laden on board her, worth some £600,000, was totally lost.

The action was brought by the Attorney-General, the stores being the property of, and the ship presumably requisitioned by, His Majesty's Government. We were informed that the proceeding was by Latin information, an archaic form of procedure which the Crown Proceedings Committee of twenty years ago recommended should be abolished. PILCHER, J., held the Empire Soldier alone to blame and the Crown appealed. That judge delivered a carefully considered judgment. I agree so completely with it that I should have been content to adopt it as my own with only slight exegetic comments on one or two incidental sentences which may be slightly ambiguous; but as the case raises certain general questions of seamanship, if not also of law, as to the bearing upon the Collision Regulations of the fact that one or both ships in collision were sailing in convoy, I will state the facts so far as material for the consideration of these questions. I would add that if I omit to express any opinion upon any question which has arisen during the discussion, I refer to the judgment of PILCHER, J., which I think covers them all.

Each of the two vessels was in convoy but not the same convoy. That of the Empire Soldier was a large one of about 36 vessels of eight columns, five cables between columns and two or three cables between ships, eastward bound. At the time in question that convoy was on a course of 25 degrees true, that is to say, roughly N.N.E. The Empire Soldier (of about 4,500 tons gross, heavily laden with military stores, draft 23ft. 6ins. forward and 26ft. aft) was leading the third column from the port side, the commodore ship being at the head of the fifth column. The F. J. Wolfe's convoy consisted of only four ships, similarly spaced, the F. J. Wolfe being commodore and leading the port column, with the S.S. Daghild behind her, the Pachesham leading the starboard column, with the Marit II behind her. This small convoy had been formed unexpectedly at sea after an enemy attack by torpedoes which damaged the F. J. Wolfe, the Daghild and the Marit II and caused them to be sent off to St. John's for repairs. The Pachesham had not been attacked and apparently was a single ship which, being bound for St. John's also, had joined the small convoy. The F. J. Wolfe had broken plates projecting out of her port side, which interfered with her steering and necessitated some continuous starboard wheel to counteract the interference. She was of about 12,000 tons gross, drawing 22ft. forward and 23ft. 10ins. aft. At the time in question the small convoy was on a course of 262 degrees true, or about W¾S. It was accompanied by two naval corvettes as escort, their normal station being some half a mile 4 points off the bow of the port and starboard leaders. The courses of the two convoys, therefore, crossed at an angle of intersection of 57 degrees. If the crossing rule No. 19 applied, either as a regulation in the strict sense or "as a guide to seamen," the duty of the Empire Soldier, having the F. J. Wolfe on her starboard hand, was to keep out of the way of the F. J. Wolfe and, under rule 22, to go under her stern; and the primary duty of the F. J. Wolfe was to keep her course and speed under rule 21, unless the note to that rule came into operation.

The night was fine and clear and northern lights enabled an unlit vessel to be seen from the south at a distance of three miles; but from the north the visibility was limited to one mile. Neither convoy was exhibiting lights. At about 1.30 a.m., when still some three miles to the southward of the small convoy, the second officer of the Empire Soldier in charge on the bridge, observed the loom of two or three ships 2 to 2½ points on his starboard bow. Their bearing did not change. When about one mile or three-quarters of a mile away he saw that there were four vessels still on the same bearing, and observed that their course was west or a little south of west. After that, according to his evidence in the box, three of the ships broadened a little on his starboard bow but the bearing of the fourth continued the same. The fourth ship was the F. J. Wolfe. The judge's finding is this :

> When the vessels were a little under half a mile apart the F. J. Wolfe switched on first her red and shortly afterwards her masthead and green lights. No helm action was taken by the Empire Soldier until the vessels were so close that it was apparent that the F. J. Wolfe was going to strike the starboard side of the Empire Soldier stem on. At the last the wheel of the Empire Soldier was put hard-a-starboard in order to throw her after-part away from the advancing F. J. Wolfe. From first to last the engines of the Empire Soldier remained working to give her the convoy speed of 6½ knots. If the Empire Soldier ever sounded a series of short warning blasts, I am satisfied that she did not do so until a late moment and at a point of time well after the F. J. Wolfe was committed to her hard-a-starboard wheel. I find that the Empire Soldier went off about a point to starboard under her hard-a-starboard wheel at the last and did not switch on her lights till a late moment.

It is common ground that at some time (although at what stage of the story was in dispute at the trial) the Pachesham and the Marit II starboarded and eventually got away northwards on to a course parallel to that of the big convoy, that is to say, 25 degrees true, but that the Daghild ported and passed southwards between the third and fourth columns of that convoy. This operation of the Daghild escaped the notice of the second officer on the Empire Soldier. I will revert to these vessels in a moment, but I will first state the findings of the judge about the F. J. Wolfe. He said :

> I find the following facts with regard to the navigation of the F. J. Wolfe. When on her convoy course of 262 degrees and making her convoy speed of 7 knots with her convoy in reasonably good formation, the loom of an unlighted vessel, which was at first taken to be an escort vessel, but which proved to be the Empire Soldier, was made out about three points on the port bow at a distance which I find to have been about half a mile, the helmsman of the F. J. Wolfe was ordered to starboard 5 degrees. This order was carried out, but very shortly afterwards Mr. Salmond [the second officer of the F. J. Wolfe] appreciated that what he had seen was not an escort vessel but a cargo vessel on a northerly course crossing his own. He immediately ordered the wheel to be put hard-a-starboard, blew a short blast on his whistle, put the starboard engine full astern and switched on his port sidelight. I think he took this action when the vessels were about 3 cables distant from each other. Shortly afterwards, seeing that the Empire Soldier was apparently taking no action to keep clear, Mr. Salmond rang the starboard engine full astern and switched on his masthead and starboard lights. By this time the vessels were only about 2 cables apart, and collision was virtually inevitable. It occurred in the manner already described, the stem of the F. J. Wolfe cutting into the starboard side of the Empire Soldier in the way of No. 2 hatch. I am not satisfied that the F. J. Wolfe went off quite as much as 50 degrees to starboard before collision and I think that the collision took place at about a right angle.

The evidence of the second officer of the F. J. Wolfe, who was in charge on the bridge from midnight until after the collision, was that at about 1.15 he saw flashes from about 4 points on the port bow, which had been reported to him by the look-out, and that they continued for about a minute. He thought it was one corvette signalling to the other. Checking back from the engine room times later, he thought that it must have been about 1.40 when he saw a dark shape 3 to 4 points on his port bow, about half a mile away. He assumed that it was the corvette. He saw also about then what he thought was the other corvette, half a mile off the starboard bow of the Pachesham. Under the impression that the corvette off his port bow was "rather too close" he went into the wheelhouse and ordered a change of course to starboard of 5 degrees in order, as he said in the box, "to give the corvette more room"; but he did not give any short blast on his whistle. From the commodore ship such a signal would have been an order to the convoy, whereas his purpose was limited to what he said. He had not then realised it, but the dark shape was not the corvette, but the Empire Soldier. Counsel for the appellant made much of this starboarding, but it could not have affected the action of the Empire Soldier as it was not, and could not be, observed by her. It is in my view irrelevant on the issue of liability. We are advised by our assessors that if the dark shape had been the corvette it would have been a legitimate movement in case the corvette was intending to cross the path of the F. J. Wolfe some distance ahead. It is also, for a reason which I will state later, important to observe that the 5 degrees starboarding was unknown to the other members of the F. J. Wolfe's convoy.

It was immediately on coming out of the wheelhouse after ordering the 5 degrees change of course to starboard that the second officer of the F. J. Wolfe realised that the dark shape was not the corvette but a merchantman crossing his bows from port to starboard, in direct breach of the crossing rule. He at once realised, with this other ship so near, the absolute necessity of the F. J. Wolfe as the stand-on ship taking action under the note to art. 21. He immediately ordered the helm hard-a-starboard and, to help that helm action, reversed the starboard engine full speed astern. He came out on to the port side of the bridge, saw that the crossing ship was not giving way but continuing without change of course, rushed back into the wheelhouse and put the port engine also full astern and switched on his lights, or at any rate, as the judge stated, his red light.

I have now stated the essentials of the problem we have to solve. Upon those facts the judge put to the Elder Brethren the following questions :

> On the facts as found ; (i) Was the Empire Soldier justified as matter of seamanship in standing on until she was between 2 and 3 cables distant from the F. J. Wolfe ? (ii) Was the situation such when the F. J. Wolfe took action that it could reasonably be anticipated by the F. J. Wolfe that collision could not be avoided by the action of the Empire Soldier alone ? (iii) Could the Empire Soldier have starboarded sufficiently to clear the F. J. Wolfe without incurring risk of collision with the leader of the fourth column ?

The Elder Brethren answered these questions as follows : (*i*) " No " ; (*ii*) " Yes " ; (*iii*) " Yes." The judge continued :

> They point out that while, in their view, good seamanship demanded on the particular facts of this case that each of the vessels involved should act in accordance with the requirements of the crossing rule, they would not be prepared, again on the facts of the present case, to condemn a vessel which, like the Pachesham, took early action to get on to a parallel course with the approaching convoy, provided always that the units of such convoy were observed at a sufficient distance to enable the turn to be made in reasonable safety. Whilst adding this rider the Elder Brethren are clear that the best course in this case as a matter of seamanship was to take action in accordance with the crossing rule.

On that I just observe that the turn to be taken by these two vessels in order to get parallel was necessarily 123 degrees (in order to make up the 180 degrees with the 57 degrees of intersection), that is to say, substantially half as much again as a right-angle. The judge added :

> With this conclusion I am in complete agreement and I accordingly hold the Empire Soldier to blame for standing on in the way she did.

Our assessors (before Captain Townshend had unfortunately to leave for domestic reasons) agreed with those answers, but, for reasons which I will state presently, did not express any opinion about the rider. Since Captain Townshend left, Admiral Hamilton has, with the consent of both counsel, acted as our sole assessor.

I will now state certain supplementary facts which are not material to the main issue, but call for consideration because of certain arguments of counsel for the appellant. The chief of these arguments was that the Pachesham and the Marit II had acted as they did because they had seen the large convoy and that that action was in accordance with the duty of a prudent navigator of a ship in a small convoy ; and on that contention he submitted that, if the crossing rule had any application, the F. J. Wolfe ought, as a matter of seamanship, to have done the same in order to obey the note to rule 21. This contention rests on an erroneous foundation. On Sept. 22, 1942, only six days after the collision, the master of the Paschesham made a protest at St. John's in these terms :

> That the Pachesham was in the same convoy as the motor vessel F. J. Wolfe

> On Wednesday, Sept. 16, I was called to the bridge at 1.25 a.m. by the second officer who informed me that another convoy was crossing our track. I could see quite a number of ships. The night was clear and calm and there were northern lights in the sky. At about 1.35 a.m. the F. J. Wolfe switched on her navigation lights and gave one short blast on her siren. This was a signal to go to starboard. I ordered that my ship do the same and it was done. Shortly after the F. J. Wolfe switched on her light and gave a blast on her siren, another ship, which was deeply laden and which was not seen by me up to that time, switched on her navigation lights. I could see immediately that a collision between the two ships was unavoidable and in fact they did collide at about 1.45 a.m. As the ships of the other convoy were bound north, they should have seen us before we could see them. They cut across our track. Before altering the course of my ship our course was 262 degrees true and the course of the other convoy was 025 degrees true. I did not know at the time what was the name of the ship with which the F. J. Wolfe collided, but I have been informed since then that it was the Empire Soldier.

That protest, it is to be observed, was made immediately after the event. He was subsequently a witness at the trial and the judge in his judgment decided that his evidence as contained in that original protest ought to be accepted. That is a finding which, in my view, is obviously right, and I think anyhow that after he had seen the witness we too ought to accept it. It is thus clear that it was the short blast given by the second officer from the commodore ship which caused the starboarding of the other two, and that consequently the argument based upon that starboarding as representing the seamanlike reaction of presumably competent navigators under the stand-on obligation of rule 19 is misplaced. That is the reason why I venture to say that the argument of counsel for the appellant in that respect rested on an erroneous foundation. It seems to me that the action of the Pachesham and Marit II has nothing whatever to do with the merits of this appeal. It was that order from their commodore ship which alone caused them to act.

There is one more fact that I must state. The judge found (and I accept the finding absolutely) that the look-out of the F. J. Wolfe was defective in that the Empire Soldier ought to have been seen at an earlier time. I accept that. But the judge held (and I agree with him) that that neglect of duty had nothing to do with the collision in the sense of in any way contributing to it, because the ship was then doing what it would have been its duty to do even if it had been alive to the presence of the Empire Soldier as the give-way ship on a crossing course at an earlier time.

The arguments of counsel for the appellant amounted to this: first, a contention, which I do not think he really pressed very hard, that the mere fact that the Empire Soldier was in convoy eliminated all obligations of the rules either as regulations having a binding force or as what I prefer to call principles of seamanship. In my view, it is impossible to say that about a convoy. I am alive to the warning contained in notice No. 7 of Jan. 1, 1942, which in effect merely applied the recognised views which have been expressed in the courts about squadrons of warships and, in this war, about convoys—that the fact of a ship being in convoy is a relevant circumstance and that it is desirable for a single ship if possible to avoid getting mixed up with a convoy. If a ship has got mixed up with a convoy in circumstances when it cannot be blamed for getting there, then, as it seems to me, it is quite impossible to argue that the fact that the other ship is in convoy eliminates all necessity of considering the principles of seamanship as embodied in the regulations. Those rules represent the considered views of generations, almost, of seamen of many nations. To that aspect I will revert in a moment. His second argument was that, assuming that rule 19 either "as such" or as a principle of seamanship applied in the circumstances of this case, the F. J. Wolfe acted prematurely. His third contention was that, if she did not act prematurely, when she did act she acted wrongly.

On the findings of the judge in this case I have no hesitation in saying that his conclusions were right. The fundamental issue is as to the duty of crossing ships when the give-way ship is a member of a convoy. In my opinion, since the abolition in 1911 of the statutory presumption of fault it makes, generally speaking, very little practical difference whether one says that the operational rules for prevention of collisions apply directly "as such" or merely "as a guide to seamanship." If one of the ships is under a definite order from its commodore to take specific action, that is, of course, a relevant matter for consideration; it is one of the circumstances that the navigator has to consider: but the principles of seamanship ought, in my view, always to be borne in mind, whether you call them "rules" or whether you call them "principles." Their bearing on maritime duty and fault under the one aspect or the other is normally just the same. Every skilled and experienced navigator has got the crossing rule at any rate deeply ingrained and reacts to it just as a natural stimulus from the brain acts on muscles; it is automatic. This view has been strongly expressed to us by Admiral Hamilton since his brother assessor was obliged to leave.

That being so, I think it is the end of the case and, therefore, I do not discuss the cases decided since 1911 (when statutory fault was abolished) to which reference has been made, nor those that were decided before. We have carefully considered the cases decided since 1911, all four of them; *The Gulf of Suez*; (1); *The Otranto* (2); *The Heranger* (3); and *The Scottish Musician* (4). The cases before 1911 were *H.M.S. Sans Pareil* (5); *The S.S. Albano* (6), a Privy Council decision; and *The Etna* (7). When there was a statutory presumption of fault, some different considerations may have applied; but I do not think it necessary to discuss either group of cases.

I would only add this with regard to the phrase in art. 4 of the notice of Jan. 1, 1942, entitled "Caution with regard to single ships approaching squadrons or aircraft carriers," as to which it is agreed that the word "squadrons" should be treated as including "convoy." Article 4 of that notice says:

> In circumstances where a single vessel has not taken early measures to keep out of the way of a squadron or aircraft carrier, the "regulations for preventing collisions at sea" must be the guide.

In spite of the argument of counsel for the appellant, "must be the guide" is a phrase which does not seem to me in any way ambiguous. I cannot imagine any direction more simple or more proper than that mariners should take regulations as their "guide," always bearing in mind the elasticity of arts. 27 and 29 to which reference was made in the pre-1911 decisions. Whether the regulations are to be regarded as quasi-statutory or as generally accepted principles of seamanship does not seem to me to make any practical difference on the facts of the present case. So far as my judgment in the present appeal is concerned, they may be either.

The appeal, in my view, should be dismissed with costs.

DU PARCQ, L. J.: I agree with SCOTT, L. J., that the judgment of PILCHER, J., cannot really be criticised at all seriously. It has been minutely examined, as was quite right, and no doubt something may be said by way of criticism which has at any rate some apparent justification; but taking the judgment as a whole, I wish to express my respectful approval of it.

The first question in this case, it seems to me, is what rules or principles ought to have governed the conduct of these ships, the Empire Soldier and the F. J. Wolfe. The judge puts it in this way

> Whilst the collision regulations as such do not apply to the case under consideration, such regulations constitute a code recognised by all civilised maritime nations as a code well adapted for preventing collisions at sea.

It does not in the end make much difference whether one says that the regulations, or at any rate the regulations as to crossing ships, apply with such modifications as are made necessary by the fact that ships are in convoy, or one says with the judge, that the regulations as such do not apply but in fact as a matter of seamanship what are called the crossing rules must be considered to apply because, as SCOTT, L. J., has said, every mariner will properly expect every other mariner to be acting on them and to be expecting that he himself will ac upon them in his turn. If the judge approached the matter in the right way it seems to me that this becomes really a question of fact involving no doubt when once you have decided all the particular facts of the case, the question wha did good seamanship demand? I say that that is a question of fact becaus that was strongly emphasised by LORD WRIGHT in *The Heranger* (3) ([1939 A.C. 94, at pp. 101, 102). He says (at p. 101) that precedents are a very doubtfu guide and that a question of this kind, a question of good seamanship, is question of fact; and (at p. 102) that where there are no rules which appl to the particular facts the decision what action should be taken depends, and can only depend, on the requirements of good seamanship and the application of the ordinary principles of the law of negligence.

For myself, I should not profess to be able to say what the rules of good seamanship demand without expert assistance. Here we have remarkable unanimity of expert opinion. The Elder Brethren, answering questions which Scott, L.J., has already read, clearly were of opinion that the duty of the Empire Soldier was to regard herself as the give-way ship, in the circumstances of this case. Our assessors have taken the same view. Counsel for the appellant objected that, in the court below, the Elder Brethren had left out of account the Daghild, but we can assure him that, having heard all his criticisms in this court, our assessors, and certainly the assessor who was able to remain to the end (although I think the observation applies to both of them) did not leave the Daghild out of account at all. There is unanimity among the assessors, but I think it goes much further than that because, as I read the evidence of the second officer of the Empire Soldier, who was responsible for the navigation, he does not disagree. Some of the passages in the evidence are of vital importance in this case and they were properly emphasised yesterday.

I read the witness as agreeing that, though the crossing ships may be in a convoy, as between those two ships the crossing rule will, generally speaking, apply. Indeed, it cannot be put more strongly than it was by the witness himself when, in answer to the question "You knew they applied both to a single ship and to your ship ?" he said "To any two ships meeting."

Looking at the evidence, the fact is that the real cause of the course taken by the second officer of the Empire Soldier was that he had formed on inadequate material an erroneous conclusion as to what those ships which he saw were doing.

If, as I think with SCOTT, L.J., the judge has correctly found the facts of the case on which the assessors have based their answers, it seems to me that there is very little left to be said. Counsel for the appellant, not unnaturally, found something to criticise in the judgment, because it is very difficult to deliver a judgment which is not susceptible to some criticism. One matter was what the judge said about the failure of the Empire Soldier to switch on her lights. No doubt it may be said with regard to that with some justification that, even if she had, the F. J. Wolfe, regarding herself as the stand-on ship, would not have taken any other action than she did. Let that be ignored altogether it does not affect the case. Even supposing the judge to be wrong about that (and I am not saying that he was because it might have served a useful purpose if the lights had been switched on) it does not affect his main conclusion at all.

With regard to the starboarding to the extent of 5 degrees, again I agree with SCOTT, L.J., that that is an irrelevancy. So, I think, is the point which counsel for the appellant forcibly made, that down to a certain time the look-out on the F. J. Wolfe was not satisfactory. It does not avail anybody to say that the look-out on a ship is unsatisfactory unless the badness of the look-out contributed to the collision, and in this case I do not think that it did.

I agree also with what SCOTT, L.J., said as to the criticism that the action taken by the F. J. Wolfe was premature, and that it was wrong. There again we are advised (and I can see no reason whatever to think that the advice is unsound, if I may say so) that on the facts found by the judge the action taken was neither premature nor wrong. The judge sums it up by saying that the F. J. Wolfe took no action until she was distant under half a mile from the advancing Empire Soldier and thereafter switched on her lights, starboarded, hard-a-starboarded, and put her engines astern in the expectation that the Empire Soldier which was the give-way ship under the crossing rule, would starboard, albeit belatedly, and thus avoid collision. The judge thought that that was not a negligent course to take or an improper one and, advised as I am, I agree with him.

I have given no new reasons, but I thought it right that I should say how the case appeared to my own mind. I agree that the appeal should be dismissed.

MORTON, L.J. : I also agree and I desire only to add a few words on an argument of counsel for the appellant which has not been referred to by either of my brethren. Plainly it did not suit the argument of counsel for the appellant if the crossing rule ought to have been applied in the circumstances of the present case and, very naturally, he sought to put forward another rule which ought to have been applied when these two convoys were meeting each other. He suggested that when a smaller convoy meets a larger convoy either the smaller convoy should keep out of the way of the larger convoy or each individual ship in the smaller convoy should give way to each individual ship in the larger convoy if there is any risk of collision. There seems to me to be strong objection to the application of any such rule. It was brought to our attention by counsel for the respondents. In the first place, I am not sure what the suggestion of counsel for the appellant would be as to what is to be the test of the size of the convoy, whether it is to be the number of ships or the tonnage of the individual ships. In the second place, I should have thought (and this is confirmed as a practical matter by Admiral Hamilton) that it would be often a matter of the greatest difficulty when two convoys are approaching for either convoy to be sure whether it is a larger or a smaller convoy than the other. This must plainly be so at night, especilly under war conditions, and I understand from Admiral Hamilton that the same practical difficulty would or might well arise in daytime. If convoys well spread out and of considerable size were approaching each other, it might be said that the commodore of each convoy might be warned if he was likely to meet another convoy on his journey ; but, apart from the difficulty that that information might not be communicated to each unit in the convoy under war conditions, the convoy might start off with 30 ships in it, and might be expecting to meet a convoy of 20 ships and there might be, for reasons so obvious that I need not specify them, a very considerable reduction in the number of the convoy which was originally the larger and before it meets the other convoy it may be the smaller. I cannot see any answer to those criticisms of the suggestion of counsel for the appellant.

I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors : *Treasury Solicitor* (for the appellant) ; *Thomas Cooper & Co.* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

FYFE AND OTHERS *v.* GARDEN AND OTHERS.

[House of Lords (Viscount Maugham, Lord Macmillan, Lord Porter, Lord Simonds and Lord Goddard), November 19, 20, 22, 23, 1945, February 15, 1946.]

Charities—Bequest of money on educational trusts—Asset consisting of debt payable to testator under agreement for dissolution of partnership—Business to be carried on by other partners—Testator entitled under agreement, on breach of certain conditions, to wind up business and repay himself his debt—Assets of business, at time of testator's death, including equity of redemption of business premises—Whether testator's rights under agreement "a charge or incumbrance affecting or to affect land"—Charitable Uses Act, 1735 (c. 36), *s.* 3.

By his will made on May 4, 1878, the testator bequeathed, after the death of his wife, "out of such part of my personal estate as may legally be bequeathed for charitable purposes," a legacy of £40,000 upon trusts for the advancement of education in Aberdeenshire. The testator died on Jan. 15, 1879, and the widow died in 1943. One of the assets of the testator's estate at his death was a sum of £32,293 16*s.* 10*d.*, representing the balance of a sum payable under an agreement dated Sept. 20, 1877, for the dissolution of a partnership. Under this agreement, the testator retired and the other partners were to carry on the business, and the sum in question was left by the testator in the business by way of loan. Under cl. 11 of the agreement, on breach of any condition of the loan, the testator was authorised to demand repayment of the whole amount then owing and, in default of payment, to enter the premises where the business was carried on and to wind up the business, or to continue it as long as might be found necessary or expedient in order to wind it up beneficially and thereby to effect repayment to himself of the amount due to him. At the time of the testator's death, the assets of the business included the equity of redemption of the premises in which the business was carried on. The question to be determined was whether, by reason of cl. 11 of the agreement, there was at the testator's death an equitable assignment or charge affecting land (*viz.*, the equity of redemption of the business premises) with the result that the sum due to the testator under the agreement could not legally be bequeathed for charitable purposes, by reason of the Charitable Uses Act, 1735, s. 3 (which was still in force at the testator's death) :—

Held : upon its true construction, cl. 11 of the agreement did not create any charge, nor did it effect an equitable assignment ; it merely gave to the testator a right to payment out of a fund to be ascertained in the future and, at the time of payment, the fund might not consist of the proceeds of sale of the business premises since they might have been disposed of long before. Therefore, the testator's interest in the outstanding debt was not secured by a charge or incumbrance affecting land within the meaning of the Charitable Uses Act, 1735, s. 3, and it could, at the time of his death, be legally bequeathed for charitable purposes.

Decision of the Court of Appeal (Lord Greene, M.R., *and* Luxmoore, L.J., MacKinnon, L.J., *dissenting*), *sub nom. Re Nicol, Nicol* v. *Nicol* ([1944] 2 All E.R. 181) *reversed.*

[**EDITORIAL NOTE.** The House of Lords reverse the Court of Appeal, holding that the agreement by the testator did not create any charge upon the partnership property, which consisted partly of land. The testator could, therefore, make a legal bequest of his interest in the loan, since it was not secured by a charge or incumbrance affecting land within the Charitable Uses Act, 1735, which, having been long repealed, will probably not come before the courts again for consideration.

As to Meaning of " Land " in the Mortmain and Charitable Uses Acts, see HALSBURY, Hailsham Edn., Vol. 4, pp. 138, 139, para. 181 ; and for Cases, see DIGEST, Vol. 8, pp. 266-273, Nos. 280-400.]

Cases referred to :

(1) *Re Corcoran, Corcoran* v. *Riddell* (1892), 62 L.J.Ch. 267 ; 8 Digest 274, *418* ; 67 L.T. 754.

(2) *Re Hamilton, Cadogan* v. *Fitzroy,* [1896] 2 Ch. 617 ; 8 Digest 274, *419* ; 65 L.J.Ch. 815 ; 75 L.T. 113.

*(3) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523 ; 20 Digest 334, *770* ; 58 L.J.Q.B. 75 ; 60 L.T. 162.

(4) *Governments Stock & Other Securities Investment Co.* v. *Manila Ry. Co.,* [1897] A.C. 81 ; 10 Digest 761, *4758* ; 66 L.J.Ch. 102 ; 75 L.T. 553.

(5) *Re Florence Land & Public Works Co., Ex p. Moor* (1878), 10 Ch.D. 530 ; 10 Digest 750, *4692* ; 48 L.J.Ch. 137 ; 39 L.T. 589.

(6) *Re Colonial Trusts Corpn., Ex p. Bradshaw* (1879), 15 Ch.D. 465 ; 10 Digest 746, *4665.*

*(7) *Re Dawson, Pattisson* v. *Bathurst,* [1915] 1 Ch. 626 ; 8 Digest 273, *391* ; 84 L.J.Ch. 476 ; 113 L.T. 19.

*(8) *Ashworth* v. *Munn* (1880), 15 Ch.D. 363 ; 8 Digest 273, *397* ; 50 L.J.Ch. 107 ; 43 L.T. 553.

(9) *Attree* v. *Hawe* (1878), 9 Ch.D. 337 ; 8 Digest 272, *384* ; 47 L.J.Ch. 863 ; 38 L.T. 733.

(10) *Reeve* v. *Whitmore, Martin* v. *Whitmore* (1863), 4 De G.J. & Sm. 1 ; 7 Digest 119, *689* ; 3 New Rep. 15 ; 33 L.J.Ch. 63 ; 9 L.T. 311.

Appeal by the trustees of the charity from a decision of the Court of Appeal (Lord Greene, M.R., and Luxmoore, L.J., MacKinnon, L.J. dissenting), reported *sub nom. Re Nicol, Nicol* v. *Nicol* ([1944] 2 All E.R. 181). The facts are fully set out in the opinion of Viscount Maugham.

R. F. Roxburgh, K.C., and *W. L. Blease* for the appellants, the trustees of the charity.

Harold Christie, K.C., and *William Geddes* for the residuary legatees.

Edward Ackroyd for the present trustees of the will.

The House took time to consider its opinion.

Viscount Maugham : My Lords, the question raised on this appeal is whether an asset of a testator, consisting of a sum of £32,293 16*s.* 10*d.*, payable to him under a certain agreement, fell within the Charitable Uses Act, 1735, s. 3 (which was still in force at the date of his death), and was, therefore, one which he could not lawfully bequeath for charitable purposes. The estate is under administration by the court in the County Palatine of Lancaster and the question has been raised by petition addressed to that court.

The testator, Robert Nicol, died on Jan. 15, 1879. He left surviving him (i) his widow who lived for a further 65 years and died on Jan. 31, 1943 ; (ii) three brothers and two sisters, named in his will as his residuary legatees, whose legal personal representatives are respondents to this appeal. The appellants are the persons in the will appointed by the testator to act as trustees of a legacy of £40,000, bequeathed by the testator on the death of his widow upon trusts for the advancement and promotion of education in the city and county of Aberdeen. The question before your Lordships is whether the proceeds of a certain asset belonging to the testator at his death may be resorted to in order to make up the £40,000 or whether resort to those proceeds for that purpose is prohibited by the Statute of Mortmain which was then in force. If the testator had died after the enactment of the Mortmain and Charitable Uses Act, 1891, the question would not have arisen owing to the change in the law as to gifts of impure personalty for charitable purposes effected by that Act. This is probably the last case in which your Lordships will be asked to consider the effect of the long repealed Charitable Uses Act, 1735.

The relevant words of that statute are contained in sect. 3. They are as follows :

> . . . all gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands' tenements, or hereditaments . . . to or in trust for any charitable uses whatsoever, which shall at any time from and after the said June 24, 1736, be made in any other manner or form than by this Act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void.

For some years before Sept., 1877, the testator had carried on the business of a textile manufacturer, embroiderer, merchant and warehouseman in co-partnership with one William Devonshire Ryde at Ashenhurst Works, Blackley, in the county of Lancaster, under the style or firm of "Cowlishaw Nicol & Co.," and in co-partnership with the said William Devonshire Ryde and one Charles Edward Smith in the United States of America, under the style or firm of "Nicol Cowlishaw & Co." The business had prospered and the testator's interest in it was a large one. He wished to retire, and on retirement to leave the sum of £35,000 (the balance of a much larger sum due to him) on loan at interest to his partners William Devonshire Ryde and Charles Edward Smith. The terms agreed upon were contained in the agreement which must now be stated.

By the agreement, which was dated Sept. 20, 1877, and made between the testator of the first part, William Devonshire Ryde of the second part and Charles Edward Smith of the third part, after reciting that arrangements had been made for the dissolution of the partnerships therein mentioned and, by an agreement of even date therewith, for the continuation of the said businesses by the said W. D. Ryde and C. E. Smith in partnership with other persons, and for the introduction into the said businesses of capital, which, with the capital of the said W. D. Ryde in such new businesses, would amount to £45,000 at the least, and for the continuation of such capital in the said businesses, and for payment of sums equal to one half the profits of such new partnership to the testator as thereinafter mentioned, it was agreed that both the partnerships should cease and determine from Jan. 1, 1878, and that the testator should not participate in the profits of the said businesses after June 30, 1877, nor be liable for the losses incurred therein as from that date and the said agreement contained among others the following clauses :

> Cl. 1. That both the said partnerships heretofore subsisting between the said parties hereto shall cease and determine from Jan. 1, 1878.
>
> Cl. 2. That the said Robert Nicol on the terms and for the considerations herein agreed to be paid or secured doth hereby agree that the said William Devonshire Ryde and Charles Edward Smith shall from such date take and enjoy all the estate share right and interest of him the said Robert Nicol of and in all the property stock in trade debts goodwill contracts credits and effects of the said copartnership business as their own absolute property.
>
> Cl. 6. That the said William Devonshire Ryde and Charles Edward Smith shal pay to the said Robert Nicol for his share and interest in the said partnership propert stock in trade debts goodwill contracts credits and effects the sum of £63,390 2*s.* 9*d* of which the sum of £28,390 2*s.* 9*d.* part thereof shall be paid by instalments of not les than £5,000 each on or before June 30, 1878, together with interest at the rate of £1

per cent. per annum on the said sum of £63,390 2*s.* 9*d.* or so much thereof as shall for the time being remain unpaid from June 30, 1877, to the said June 30, 1878, and that no instalment may be paid unless 6 months previous notice in writing has been given to the said Robert Nicol his executors or administrators. The said Robert Nicol shall lend and advance to the said William Devonshire Ryde and Charles Edward Smith the sum of £35,000 the balance of the said sum of £63,390 2*s.* 9*d.* as from June 30, 1878 at the rate of £10 per cent. per annum on condition that the capital employed in the said businesses by the said William Devonshire Ryde and Charles Edward Smith or any other person or persons carrying on the said businesses shall not amount to less that the sum of £45,000 in the whole (irrespective of the said sum of £35,000) during such time as the said sum of £35,000 or any part thereof shall remain due and owing to the said Robert Nicol and shall employ the whole of the said capital in the said businesses to the best advantage.

Cl. 7. That the interest on the said sum of £35,000 or so much thereof as shall for the time being remain unpaid shall be paid half yearly on Dec. 30 and June 30 in every year the first payment thereof to be made on Dec. 30, 1878.

Cl. 8. That the said William Devonshire Ryde and Charles Edward Smith shall carry on and conduct the said businesses in the most efficient manner and promote the prosperity thereof to the utmost extent of their ability and that during the period aforesaid the said William Devonshire Ryde and Charles Edward Smith shall not engage directly or indirectly in any other business occupation or employment or in any speculation whatsoever and shall accurately and faithfully keep proper account books and all other documents showing the mode of carrying on such businesses and the profits and losses thereof and shall have proper valuations of stock and stocktakings made on the Saturday nearest July 1 in every year the first of such stocktakings to be made on the Saturday nearest July 1, 1878, so as to show the true value of the said stock and the state of the said businesses and from time to time when required furnish the said Robert Nicol his executors administrators or assigns with true copies of the said stocktakings and balance sheets.

Cl. 9. That the said William Devonshire Ryde and Charles Edward Smith will not do any act or incur any liability except in the usual course of business by which the partnership property or their several shares therein may be liable to be seized or taken in execution or prejudicially.

Cl. 11. That it shall be lawful for the said Robert Nicol his executors administrators or assigns and any person or persons to be appointed by him or them from time to time (so long as the said sum of £35,000 or any part thereof shall remain owing to him or them) during the usual business hours to enter upon the premises where the said businesses shall be carried on or any part thereof and to inspect and examine the mode of conducting and carrying on the said businesses. And all books of account stock books ledgers receipts papers and writings in the possession or power of the said William Devonshire Ryde and Charles Edward Smith kept for the purposes of their said businesses and to take copies thereof or extracts therefrom in order to ascertain the true state thereof and if thought necessary or desirable may at any time whilst the debt due to the said Robert Nicol or any part thereof shall be unpaid have the stock taken in the usual manner and that if upon any inspection or examination or stocktaking it should appear to the said Robert Nicol his executors administrators and assigns that the joint capital of the said William Devonshire Ryde and Charles Edward Smith and such other partners to be introduced by them as aforesaid is reduced to the sum of £40,000 or less or in case of the breach of any of the conditions herein contained it shall be lawful for the said Robert Nicol his executors administrators or assigns by notice in writing to be given to the said William Devonshire Ryde and Charles Edward Smith or left at their place of business to require repayment of the whole amount then owing to the said Robert Nicol his executors administrators or assigns And in default of payment at the time named in such notice the said Robert Nicol his executors administrators or assigns and any person or persons of his or their appointment shall in case his debt or any part thereof shall then be unpaid have full power and authority to enter upon the premises where the said businesses may be carried on and either forthwith to discontinue the said partnership businesses and to wind up the same and dispose of all the stock property and effects thereof or to continue such businesses as long as may be found necessary or expedient in order to wind up the same beneficially and as the attorney or attorneys and in the names of the said William Devonshire Ryde and Charles Edward Smith to collect the debts and goods and effects owing or belonging to the said concern and give discharges for the same and to repay himself or themselves the whole amount of principal and interest then due to him or them under or by virtue of these presents and in case of deficiency to sue for and recover the same from them in any way he or they may think proper.

Cl. 12. That in the event of the said William Devonshire Ryde and Charles Edward Smith or either of them dying or otherwise quitting the said partnership businesses or any of them the capital of such partner or partners shall not be withdrawn from the said partnership so as to reduce the capital thereof below £50,000 irrespective of the said sum of £35,000 so long as the same or any part thereof shall be owing to the said Robert

Nicol it being the intention of the said parties hereto that the amount due to him shall have priority and take precedence over the claims of the said William Devonshire Ryde and Charles Edward Smith or their respective representatives.

(Cl. 13). Ryde and Smith undertook to pay to the testator on Jan. 1 in each year a sum equal to one half of the clear profits of the business towards repayment of the £35,000. (Cl. 14.) The payment of the £35,000 might be "accelerated" by mutual consent. (Cl. 15.) This clause contained mutual covenants for further assurance. (Cl. 16.) So far as the parties could lawfully so declare, all the stipulations and provisions of the agreement relating to Ryde and Smith were to be "applicable so far as may be to any partner or partners for the time being" of Ryde and Smith or either of them. (Cl. 17.) If Ryde and Smith should observe and perform all the agreements and conditions of the agreement, the testator agreed not to call in the debt until June 30, 1884.

A memorandum of even date signed by the testator, Ryde and Smith was endorsed on the agreement, providing (cl. 1) that Ryde and Smith should be jointly and severally liable for the due payment of the whole sum of £63,390 2*s.* 9*d.*; (cl. 2) that the powers given to the testator by cl. 11 of the agreement were to apply to the whole sum of £63,390 2*s.* 9*d.*, and not merely to the sum of £35,000.

It was in the light of these agreements that the testator on May 4, 1878, made his will. By it the testator appointed executors and trustees and made divers dispositions of several parts of his estate, including bequests and a devise for life to his wife Mary Edla Nicol, and gave his residuary real and personal estate to his trustees upon trust for sale and conversion and out of the proceeds to pay certain legacies, including a pecuniary legacy of £1,000, out of such part of his personal estate as might legally be bequeathed for charitable purposes, to the treasurer for the time being of the Royal Infirmary of the city of Aberdeen in Scotland for the benefit of that charity. From and after the death of his wife the testator bequeathed out of such part of his personal estate as might legally be bequeathed for charitable purposes (and as should remain after paying or providing for the before mentioned legacy of £1,000 to the treasurer of the Aberdeen Infirmary) to the persons who should at the time of the decease of his wife hold certain offices or positions in connection with the city of Aberdeen (which he proceeded to enumerate) and to hold the same upon trust to invest and with the like power to vary the investments and to pay and apply the annual income thereof in perpetuity for the advancement and promotion of education in the city and county of Aberdeen.

At the date of the death of the testator, the partnership was being carried on by W. D. Ryde and C. E. Smith and four new partners at works called the Ashenhurst works. These premises were in mortgage for an amount of £20,000, secured to the testator by a mortgage dated July 3, 1875. At the date of the death, £2,706 3*s.* 2*d.* had been paid in reduction of the debt of £35,000, but the balance, *viz.*, £32,293 16*s.* 10*d.*, remained owing upon the terms of the agreement. The mortgage for £20,000 was still outstanding at the testator's death, and it is not disputed that such part of his estate as is referable to it could not lawfully be bequeathed for charitable purposes. The sum of £32,293 16*s.* 10*d.* was paid off during the lifetime of the testator's widow and was represented at her death by pure personalty: but, if the validity of the bequest is to be determined by the facts existing at the death of the testator, this circumstance is irrelevant.

The judgment of Sir John Bennett, V.-C., so far as it relates to the subject of this appeal, was to the effect that cl. 11 of the said agreement gave to the testator a charge upon the partnership property and that, as the partnership property included real estate, the sum of £32,293 16*s.* 10*d.* owing to the testator as aforesaid was charged upon land and, therefore, came within the mischief of the said statute and, accordingly, could not be applied in the payment of a charitable legacy. Upon appeal from the decision of the Vice-Chancellor to the Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), the judgment was affirmed by a majority (Lord Greene, M.R., and Luxmoore, L.J., MacKinnon, L.J., dissenting). Lord Greene, M.R., and Luxmoore, L.J., rejected the submission that the nature of the testator's rights under the said agreement fell to be determined at the date of the death of his widow and held that their nature had to be ascertained at the date of the testator's death. They were prepared, if necessary, to draw the inference that at that date the said agreement was binding on all the said six partners, but held that in any case it was effective against the interests of the said W. D. Ryde and C. E. Smith. They found nothing in the said agreement except cl. 11 thereof which created any estate or interest in, or charge or incumbrance affecting, the equity of redemption in the said Ashenhurst works (which was the only real property which the partnership was shown to have owned) but they construed cl. 11 as creating such a charge. They held that it created no floating charge, but was an equitable assignment of such part of a fund which was to come into existence at a future date as would be sufficient to satisfy the testator's claim, that such a contingent charge operated from the date of its creation upon each and every partnership asset, including the said equity of redemption, and that its operation could not be postponed until the happening of the contingency.

MacKinnon, L.J., dissented, and held that, although cl. 11 purported to give rights as to the assets of the partnership, it was a clause in a contract to which only the testator, the said W. D. Ryde and the said C. E. Smith were parties, and that, for anything that was proved, the said agreement might only impose a personal joint liability upon the said W. D. Ryde and C. E. Smith, with a purported charge or security upon the assets of the new partnership which was, in fact, no charge or security at all. He felt himself in a position to defeat what he described as the unrighteous claim of the respondents based on the Act of 1735 which had long since rotted in its grave. There is no direct evidence that the four new partners who joined William Devonshire Ryde and Charles Edward Smith ever ratified the agreement of Sept. 20, 1877. The majority of the Court of Appeal were prepared to draw the inference that they did ; but MacKinnon, L.J., as stated, declined to do so. For my part, I should be inclined to share the doubts he expressed on this matter, but some fresh evidence has been discovered on the point and has been by consent admitted. That evidence is, in my opinion, sufficient to establish that the new partners did in fact ratify the agreement, and I do not think it necessary to say anything more on this point.

It was argued by counsel for the appellants that the testator's rights under the agreement of Sept., 1877, were such that the directions in his will ought to be construed as making the death of the widow, not the death of the testator, the time at which the character of the assets constituting the residuary estate ought, for the purpose of the Charitable Uses, Act, 1735, to be ascertained. At that date, the particular asset the subject of dispute was represented by pure personalty, and the investments representing it could lawfully be used for the purpose of making up the bequest of £40,000. The appellants relied on a decision of North, J., in the case of *Re Corcoran* (1), which was considered and explained in *Re Hamilton* (2). This argument was carefully considered in the judgment of Lord Greene, M.R., and Luxmoore, L.J., and the distinction between the present case and that of *Re Corcoran* (1) was clearly pointed out. I am content to say, on this point, that I accept the view of the Court of Appeal, and do not think I can usefully add anything to it.

The question then is : Was there at the date of the testator's death in 1878 an equitable assignment or charge affecting the real estate, *viz.*, the equity of redemption of the Ashenhurst works (and the other assets of the partnership), arising by virtue of cl. 11 of the agreement ? Or is the appellants' view correct that the only assignment or charge effected by the clause related to a fund to be derived by the dissolution of the partnership and that there was no present assignment or charge created in respect of the "stock, property and effects" of the business as from the date of the agreement ? This obviously was a future fund which could not come into existence unless there was a winding up of the business.

My Lords, it is not in dispute that there cannot be an equitable charge on, or assignment of, a future asset unless and until it comes into existence. On the other hand, it is well settled that when the asset comes into existence, if there has been an assignment for value of that asset in terms present and immediate, equity regards the assignment "as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so desrcibed as to be capable of being, ascertained and identified" : see *per* Lord Macnaghten (13 App. Cas. 523

at pp. 543, 546) in *Tailby* v. *Official Receiver* (3). I cannot improve on the language of LORD MACNAGHTEN'S much admired speech ; but I will add one remark which is amply justified by the many authorities on this subject, namely, that in order that there should be held to be an equitable charge or assignment, the intention to create such a result must be reasonably clear, though no particular form of words is necessary for that purpose. The absence of words indicating a present assignment or charge, such as existed in *Tailby* v. *Official Receiver* (3) is, however, an important circumstance in considering whether the intention is made out. It would have been very easy in an elaborate agreement such as that of Sept. 20, 1877, to have qualified the express terms of cl. 2, as the result of which the Ashenhurst works were to become the "absolute property" of the remaining partners.

My Lords, a word must be said as to how the problem before us should be approached. There are authorities to be found in which the judges seem to have considered the question whether the Charitable Uses Act, 1735, s. 3, had been infringed in the light of the old maxim *ut res magis valeat quam pereat* after transposing the two verbs. That, however, has long been abandoned ; and I propose to travel the narrow road which lies before us with an endeavour to construe the language of cl. 11 as if the statute did not exist and with an entire disregard of the consequences which may follow.

It is an unfortunate circumstance that the clause is defective where it deals with the events which may follow on a notice to require the partners to repay the whole amount then owing to Robert Nicol or his representatives. In default of payment, they are to have the power to enter upon the business premises and *either* to discontinue the partnership businesses and to wind up and to dispose of all the stock, property and effects (which of course involves the collecting of the debts and goods) *or* to continue the business in order to wind up the same beneficially and to collect the debts, goods and effects and to repay themselves the amounts then due. This is not a true alternative, but the same thing expressed with a little difference in the use of rather inaccurate language. In either case, not a word is said as to creditors of the business, whose debts might well have accrued before Robert Nicol left the firm or might have become due for goods subsequently supplied to the partnership and not yet paid for ; and the draftsman can hardly have been unaware that any creditors of the firm would have had the power, if Robert Nicol had attempted to step in, to invoke the assistance of the Bankruptcy Court. In this state of muddle, I can only come to the conclusion that Robert Nicol became a creditor of the firm under the deed for the sum of £35,000, payable by instalments, with a power in certain events to cause the immediate winding up of the firm in a legal manner, and, as part of that process, in the case of insolvency to pay the preferential debts and then to distribute the balance among the creditors. His own debt would not rank in front of the latter and might indeed be postponed to them. It is sufficient to say that under cl. 11 Robert Nicol or his representatives are to have a right to payment out of the moneys arising as the result of the winding up. He is to have priority over the claims of the remaining partners, but the clause is not designed to give him priority for his loan over any creditors of the partnership, though he might be entitled to rank *pari passu* with ordinary creditors of the business for debts accrued after he left the firm. Complete liquidation appears to be comtemplated, and the real estate or the leaseholds would have to be sold just as much as the stock, machinery and effects of the firm. Real estate, if any, of the firm is covered by the general phrase "stock, property and effects," and it is not, I think, suggested that the equitable assignment or charge contended for does not apply equally, if it exists, to all the different descriptions of property of the firm for the time being.

One thing is quite clear, *viz.*, that, in any event, the business as a whole is to be carried on by the remaining partners in the most efficient manner, with all kinds of precautions to safeguard the rights of Robert Nicol while any part of his debt is outstanding (cl. 8, 9). The suggested equitable charge on all the assets would, therefore, inevitably be of the nature of a floating charge, *i.e.*, it would be a floating security on all the assets of the partnership, leaving the partners free to dispose of any of those assets by sale or otherwise in the ordinary course of business. In other words it would attach in a dormant manner to all the subjects of the charge in their varying condition from time to time, but would cease to float (or to slumber) and would "crystallise" as soon as Robert Nicol or his representatives intervened under cl. 11: see *Governments Stock & Other Securities Investment Co.* v. *Manila Ry. Co.* (4), *per* LORD MACNAGHTEN ([1897] A.C. 81, at p. 86), and cases there cited. In the case of an issue of debentures, there is the strongest reason for implying, even from rather doubtful language, that such a charge exists before the debentures become due according to their terms; for, if it does not, the debenture holders will have no claims in liquidation in priority to ordinary creditors. But there must be some indication of the intention to create a floating charge. That circumstance will appear from a perusal of the decision in *Re Florence Land Co.* (5) and by observing the change of opinion of JESSSEL, M.R., in the circumstances of that case. See also *Re Colonial Trusts Corpn.* (6). There is no indication of such an intention in the language of cl. 11. The main reason for implying an intention to create a floating charge in the case of a debenture issue does not exist here; and I am unable to imagine any probable event in which the rights of Robert Nicol would have been improved by giving him a floating charge on the assets of the partnership, whilst such a charge might have been an element to be considered if it were alleged in possible circumstances that he remained a sleeping partner, which of course was not the intention. For these reasons, in addition to those clearly stated in the Court of Appeal, I have come to the opinion that there was no floating charge in the usual sense created by cl. 11.

The judgment of the majority in the Court of Appeal, after the rejection of the argument that there was an intention to create a floating charge, continued as follows ([1944] 2 All E.R. 181, at p. 188):

> The position at the death of the testator was that, if at the date when the testator's powers under cl. 11 came to be exercised the partners still owned the equity of redemption in the Ashenhurst works, the proceeds of sale of that equity would constitute part of the fund and the statute would apply. We do not think that the operation of the statute can be defeated where there is a contingent charge of this character. The position in this respect appears to us to be analogous to the case of a floating charge. In that case it cannot be stated one way or the other that when the charge crystallises there will be any land comprised in it. It may or may not be so according as the event turns out. The very point was dealt with by LORD COZENS-HARDY, M.R., in *Re Dawson* (7). He said ([1915] 1 Ch. 626, at p. 636): "This court put the more simple case of an individual who covenants to pay £10,000 twelve months hence and to charge any real estate which at that time he may have in payment of it. Could it possibly be said that pending the twelve months there was not even a contingent charge upon the real estate? Any charge or interest whether it be contingent or not is quite sufficient to satisfy the statute."

My Lords, with the greatest respect I am unable to agree with the view expressed in the first sentence. As I have pointed out, the proceeds of sale of the Ashenhurst works, if still the property of the firm, just like any other assets of the partnership existing at the time mentioned, would be applicable in discharging the partnership debts as above mentioned and the costs of liquidation. The balance (if any) would consist of money, and would be payable to the partners in the firm. It may well be that, after the testator's powers under cl. 11 came to be exercised, creditors would have an equitable charge of some kind on the fund to be realised by the winding up: but that is not a material circumstance, for the question under consideration relates to the position at the death of the testator. Nor can I follow the observation that the position "appears . . . to be analogous to the case of a floating charge." For the reasons already given, there could not be a floating charge on the Ashenhurst works, unless it also attached to all the other effects for the time being of the partnership; and that view has already been rejected by the majority of the Court of Appeal for, as it seems to me, good and sufficient reasons.

The Court of Appeal relied upon the *dictum* of COZENS-HARDY, M.R., in *Re Dawson* (7): but his remark does not, I think, throw any light upon the matter; for it appears to be dealing with a different case in which the debtor in terms is purporting at a future date to give a charge upon any real estate he *then* has, and is not purporting to give a present charge on his existing real estate; and, I repeat, the equitable charge or assignment for which the respondents contend must be in existence at the date of the testator's death if it is to bring the Charitable Uses Act, 1735, into operation. Moreover, the language is obscure, since the judge does not say that the covenantor possesses any real estate and, if not, a charge cannot exist (in such a case) until the covenantor has acquired *some* real estate after giving the covenant. Would there then be an existing charge? The hypothesis gives rise to some curious speculations. It could not be a floating charge. For myself, I doubt whether the court would hold as a matter of construction that the real estate possessed at the end of the twelve months could be subject to a charge before that date. At any rate we have here quite different words to deal with.

In the case we have before us, I must conclude that there is no sufficient ground, in the absence of any words of present assignment or charge, to accept the view that cl. 11 gives or was intended to give anything more than a right to payment out of a fund to be ascertained in future events, a fund which might not be composed (*inter alia*) of the proceeds of sale of the Ashenhurst works, since those works might have been disposed of long before.

For these reasons I must come to the conclusion that the appeal must be allowed.

Lord Macmillan: My Lords, in 1878 Robert Nicol, a Manchester manufacturer of Scottish origin, made his will and thereby bequeathed, after the death of his wife, "out of such part of my personal estate as may legally be bequeathed for charitable purposes," a legacy of £40,000 to the holders at the time of his wife's death of certain offices in the city of Aberdeen, the income to be applied for the advancement and promotion of education in the city and county of Aberdeen. Robert Nicol died in 1879, survived by his widow, who died in 1943, whereupon the legacy became payable. The sole question in the case is whether a particular item included among the testator's assets at his death was personal estate which could legally be bequeathed for charitable purposes. The trustees of the testator have in their hands funds representing this item of the original estate and it has now to be decided whether they can utilise these funds towards payment of the above-mentioned charitable bequest.

In 1878, when the testator made his will, and in 1879, when it became effective on his death, there was in force the Charitable Uses Act, 1735. That Act was repealed by the Mortmain and Charitable Uses Act, 1888, but by sect. 13 (1) (*b*) the repeal was expressly declared not to affect any instrument executed before its passing. Your Lordships are now invited, in 1945, fifty-seven years after its repeal, to enforce the provisions of the statute of 1735 in favour of the residuary legatees of the testator and to the detriment of his charitable bequest.

The Act of 1735 has a long history behind it, beginning with the first Statute of Mortmain [Statute *De Viris Religiosis*] in 1279, and it was the successor of a series of enactments of increasing severity designed to defeat the evasions which the ingenuity of conveyancers devised. The purpose of the legislation was originally to prevent the loss of the incidents of feudal tenure which resulted from the gift of lands in mortmain to religious communities, but it was subsequently maintained in the interest of free commerce in land. The Act of 1735 is entitled "An Act to restrain the disposition of lands, whereby the same become unalienable" and it proclaims its purpose in an elaborate preamble which recites the prevalance of the increasing "public mischief" of:

> . . . large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs.

Sect. 1 of the statute enacts that from and after June 24, 1736:

> . . . no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out, or disposed of in the purchase of any lands tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever [except in comformity with certain prescribed requirements.]

Sect. 3, which is the section specially relevant to the present case, provides that:

> . . . all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate

> or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the said June 24, 1736, be made in any other manner or form than by this Act is directed and appointed, shall be absolutely, and to all intents and purposes null and void.

These are wide words and I shall now proceed to consider whether the particular item of the testator's estate with which this appeal is concerned falls within them.

The testator, until his retirement in 1877, carried on business as a manufacturer in co-partnership with one Ryde at Ashenhurst Works, Blackley, in the county of Lancaster, and in co-partnership with Ryde and one Smith in the United States of America. On his retirement the testator entered into an agreement, dated Sept. 20, 1877, with Ryde and Smith for the dissolution of both partnerships as at Jan. 1, 1878. Ryde and Smith, who were to carry on the business with new partners, thereby undertook to pay to the testator the sum of £63,390 2*s.* 9*d.* for his share and interest in the dissolved partnership. Of this sum it was stipulated that £28,390 2*s.* 9*d.* should be paid off in yearly instalments of £5,000 and the balance of £35,000 should be left on loan with Ryde and Smith, on condition that they and any partners associated with them should maintain the capital employed in the business at a specified figure. In reduction and repayment of the loan of £35,000 the testator was entitled to receive yearly a sum equal to one half of the clear profits of the businesses. Interest at 10 per cent. was payable to the testator on the whole balance outstanding due to him from time to time. The testator was given a right so long as any part of his loan of £35,000 remained unpaid to enter the premises where the business was carried on and to inspect the books of account. If the capital apart from his loan were found to be below the stipulated minimum, or any other breaches of the conditions of the agreement were found to have been committed, the testator was empowered to give notice calling for payment of the whole amount remaining due to him. In default of payment the testator was authorised :

> . . . to enter upon the premises where the said businesses may be carried on and either forthwith to discontinue the said partnership businesses and to wind up the same and dispose of all the stock, property and effects thereof or to continue such businesses as long as may be found necessary or expedient in order to wind up the same beneficially [and thereby to effect repayment to himself of all sums due to him].

Of the sum of £63,390 2*s.* 9*d.* due to the testator under the dissolution agreement, £32,293 16*s.* 10*d.* remained payable to him at the date of his death. The question is whether this sum was personal estate of the testator which he might legally bequeath to charitable purposes or whether the statute of 1735 has the effect of rendering it unavailable for the satisfaction in part of the charitable bequest of £40,000 contained in his will. I remind myself that the question is not what the charity can take under this will, but what was the interest of the testator at the time of his death in this item of his estate. Comprised in the assets of his Manchester partnership at the date of the dissolution was the equity of redemption of the partnership's premises, known as the Ashenhurst works, which had been mortgaged for £20,000. Did the agreement of dissolution of 1877 confer on the testator an interest in or a charge upon this equity of redemption for the sums due to him under the agreement and, in particular, for the sum of £32,293 16*s.* 10*d.* due to him thereunder at his death ? If so, then this sum being an interest in or a charge upon land could not, under the statute of 1735, be bequeathed by him to charity.

The cases upon the Act of 1735 to which the attention of the House was drawn show that the courts, in their interpretation and application of the Act, went a very long way indeed, almost " into extravagant consequences," as PHILLIMORE L.J., said ([1915] 1 Ch. 626, at p. 641) in *Re Dawson, Pattison* v. *Bathurst* (7), one of the last of these cases, when he found himself driven to accept a conclusion which "may almost seem grotesque" (*ibid*, p. 640). Counsel for the appellant charitable trustees was not prepared to challenge the soundness of these decisions, though none of them is binding upon this House, but preferred to distinguish them and show that they were inapplicable to the present case. He maintained, and, indeed, it was agreed, that there was no case precisely in point. There could not well be, seeing that the question turns on the precise effect of a very special agreement. I think it is reasonable to approach the question with a disinclination to extend at this time of day the application of a rule of law which Parliament abrogated more than half a century ago.

If the testator had been at his death a partner in the Manchester firm and his estate had included his share and interest in the assets of the partnership business, including the equity of redemption of the firm's premises, then a bequest by him of his share in the partnership for charitable purposes would have been null and A void under the Act of 1735, according to the decision in *Ashworth* v. *Munn* (8), In that case (15 Ch. D. 363, at p. 368), James, L.J., withdrew some expressions which he had used incidentally in *Atree* v. *Hawe* (9) (9 Ch.D. 337, at p. 346) and:

> . . . which seem to indicate that we thought the cases had gone to the extent of saying that no share in a partnership which had land for the purposes of the partnership, or real property, or impure personalty, as part of the assets or capital, was hit by the statute . . . B

Although James, L.J., withdrew what he had previously said *obiter*, the fact that he did make such a statement is an indication that the point was at least *prima facie* arguable. *Ashworth* v. *Munn* (8), however, has no application to the present case, for here the testator had ceased to be a partner of his former firm before his death and all his former interests in the firm had merged in his rights under the dissolution agreement. His position at his death was simply that of a C contract creditor under that agreement, which gave him the right to certain payments in money, with certain rights for enforcement of payment.

As I see it, the only question then is whether the right of enforcement conferred upon the testator by the clause of the agreement which I have quoted above, and which, in the event of default, entitled him to enter upon the premises of his former business and realise its assets (including the equity of redemption of the Ashenhurst works) for the purpose of effecting payment of his debt, constituted D in the testator's person an interest in or a charge upon land (to wit the aforesaid equity of redemption) within the meaning of the statute. I am of opinion that it did not. I observe, in the first place, that the words of the agreement do not in terms create any charge. In the next place, Ryde and Smith were under no obligation to retain the equity of redemption of the premises; they were at perfect freedom to part with it whenever they should think it expedient to do so and to dispose of it free of any charge in favour of the testator. This feature is E no doubt characteristic of what is known as a floating charge, and counsel for the respondents maintained that this was what the agreement created. But I agree with Lord Greene, M.R., for the reasons which he assigns ([1944] 2 All E.R. 181, at p. 188), that this is not so and that *Re Dawson* (7) is therefore inapplicable. No direct or immediate charge whatever was created by the agreement. Moreover, no priority or preference was thereby conferred upon the testator F over other creditors of the business.

The majority of the Court of Appeal based their decision on the ground that, in their view, the agreement effected an equitable assignment of the equity of redemption of the Ashenhurst premises, tantamount to a charge thereon in the testator's favour. The very special, and not very apt, language of the agreement does not, in my opinion, compel or justify such an interpretation, and I share the view of its import which the noble and learned Lord on G the Woolsack has expressed. Even if the matter were in doubt, I should not be disposed to strain the reach of this obsolete statute, in the absence of any precedent precisely in point. I do not think that the case comes fairly within the mischief of the Act.

I am accordingly in favour of allowing the appeal.

Lord Porter: My Lords, I find myself in agreement with the opinions H which your Lordships have expressed and concur in the result.

Lord Simonds: My Lords, the question raised in this appeal is whether as asset forming part of the estate of Robert Nicol, who died on Jan. 15, 1879, could lawfully be bequeathed by him for charitable purposes. Inasmuch as he died when the Charitable Uses Act, 1735, was in force, he could not do so if that asset was an estate or interest in land or a charge or incumbrance affecting or to affect any land. The answer to be given to this question is the same answer that must have been given had it fallen for decision shortly after the testator's death. The fact that soon after that event the law was altered by the Acts of 1888 and 1891 is an irrelevancy which does not induce in me a wish to decide this case in one way or a reluctance to decide it in another.

I have said, my Lords, that the same answer must be given now as would have been given long ago, and this involves the rejection of an argument which was urged upon the House, that the character of the asset must be determined not at the death of the testator, but at the date when the legacy became payable, an event which the interposition of a life estate in favour of the testator's widow postponed for more than sixty years. Upon this part of the case I so fully concur in what has been said by the majority of the Court of Appeal that I will add nothing. Nor do I think it necessary to say anything upon the aspect of the case which led MACKINNON, L.J., to deliver a dissenting judgment—not, I hope, from any want of respect for his opinion, but because, since the case was before the Court of Appeal, further evidence has been discovered and adduced which would in any case make the view held by him untenable. The single question is whether the asset that I must now describe was, at the testator's death, of such a character as to be covered by the Charitable Uses Act, 1735, s. 3.

In 1877, the testator carried on business at Ashenhurst Works, Blackley, in the county of Lancaster, and in the city of Manchester and in London in partnership with one Ryde, under the style of Cowlishaw Nicol & Co., and the testator and Ryde also carried on business in America in partnership with one Smith, under the style of Nicol Cowlishaw & Co. In the same year, arrangements were made for the dissolution of these partnerships and for the continuation of the businesses by Ryde and Smith in partnership with other persons, and on Sept. 20, 1877, a formal agreement was made between the testator of the first part, Ryde of the second part and Smith of the third part to carry these arrangements into effect. The provisions of this agreement have been so fully stated by my noble and learned friend, LORD MAUGHAM, that I need not repeat them. It is sufficient to say that, under the agreement and a memorandum of the same date indorsed thereon, the sum of £63,390 2*s.* 9*d.* was payable to the testator in the manner therein provided. Of this sum £31,096 5*s.* 11*d.* had been paid or secured to him before his death, at which date the sum of £32,293 16*s.* 10*d.* was still owing to him. One further fact only need be stated. At the death of the testator, the partnership property included the equity of redemption in the freehold property known as the Ashenhurst works.

My Lords, I agree with the appellants' contention that the rights which the testator might otherwise have had upon the dissolution of his partnerships were superseded by the agreement of Sept. 20, 1877. The single question is what was the nature of his contractual rights under that agreement at the date of his death. I do not think that any principle of law or equity is involved. The question appears to me to be purely one of construction of an agreement, the language of which is well calculated to puzzle and confuse.

The Court of Appeal has rejected the contention that, upon its true construction, the agreement created such a charge in the nature of a floating charge in favour of the testator, that at his death it could be said that he had a charge upon partnership property which included land. My Lords, I have felt much doubt upon this point, but, while I was in the course of preparing my opinion, I had the privilege of reading that of my noble and learned friend on the Woolsack, and by it I have been satisfied that the agreement cannot fairly be read as creating a present charge in favour of the testator. I will, therefore, content myself with saying that upon this point I concur in his reasons and conclusion.

But the Court of Appeal, while rejecting the view that the agreement created a charge upon land, yet held that it operated as an equitable assignment of such part of a fund to come into existence at a future date as would be sufficient to satisfy the testator's claim. This may be so. But it is the next step which I find myself unable to take. It is said that, since the partnership property at the death included land, and the fund to be established by a sale of such property, if it took place at the death, would therefore include proceeds of sale of land, the statute must apply. I think that the short answer to this is that at the death the event, upon the happening of which such a fund could be established, had not happened. It could not, therefore, be predicated of the testator's rights at that moment that they included an interest in land. There is no doubt that an equitable interest may be presently created by contract: there is no commoner way of creating such an interest. But it remains a question of construction whether the contract creates a present interest in property then existing or merely operates, if and when a certain event happens, to create an interest in the property which shall at that date be existing. In the former case, even though the interest may be in a sense contingent, I should hold, consistently with authority, that the statute applied. But in the latter case I see no reason for saying that there is any interest, contingent or other, in land until the event in question has happened. The distinction between the two classes of case is well brought out in *Reeve* v. *Whitmore* (10), *per* Lord Westbury, L.C., (4 De G.J. & Sm. 1, at p. 18). It is, I think, into the latter category that the present case falls. Here, too, I find myself so fully in agreement with my noble and learned friend that I will not embark upon further examination of a document such as your Lordships are not likely again to consider.

I concur in the motion that the appeal should be allowed.

Lord Goddard: My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Maugham, with which I entirely agree. But as we are differing from the majority of the Court of Appeal on grounds different from those expressed by MacKinnon, L.J., who dissented, I will add a few words of my own. The whole question depends on whether cl. 11 of the agreement of Sept. 20, 1877, conferred on the testator any estate or interest in land or conferred any charge therein in his favour. The object and intention of the agreement is perfectly clear. The testator was minded to retire from a partnership in a manufacturing business of which he had hitherto been a member. He agreed to leave a part of his capital in the business as a loan to the remaining partners on certain conditions and at 10 per cent. interest. The loan was to be repaid by annual sums equal to one half of the clear profits of the business. Cl. 11, which for this purpose is the most important, gave the testator the right of entering on the business premises and inspecting the mode of conducting the business and all the books and other documents. On breach of any condition of the loan, or if the capital was reduced to a certain sum or less, the testator was entitled to wind up the partnership business "or" (so the agreement is worded, though it appears to me that "and" would have been the more appropriate word to use), to continue the business as long as may be found necessary or expedient in order to wind it up. Thus, it was expressly contemplated that the business was to continue and be carried on as heretofore. If it had been found necessary or convenient, it could have been moved to other premises, and the firm could have disposed of the equity of redemption that they possessed. Certainly no words are used which appear to impose any charge or assignment, present or future. True, it is expressly stated in cl. 12 that the intention of the parties is that the amount due to the testator should have priority over the claims of the remaining partners, but this provision does not appear to me to confer any additional right on the testator. As a creditor of the firm, he was entitled to be paid the money he had lent before his debtors took anything. Suppose something had happened which amounted to a breach of one of the conditions so that the testator became entitled to exercise his right of winding up the business. If the assets of the firm proved sufficient to pay its debts, no difficulty would arise. The debts, including that due to the testator, would be discharged and the balance, if any, would go to the existing partners. If the firm proved to be insolvent, bankruptcy proceedings would probably have been taken by some creditor. In that case, I do not see how the testator could have proved as a secured creditor. Indeed, as he was entitled to receive one half of the profits by way of repayment, in my opinion his debt, by reason of sect. 5 of Bovill's Act, 1865, replaced by sects. 2 and 3 of the Partnership Act, 1890, would have been postponed to that of other creditors. In no case could he have got a preference over other creditors. In my opinion, therefore, what the agreement gave him was a right or power to wind up the partnership in certain events, but did not confer upon him any charge or interest in the assets. Nor do I feel able to construe cl. 11 as effecting an equitable assignment. It does not appear to me to confer on the testator any greater right to payment than was possessed by any other creditor of the partnership, though it does give him a method of enforcing his right by allowing him to wind up the partnership without having first to obtain judgment. As I have already said, in the event of insolvency, his position would have been less favourable than that of other creditors. I am accordingly of opinion that the Charitable Uses Act, 1735, has no application to the present case, and I would allow the appeal.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the appellants); *Hill, Dickinson & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

SPAWFORTH *v.* SPAWFORTH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), January 18, 22, 23, 1946.]

Divorce—Desertion—Failure to establish statutory period—Whether curable by supplemental petition—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 176—*Matrimonial Causes Act,* 1937 (*c.* 57), *s.* 2 (*b*).

A supplemental petition for divorce must be treated as part of and an amendment to the original petition. Consequently, on a petition for divorce on the ground of desertion, failure to establish desertion without cause for 3 years immediately preceding the presentation of the petition cannot be cured by the presentation of a supplemental petition and taking into account the period which has elapsed since the presentation of the original petition.

Chapman v. *Chapman & Thomas* (1) *followed.*

Howard-Williams v. *Howard-Williams* (3) *not followed.*

[**EDITORIAL NOTE.** The Matrimonial Causes Act, 1937, requires desertion for a period of three years immediately preceding the presentation of the petition. This period cannot be arrived at by filing a supplemental petition and adding the periods in the original and the supplemental petitions, since it is established by *Sandler* v. *Sandler* (2) that a supplemental petition is part of the original petition. The decision to the contrary in *Howard-Williams* v. *Howard-Williams* (3) was arrived at without argument by the opposing counsel, and without the attention of the court being drawn to *Chapman* v. *Chapman* (1).

FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 2 (*b*), see HALSBURY'S STATUTES, Vol. 30, p. 337.]

Cases referred to:

*(1) *Chapman* v. *Chapman & Thomas*, [1938] 1 All E.R. 635; [1938] P. 93; Digest Supp.; 107 L.J.P. 30; 158 L.T. 424.

*(2) *Sandler* v. *Sandler*, [1934] P. 149; Digest Supp.; 103 L.J.P. 88; 151 L.T. 313.

*(3) *Howard-Williams* v. *Howard-Williams*, [1944] P. 85; 113 L.J.P. 71; 171 L.T. 278.

(4) *Cohen* v. *Cohen*, [1940] 2 All E.R. 331; [1940] A.C. 631; Digest Supp.; 109 L.J.P. 53; 163 L.T. 183.

PETITION by the wife for divorce on the ground of the husband's desertion. The report is confined to the following question raised at the hearing: Whether or not—the petitioner having failed to establish 3 years' desertion before the presentation of the petition—the difficulty could be overcome by means of a supplemental petition and taking into account the period which had elapsed since the presentation of the original petition.

W. R. K. Merrylees for the petitioner.

J. Roland Adams for the respondent.

HODSON, J.: Notwithstanding the fact that 3 years' desertion before the presentation of the petition has not been established, I have been asked to cure the difficulty by allowing a supplemental petition to be filed, because by now considerably more than 3 years have elapsed since the wife was deserted.

I have had to consider this question before. In *Chapman* v. *Chapman & Thomas* (1) I referred to the relevant section [2 (*b*)] of the Matrimonial Causes Act, 1937, which reads as follows:

> A petition for divorce may be presented to the High Court . . . either by the husband or the wife on the ground that the respondent . . . has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; . . .

and the question which arose there was whether the presentation of the petition need be of the original petition or not ; and I came to the conclusion that it must be, having regard to the language of the Court of Appeal in *Sandler* v. *Sandler* (2), where LORD HANWORTH, M.R., said ([1934] P. 149, at p. 156) :

> . . . it is impossible to hold that a supplemental petition is anything more than a part of and an amendment to the original petition . . .

He was not dealing with this point at all ; he was dealing with the question of whether collusion in respect of a main petition affected a supplemental petition. He said it did, and the Court of Appeal unanimously came to that conclusion. The position in this case seems to me to be exactly the same. I have to consider whether a supplemental petition would be anything more than an amendment of the original petition ; and I see nothing to indicate that it would.

The point came before BARNARD, J., in *Howard-Williams* v. *Howard-Williams* (3). The matter arose without argument on the other side as both spouses were supporting the application for the matter to be dealt with by way of a supplemental petition. Barnard, J., had not his attention then drawn to the decision in *Chapman* v. *Chapman & Thomas* (1), but it was argued before him that there were old cases before the Act of 1937 where desertion had been brought up to date, so to speak, by a supplemental petition, and that those cases were referred to without disapproval by the House of Lords in *Cohen* v. *Cohen* (4), in 1940. Of course, the point that was not brought to his notice was that the old cases dealt with desertion for two years and upwards *simpliciter*, which was introduced by the Act of 1857, and had nothing at all to do with desertion immediately preceding the presentation of the petition, and, therefore, did not touch this point at all.

I have been empowered by BARNARD, J., to say that he did not have *Chapman* v. *Chapman & Thomas* (1) brought to his attention, and that he is now at any rate inclined to the view that he would have come to the same conclusion as myself if he had considered the matter in the light of the wording of the 1937 Act.

Counsel for the respondent has pointed out that, if the suit could always be put straight by a supplemental petition, a wife could present a petition for divorce as soon as she was deserted, on the ground of desertion for 3 years and upwards, and obtain her alimony *pendente lite*, and stand the case over until the 3 years had really run out, and then bring it up to date by a supplemental petition. Of course, that might be possible—I do not know—but, in my view of the wording of this statute, the supplemental petition must be treated as part of the original petition, and " the petition " in the statute means the original petition, and the 3 years must precede that date.

The consequence is, that this petition fails, the desertion not having lasted for the 3 years before the petition.

Petition dismissed.

Solicitors : *Spiro & Steele* (for the petitioner) ; *Jaques & Co.* (for the respondent).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

LINNETT *v.* COMMISSIONER OF POLICE FOR THE METROPOLIS.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J., Humphreys and Henn Collins, JJ.), January 30, 31, 1946.]

Intoxicating Liquors—Licensed premises—Co-licensees—" Keepers "—Management and sole control in one of two co-licensees—Knowingly permitting disorderly conduct on premises—Liability—Metropolitan Police Act, 1839 (c. 47), *s.* 44.

The appellant was employed as a secretary of a company owning several establishments licensed for the sale of intoxicating liquor, the licences being held jointly by the appellant and the managers of the respective establishments. In respect of one of these licensed premises, the appellant and the manager were both charged and convicted under the Metropolitan Police Act, 1839, s. 44, as keepers of premises on which disorderly conduct was knowingly permitted. It was found by the metropolitan police magistrate that the appellant had never at any time been on the premises which were in the sole control of the manager. An appeal from this decision to quarter sessions was dismissed and, at the instance of the appellant, a case was stated for the opinion of the High Court. It was contended for the appellant that (i) he was not a "keeper" of the premises within the meaning of the Metropolitan Police Act, 1839, s. 44; (ii) he was never on the premises, nor had he any knowledge of the conduct which had taken place on the premises:—

HELD: (i) as a joint holder of the licence to sell intoxicating liquor on the premises, the appellant was a "keeper" of the premises within the meaning of the Metropolitan Police Act, 1839, s. 44.

(ii) although the appellant had not actually conducted the business carried on at the licensed premises, the facts showed that he had delegated his rights and duties as a licensee to the manager, a co-licensee; he must, therefore, accept responsibility for the disorderly conduct permitted on the premises.

Allen v. *Whitehead* (2) *applied.*

[**EDITORIAL NOTE.** Notwithstanding the absence of *mens rea*, it has been held under various statutes that a man may be liable for "knowingly" doing or permitting certain acts which have in fact been done or permitted by his servant acting within the scope of his authority. It is held in this case that the principle underlying this liability is not the relationship of master and servant, but the broad principle expressed in the maxim "*qui facit per alium facit per se.*" Accordingly, a licensee of licensed premises cannot avoid liability for permitting disorderly conduct by leaving the whole management and control of the premises to a co-licensee, both being "keepers" of the premises by reason of the grant of the licence.

AS TO KEEPING DISORDERLY HOUSES, see HALSBURY, Hailsham Edn., Vol. 19, pp. 154-156, paras. 376-379; and FOR CASES, see DIGEST, Vol. 30, pp. 93, 94, Nos. 711-721.]

Cases referred to:

*(1) *Somerset* v. *Hart* (1884), 12 Q.B.D. 360; 25 Digest 431, *304*; 53 L.J.M.C. 77.

*(2) *Allen* v. *Whitehead*, [1930] 1 K.B. 211; Digest Supp.; 99 L.J.K.B. 146; 142 L.T. 141.

APPEAL by way of case stated by the court of quarter sessions for the county of London, who dismissed the appeal of the appellant against a conviction by a metropolitan police magistrate under the Metropolitan Police Act, 1839, s. 44. The facts are fully set out in the judgment of LORD GODDARD, L.C.J.

Gilbert Paull, K.C., and *Sidney Lamb* for the appellant.

Vernon Gattie for the respondent.

LORD GODDARD, L.C.J.: This is a case stated by quarter sessions for the county of London, who dismissed an appeal by the present appellant, Geoffrey Samuel Johnston Linnett, who had been convicted by a metropolitan magistrate of an offence under the Metropolitan Police Act, 1839, s. 44, which provides:

> Every person who shall have or keep any house, shop, room, or place of public resort within the metropolitan police district, wherein provisions, liquors, or refreshments of any kind shall be sold or consumed (whether the same shall be kept or retailed therein or procured elsewhere) and who shall wilfully or knowingly permit drunkenness or other disorderly conduct in such house, shop, room or place, or knowingly suffer any unlawful games or any gaming whatsoever therein, or knowingly permit or suffer prostitutes or persons of notoriously bad character to meet together and remain therein, shall for every such offence be liable to a penalty of not more than five pounds. . .

The facts of the case seem to be these: The licensed premises or the place of public resort where liquor was sold was a public house in Piccadilly known as Ward's Irish House, and that belongs to a company called Ward's Catering Co., Ltd. The appellant is employed, as the case finds, as its secretary and salaried servant, but the licence for selling intoxicating liquors at these premises was a joint licence granted by the licensing justices to the appellant and to one Baker, who was also a servant of the company. It appears that Linnett, the appellant, although he was one of the licensees, took no part in the management of the premises but left them entirely to his co-licensee Baker.

The premises were ill-conducted, but it is unnecessary to go into any details with regard to the facts which constituted the offence. There was a summons taken out and there was a conviction by a metropolitan police magistrate for allowing these premises to be improperly conducted. The magistrate convicted both Linnett and Baker. The quarter sessions upheld the conviction of Linnett, who appealed—Baker did not appeal—and the case has been stated at the instance of Linnett. Two points have been taken on his behalf. The first point is that it is said he was not the keeper of the house. That is a point which the court has no difficulty in disposing of quite shortly. The licence to sell intoxicating liquor was granted to him and to Baker ; it was a joint licence. Under that joint licence the premises were opened or kept open and liquor was sold under that licence. We are not concerned with what might have happened if the licence had been granted to these two men and nothing at all had been done under it, if, for instance, they had not taken out an excise licence, or if they had never sold, but intoxicating liquor having been sold at these premises under this licence, it cannot be said, in my opinion, that both the licensees were not keeping this house. Liquor was being sold by them, and only by them, because it could not have been lawfully sold by any other person.

Counsel for the appellant has argued that a licence is a mere permission. In one sense that is perfectly true, but if the person to whom the licence has been granted, who holds that licence, proceeds to sell liquor under that licence, it is impossible, in my opinion, to say that he is not the person, or one of the persons, who is keeping the house. It is quite true that a keeper of the house for the purposes of this section need not necessarily be a licensee, but it is difficult indeed to see how the licensee of a house which is being conducted as licensed premises is not the keeper of the house. In my opinion, it is quite clear that Linnett was a keeper of the house just as much as Baker was a keeper of the house, and that point therefore fails.

There is a little more to be said about the other point. Having read the section, the offence, as I have already pointed out, is knowingly permitting certain conduct and other things to take place at the house, and it is said that the case finds here that the entire management of the house was left to Baker, that the appellant was never there, and that he in fact had no knowledge of the conduct which took place at that house and that he cannot be convicted of knowingly permitting this conduct to take place. There are many cases, of course—it is unnecessary to go through them all—both under the Licensing Act, the Food and Drugs Act and various other Acts, in which persons have been held liable because their servants or their managers have done certain acts, knowingly done certain acts, and their knowledge has been imputed to the master. One has to see what the principle is that underlies those decisions. The principle does not, in my opinion, depend merely upon the legal relationship between the two persons, the person who actually permitted with knowledge and the person who is convicted although he had no actual knowledge. The point does not, as I say, depend merely on the fact that the relationship of master and servant exists ; it depends on the fact that the person who is responsible in law as the keeper of the house, or the licensee of the house if the offence is under the Licensing Act, has chosen to delegate his duties, powers and authority to somebody else.

The case which at first sight may cause some little difficulty is *Somerset* v. *Hart* (1), the head-note of which is :

> Where gaming had taken place upon licensed premises to the knowledge of a servant of the licensed person employed on the premises, but there was no evidence to show any connivance or wilful blindness on the part of the licensed person, and it did not appear that the servant was in charge of the premises : *Held*, that the justices were right in refusing to convict the licensed person of suffering gaming on the premises under the Licensing Act, 1872, s. 17.

That case seems to me to depend entirely on this, that there was no delegation by the master of his powers and duties of management to his servant. It was not a case in which the master had left the management of the house to a servant or a manager. It was a case in which the master, being in active personal management of the premises, his servant did something or allowed something to take place which he ought no doubt to have reported to his master and did not, and the court said that the master would not be convicted for knowingly doing something because he did not in fact know that it was being done. That case seems to me to have no application to a case where the master entrusts a servant or other person with the management of his house and the conduct of his house. If he chooses to delegate his powers to some other person, then the knowledge of that other person becomes, to use a convenient expression, the principal's knowledge.

In this case, no relationship of master and servant exists between the two licensees, but they were joint licensees, and if one licensee chooses to say to his co-licensee: "We both hold licences, we are both keepers of the house, but I am not going to take any part whatever in the management, I leave it entirely to you," he is putting that other one into his shoes and he must then take responsibility for the acts which his co-licensee, who is placed there by him to exercise his own powers and duties, does, and he must take responsibility for what is done. That seems to me to be the principle which underlies all these cases. I am far from saying, and I do not wish it to be thought I am saying that where the Act provides that a certain thing shall be an offence if it is knowingly done, that then if the thing is done without the knowledge of the person who is himself carrying on the business and is in charge of the business but some act is done without his knowledge and which, therefore, he was powerless to prevent, that he necessarily commits an offence; but if he chooses to delegate to somebody else the carrying on of the business, whether that other person is a servant of his or not, then it seems to me it puts him in such a position that what he does or what he knows must be imputed to the person who puts the other one into that position.

In these circumstances, it seems to me, therefore, that quarter sessions came to a right conclusion. I should be very sorry if it were thought, as I think part of the argument counsel for the appellant went, that the licensee who carries on a business or to whom is given a licence enabling him to carry on a business and who does open and carry on a business under that licence, does not thereby undertake responsibilities and duties which the various Acts have put upon him or that he can get out of them merely by saying that somebody else holds also a licence with him and he can do as he likes and say "I am not going to take any part in the business." The answer is that by taking a licence he does incur responsibilities, and if he does not feel himself in a position to take those responsibilities he should not take a licence.

Under these circumstances, this appeal fails and must be dismissed with the usual result.

Humphreys, J.: I am of the same opinion. On the first point I would only add that I think it is not merely a coincidence that when one looks at the language of the Act which for the first time instituted the General Annual Licensing Meeting, the words of the first section of the Act are: "Justices are authorised to hold a meeting for the purpose of granting licences to persons keeping or about to keep inns, alehouses," and throughout the series of Licensing Acts one finds that that notion still remains. The person who is licensed is the person who is the keeper of the house or, if the house is not built, a person who desires to become the keeper of the house when built.

With regard to the second point, I think the matter is covered by *Allen* v. *Whitehead* (2), which was decided upon precisely the ground on which Lord Goddard, L.C.J.,—and I entirely agree with every word of his judgment—has held that this case should be decided, not upon any nice question of the law of master and servant or even principal and agent, but upon this broad ground, that a licensed victualler may in certain circumstances say: "I am not going to carry on this business myself; I am going to delegate my authority to somebody else," but if he does that, then he is responsible for the act of the person to whom he has delegated his authority, not only for his act but for his knowledge in the sense that the knowledge of the person to whom is delegated the authority is the knowledge of the delegator. The only distinction between that case and the present is to be found in the fact that here there is somebody else as well as the appellant who is also a licensee. In my opinion, it makes not the smallest difference. The facts show that the appellant did delegate all his authority to do all acts which he had power to do under the licence to a gentleman who happened to be a joint licensee. I cannot for the life of me see why that should excuse him in any way when he would not be excused if he had not been a joint licensee. I, therefore, agree that the appeal should be dismissed.

Henn-Collins, J.: I agree. So far as the first point is concerned, it may be that a licensee who has done nothing at all under his licence has not become the keeper of the place to which the licence relates, but when once the business the licence contemplates is carried on from the spot named in the licence, I have no doubt at all that the holder of the licence is the keeper of that place. In this case there were two licensees, each of whom, as it seems to me, had the advantages which the licence conferred and the obligations of the licence. One of the two licensees in this case said, in effect : " I am not doing anything at all in my position as licensee ; I am going to leave it all to the other man." The result of that was that he, the present appellant, had delegated the whole of his powers and obligations under the licence to the manager. In those circumstances, if there be such a delegation, it is perfectly clear on authority, the last case being *Allen* v. *Whitehead* (2), that the knowledge of the person who has delegated is the knowledge of the other party.

For these reasons, I come to the conclusion that the magistrates were right and that the question should be answered accordingly.

Appeal dismissed with costs.

Solicitors : *J. E. Lickfold & Sons* (for the appellant) ; *Solicitor to the Metropolitan Police* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

CROYDON GAS CO. *v.* RATING AUTHORITY FOR THE COUNTY BOROUGH OF CROYDON.

[King's Bench Division (Humphreys, Lewis and Henn Collins, JJ.), January 17, 25, 1946.]

Rates and Rating—Assessment—Gas company—Computation on profits basis—Capital sum required for conduct of undertaking—Source from which, and price at which, capital obtainable irrelevant.

The Croydon Gas Co., who were the occupiers of certain hereditaments in Croydon, sought a reduction of the rateable value placed upon those hereditaments by the valuation committee. The hereditaments in question were required to be valued on the profits basis and it was agreed that, on the facts of the case, a proper tenent's remuneration was 12½ per cent. upon the estimated capital required for the conduct of the undertaking. The company had established certain funds for the benefit of their employees and during 1939 the uninvested balance standing to the credit of these funds was £66,311. Under the rules governing the funds, the trustees could, at their discretion, leave the uninvested balance with the company and this had been the practice, the company paying interest thereon at 4 per cent. or 5 per cent. per annum. The recorder found that the capital sum required for the conduct of the undertaking was £730,014, but that £66,311 should be deducted therefrom, on the ground that the uninvested balance of the funds for the benefit of the employees was available to the company in running the undertaking. He held, therefore, that the hypothetical tenant's capital was £663,703, and that £2,622 (the sum paid by the company as interest on the uninvested balance of the funds) should be allowed as a working expense and be deducted from the nett receipts of the company. On an appeal to the Divisional Court from the recorder's decision, the company contended that, in computing the tenant's capital, no deduction should be made on account of the uninvested balance of the funds for the benefit of the employees because a tenant could not assume that he would have the use of that balance for any particular period, or at all, and, moreover, the source from which a tenant raised the capital required for the undertaking was irrelevant. The rating authority contended that whether or not the sum of £66,311 should be deducted was a question of fact and not of law, and therefore no appeal lay :—

Held : (i) it was not essential, in making a computation on the profits basis, to fix 12½ per cent. as the tenant's share, but, whatever percentage was fixed, it must be applied to the whole capital which the tenant was assumed to put into the business.

(ii) the source from which, and the price at which, a tenant could get his capital had no bearing upon what amount was required. The capital sum required could not vary with the particular tenant. As it had been found that the capital sum required for the conduct of the undertaking was £730,014, that sum was immutably fixed and no deduction could be made from it. The fact that a tenant could, for the time being, obtain part of the capital required by paying less than 12½ per cent. for it was irrelevant.

(iii) in giving effect to irrelevant facts, the recorder's decision involved a mistake in law.

[**EDITORIAL NOTE.** It is held in this case that where an undertaking owns hereditaments which are assessable for rating purposes upon a profits basis, the hypothetical capital necessary for running the undertaking is not to be reduced by sums which are available upon reduced interest terms, such as, in the circumstances here considered, uninvested funds in the hands of the trustees for employees.

AS TO THE RATING OF GAS UNDERTAKINGS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 417-421, paras. 848-852; and FOR CASES, see DIGEST, Vol. 38, pp. 552-554, Nos. 929-941.]

Cases referred to:

(1) *Kingston Union* v. *Metropolitan Water Board,* [1926] A.C. 331; 38 Digest 547, *901*; 95 L.J.K.B. 605; 134 L.T. 483.

(2) *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee,* [1901] A.C. 175; 38 Digest 526, *735*; 70 L.J.K.B. 584; 84 L.T. 542.

(3) *Railway Assessment Authority* v. *Southern Ry. Co., London County Council* v. *Southern Ry. Co.,* [1936] 1 All E.R. 26; [1936] A.C. 266; Digest Supp.; 105 L.J.K.B. 115; 154 L.T. 314.

*(4) *Port of London Authority* v. *Orsett Union Assessment Committee,* [1920] A.C. 273; 38 Digest 563, *1017*; 89 L.J.K.B. 481; 122 L.T. 722.

CASE STATED under the Rating and Valuation Act, 1925, s. 31, by the recorder of the county borough of Croydon. The appellants, the Croydon Gas Co., had appealed to the Court of Quarter Sessions, from a decision of the Assessment Committee for the county borough of Croydon. The following facts were found by the recorder:—

(*a*) . . . the hereditaments to which this appeal relates comprise that part of the [appellants'] undertaking situate in the rating area of the County Borough of Croydon. (*b*) The appellants have established certain funds for the benefit of their employees and during the year 1939 [the total of] the average uninvested balances standing to the credit of these funds [was] £66,311. (*c*) It has been and is the practice for the trustees of the several funds, in accordance with the rules governing the funds, at their discretion to leave with the appellants the uninvested balances of the funds and for the appellants to pay interest at 4 per cent. per annum or less to the Co-partnership Fund and at 5 per cent. per annum to the other funds.

The case further stated:

7. It was agreed that the hereditaments to which the appeal related were by law required to be valued on the principle generally known as "the profits basis" as explained in *Assessment Committee of Kingston Union* v. *Metropolitan Water Board* (1)

8. In order to determine the rateable value of the said hereditaments on the profits basis it is first necessary to ascertain what is generally known as the *cumulo* value of the whole undertaking. In the course of finding the *cumulo* value it is necessary to determine (*inter alia*) the tenant's working expenses and his remuneration . . .

9. It was common ground between the parties for the purposes of this appeal and I found that a proper tenant's remuneration (including interest risk and profit) could on the facts of this case be ascertained by estimating the capital required by the tenant for the conduct of the undertaking and allowing the tenant 12½ per cent. upon that estimated capital.

10. Upon this point the appellants submitted to me a valuation in which no deduction was made in arriving at the estimated amount of the tenant's capital on account of the uninvested balances of the several funds being available for use by the appellants in running the undertaking, whereas the respondents submitted to me a valuation in which an amount of £66,311 was so deducted. On the other hand the sum of £2,622 paid to the said funds for interest on such balances was not claimed by the appellants as part of the tenant's working expenses but was allowed as such in the valuation submitted by respondents. I adopted the figures shown by the respondents . . . I treated the interest on the said funds as a working expense and deducted it from the nett receipts of the undertaking. In determining the tenant's capital I deducted from the total tenant's capital of £730,014 the balances of the said funds, £66,311, thus arriving at the capital which I decided the hypothetical tenant would require of £663,703 . . .

The Croydon Gas Co., being dissatisfied with this decision, applied for a case to be stated for the opinion of the High Court of Justice on the following point of law, *viz* :

Whether in computing the tenant's capital for the purpose of a valuation on the profits basis it is correct in law to deduct the said sum of £66,311, representing balances in the above-mentioned funds of which the tenant has or may have the use.

It was contended by the company :

(*a*) that a tenant of the undertaking could not assume that he would have the use of the balances standing to the credit of the said funds in whole or in part for any particular period or at all. (*b*) that if a tenant were able to have the use of balances in these funds he would not only be under an obligation to pay interest on the loan but the said balances would be at his risk in the business in just the same way as if he borrowed his capital from a banker or some other source or provided it from his own resources. (*c*) that the source from which a tenant will raise the capital required for the conduct of the undertaking is irrelevant.

The respondents contended (*inter alia*) that the question whether or not the said balances ought to be deducted was a question of fact and not of law and that on the facts the said balances ought to be so deducted.

A. S. Comyns Carr, K.C., and *Harold Williams* for the company.

Frederick Grant, K.C., and *Percy Lamb* for the rating authority.

Cur. adv. vult.

Henn Collins, J. [delivering the judgment of the court] : This matter comes before us upon a case stated under the Rating and Valuation Act, 1925, s. 31, by the recorder of the county borough of Croydon.

The Croydon Gas Co. sought a reduction of the rateable value set upon certain hereditaments of which they were the occupiers in that borough. It is common ground that these are hereditaments to be valued on the principle known as the profits basis as explained in *Assessment Committee of Kingston Union* v. *Metropolitan Water Board* (1). One step in the application of that principle requires the ascertainment of the capital sum required by the tenant for the conduct of the undertaking, and the next step is the application to that sum of an appropriate percentage for his remuneration. What that capital sum should be, and what is the appropriate percentage to apply, are clearly questions of fact : see *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (2), *per* Earl of Halsbury, L.C. ([1901] A.C. 175, at p. 180), and *Railway Assessment Authority* v. *Southern Ry. Co.* (3), *per* Viscount Hailsham, L.C. ([1936] 1 All E.R. 26, at p. 39).

The recorder fixes the proper percentage at 12½ per cent. in para. 9 of the case, while, in para. 10, he names the total tenant's capital as being £730,014. The expression " total tenant's capital " can only mean (and does, in the sense in which it is used in the case, mean) the capital sum required for the conduct of the undertaking. The amount of it cannot be affected by considering the sources from which it is, or can be, provided. It is immutably fixed by the finding that that sum is required to work the business. Yet, in the same sentence in which the total tenant's capital is said to be £730,014, the recorder says that, for the purpose of applying the 12½ per cent., which in his view the facts justify, the £730,014 is to be taken as being £663,703. But of two things one—either £730,014 or £663,703—is right ; and if one is right, the other must be wrong. The capital sum required cannot possibly vary with the particular tenant, and to assume that it can must be wrong. Whether that is by reason of a mistake of law, or of fact, is another question.

No doubt the recorder's ultimate figure can be arrived at either by applying 12½ per cent. to £663,703 and allowing the interest actually paid on the difference between that sum and £730,014 as a working expense, as the recorder has done ; or by applying some less percentage than 12½ per cent. to the capital assumed to be employed. In other words, he might have found that not 12½ per cent. but some lower percentage was appropriate in this case. There is nothing in the profits basis which fixes 12½ per cent., or any other percentage, as the tenant's share, but we think that, whatever be the proper percentage, it must be applied to the whole of the capital which the tenant is assumed to put into the business ; because, otherwise, in the same breath one is saying either that the capital, fixed as right, is wrong, or that the percentage, fixed as right, is wrong. The recorder found himself in that dilemma. He had to choose one or other of those two alternatives, either of them wrong according to his own findings, and he chose the former. He has explained why he did so, so there is no need to speculate. It was not because any less sum than £730,014 was needed in the business, but because the tenant could lay his hands upon part of that sum by paying less than 12½ per cent. for it. If that was a relevant consideration in arriving at the amount which the tenant would require to put into the business, then a conclusion of fact would have been arrived at without any mistake in law. But, in our view, to give effect to irrelevant facts involves a mistake of law: see *Port of London Authority* v. *Assessment Committee of Orsett Union* (4), *per* LORD BIRKENHEAD, L.C. ([1920] A.C. 273, at pp. 281, 282). We also think the source from which, and the price at which, a tenant can get his capital, has no bearing upon what amount is required.

We, therefore, are of opinion that the question propounded for us by this case is a question of law, and should be answered in the negative. This view seems to us, incidentally, to tally with the good sense of the matter. The funds, the existence of which have been allowed to increase the rateable value of the hereditaments, are in the hands of trustees who may invest them, (no doubt within limitations which have nothing to do with this case) as they please, and lend them to the tenants of the undertaking, or not, at their discretion, in accordance with the rules governing the fund as stated in the case. The tenant cannot borrow from them as of right and they are no inherent element in the undertaking, such as is the right to levy a "deficiency rate," or a compulsory sinking fund. We do not know, because there is no finding to that effect, that the same facilities would be available to any other tenant, though there may be reason to suppose that, if making the balances available to the tenant is going to increase the amount which the tenant has to pay in rates, the tenant may find it better not to borrow, or the trustees not to lend.

Appeal allowed with costs. Leave to appeal to the Court of Appeal granted.

Solicitors: *Blyth, Dutton & Co.* (for the company); *Sharpe, Pritchard & Co.*, agents for *E. Taberner*, Town Clerk, Croydon (for the rating authority).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILKINSON *v.* BARCLAY.

[KING'S BENCH DIVISION (Atkinson, J.), January 15, 16, 17, 18, February 1, 1946.]

Sale of Goods—Delivery of lesser quantity—Rights of purchaser—Prescribed and non-prescribed conditions—Inconsistency—Control of Timber (No. 21) Order, 1941, *S.R. & O.* 1941 No. 2088 *arts.* 1 (1), (2), 6, Sched. III.

The defendant invited tenders for the sale of a stock of home-grown timber in lots. The sale was subject to the Control of Timber (No. 21), Order 1941. The invitation to tender described each lot, gave the estimated measurement in cubic feet and the maximum price per foot-cube. It then went on to refer to the Control of Timber Order and to the licence under which the sale was made and set out the prescribed conditions of sale, on which alone the sale could be made. Finally, as permitted by the prescribed conditions of sale, certain non-prescribed conditions of sale were incorporated, among which was the following: "The lots are offered where and as they are and each lot will be considered as being tendered for separately, and the sum offered will be subject to no allowance for any faults, defects, errors of description, measurement, quantity or for any cause and without any warranty whatever." The prescribed conditions provided that in the event of inconsistency the prescribed conditions should prevail. Tenders remitted by the plaintiff for a number of lots were accepted, and the plaintiff paid to the defendant, in accordance with the contract before delivery, an amount based on the estimated measurements set out in the invitation to tender. On delivery the plaintiff discovered a considerable shortage. In an action by the plaintiff for the recovery of the amount overpaid it was contended on behalf of the defendant that the non-prescribed condition was a bar to the action:—

HELD: (i) although the non-prescribed condition excluded the right to reject and the right to claim damages for short delivery, it did not deprive the plaintiff of his right to recover money paid for timber which had not been delivered.

(ii) even if it did, and in so far as it did, it formed no part of the contract because it was inconsistent with the prescribed conditions.

[**EDITORIAL NOTE.** The purchaser of timber bought by tender for lots expressed to be of "estimated" quantity is held to be entitled to recover what he has paid for timber not in fact delivered. The material condition provided that the "sum offered" should be subject to no allowance for error in measurement or quantity but the "sum offered" is held not to be the same thing as the "price paid."

As to Delivery of Less Goods than Contracted for, see HALSBURY, Hailsham Edn., Vol. 29, p. 126, para. 153; and for Cases, see DIGEST, Vo.. 39, pp. 559-561, Nos. 1664-1678.]

Cases referred to:

*(1) *Covas* v. *Bingham* (1853), 2 E. & B. 836; 39 Digest 401, *377*; 2 C.L.R. 12; 23 L.J.Q.B. 26; *sub nom. Bingham* v. *Covas*, 22 L.T.O.S. 97.

*(2) *Wallis, Son & Wells* v. *Pratt & Haynes*, [1911] A.C. 394; 39 Digest 477, *996*; 80 L.J.Q.B. 1058; 105 L.T. 146.

*(3) *Beck & Co.* v. *Szymonowski & Co.*, [1924] A.C. 43; 39 Digest 467, *925*; 93 L.J.K.B. 25; 130 L.T. 387; H.L.; *affg.*, S.C. *sub nom. Szymonowski & Co.* v. *Beck & Co.*, [1923] 1 K.B. 457, C.A.

Action to recover money paid by the plaintiff to the defendant for timber which had not been delivered. The facts are fully set out in the judgment.

Frederick Hallis for the plaintiff.

T. F. Davis for the defendant.

Cur. adv. vult.

Atkinson, J.: This is an action brought by the plaintiff to recover three sums of money paid to the defendant for timber bought from the defendant but which has never been delivered, and the claim is based on failure of consideration. The plaintiff is a timber merchant and the defendant is receiver and manager of a company known as the Western Lumber Co. Ltd. In Mar., 1944, the defendant put into the hands of the auctioneers, Messrs. Joseph Hibbard & Sons, the task of disposing of the company's stock of home-grown timber. The bulk of it was lying in a yard at Catford and the rest at the Britannia Wharf, Millwall. The sale was to be by public tender in lots; that means that details of the timber to be sold were sent by the auctioneers to a number of possible purchasers who were asked to tender for the timber or such part of it as they required. It may have been advertised as well.

The sale was of necessity subject to the Control of Timber (No. 21) Order of 1941. That Order provided by art. 1 (2):

> No person shall dispose of or agree or offer to dispose of any timber . . . except under the authority of and in accordance with a licence granted, or a special or general direction issued, by the Minister of Supply.

Similarly by sub-clause (1) no person is to acquire timber except on the same terms. The heading to art. 6 is Home-Grown Timber:

> (1) No person shall buy or sell or agree or offer to buy or sell any home-grown timber . . . at any price exceeding the maximum price provided therefor by this Article, nor upon any terms not provided for in that maximum price: except such additional terms as are allowed under and in accordance with the provisions of the Fourth Schedule to this Order, and such other terms as may be permitted under the authority of and in accordance with a licence granted, or a special or general direction issued, by the Minister of Supply.

In order to ascertain the terms upon which timber can be sold one has first to look at the terms provided in the maximum price order. They are contained in the Third Schedule, which refers us back to a Schedule in an earlier Order, [The Control of Timber (No. 17) Order, 1940] where there are four provisions, the first of which is: "All prices are per cubic foot unless otherwise stated," and then there are various other conditions which I do not think refer to this case.

The further permitted terms would be ascertained from the licence granted and were known as prescribed conditions of sale. One of the prescribed conditions of sale permitted the contracting parties to incorporate other conditions of sale called non-prescribed, but provided that if there were any inconsistency, the prescribed conditions should prevail. That is the background of any transaction in timber.

Messrs. Hibbard prepared and distributed their invitation to tender. It is a printed document. There were 68 lots of timber described and the great bulk of them, as I have said, were at Catford. The first column on the left has the lot number. The next column is headed " Description " and each lot is described. The third column is headed " Estimated feet cube " and contains the number of cubic feet estimated for each lot. The fourth column is headed : " Maximum price per foot cube." There were 58 lots at Catford and 10 at Britannia Wharf. The third page of the document refers to the Control of Timber Order, the one that I have just read, and to the licence under which the sale was made ; and it sets out several provisions with the heading in big type " Prescribed Conditions of Sale," which are, as I have said, a necessary part of the contract because they are prescribed as the conditions on which alone the sale can be made. On the fourth and last page there is a heading " Non-Prescribed Conditions of Sale," and there follow eleven conditions, and then comes the form of tender to which I will refer in greater detail later on.

Hibbard has explained why the quantities were only estimated and not ascertained with any certainty or reasonable certainty, and also how the estimates were arrived at. He said that normally on such a sale each plank or board is measured and the cubic content ascertained by calculation. But this is a lengthy business and he said that during the war they had not the labour available to do it and he had therefore to make some sort of an estimate himself, and this is how he did it. The lots are of two kinds. About 40 of them consisted of butts and second lengths and about 27 of stacks of straight-edged planks. A butt is that part of a trunk nearest to the ground of no particular length—that would depend on the size of the tree and I suppose the best place for cutting. In this case the butts seem to have varied from 8ft. to 15ft. The second length is the next part of the tree above the butt, the length again varying according to the nature of the trunk. The butts and second lengths had been cut through into planks of various thicknesses—1 in. up to 3 ins.—but the butts and the lengths, which were called logs by the witnesses, were lying with the planks all in position so that from a distance the appearance would be that of a pile of uncut logs. Obviously it would be no easy task to estimate the cubic content.

Taking lot No. 1 which consists of 19 oak butts and second lengths cut through to 1in. and 1¼ins.—I do not know whether that means there were 19 butts and 19 second lengths, or whether it covers both the number of butts and the number of second lengths—what he said was this :

> I selected one of the visible logs which seemed to me to be a fair average size of what was in the lot. I then measured the length of that log. I selected a board or plank either a quarter of the way down or a quarter of the way up, and because I thought that would fairly represent the average width of the plank in that tree. I measured that plank in three places.

It will be realised, the bark still being on the tree, that the size of these planks would vary as trunks do, and one measurement he said would be no use, so he takes three measurements one a little distance from each end and one in the middle, averages those three measurements and takes that as the average width of not merely that plank but of every plank in the log. He then multiplies the length of the log by this average width by the thickness and by the number of planks in the log and so arrives at a cubic content for that log. He then multiplies that by the number of logs in that lot, whether they are butts or whether they are second lengths. He agrees that this was a very rough and ready way of doing things, that it was not a recognised method, that it was no more than an expert guess ; and he said :

> "If I got within 20 per cent. of the accurate measurement I should be doing my measurement as well as I could do it. When a complaint was made that there was a shortage of 25 per cent." he said, " I knew it might very well be true."

The stacks of straight-edged timber were stacks of planks which had been cut along to sizes of an even width. They were much more easily dealt with and he measured samples of these planks and he thinks that his method with these stacks ought to bring him within 5 or 6 per cent. of the true cubic content.

The form of tender itself appears on the last page and is in these terms :

> To Messrs. Stoy Hayward & Company, Chartered Accountants, 103, Cannon Street, London, E.C.4. I/We offer to purchase the stock of timber, etc., subject to your conditions of sale, as follows :

Then every lot is set out and printed from lot No. 1 " for the sum of (blank) per foot cube " ; and the person tendering has to fill in that gap the price he is offering per cubic foot for the stack of timber.

There were three separate tenders by the plaintiff in this case. The first was on Apr. 12, 1944, and was an offer for 17 lots, the same price being offered for every one. In the original tender which I have 5*s.* 6*d.* is filled in in the gap for the 17 lots which the plaintiff wanted to buy. There was a little cross put alongside the 5*s.* 6*d.* and at the bottom were these words :

> With Mr. Barclay's recommendation I will take all the lots crossed at 5*s.* 6*d.* per cube. (Signed) W. Wilkinson.

So there is a plain offer for the stock at so much per cubic foot—the stock, that is, in each of the lots indicated. On Apr. 18 that offer was accepted by letter :

> We have to inform you that your tender was accepted and we herewith enclose two sale notes, both of which will you please sign with your name and address and return to us together with banker's draft of £1,139 12*s.*, and the necessary timber control licence to purchase. We will then issue a delivery order to you forthwith.

One of the conditions of sale was that lots had to be paid for by banker's draft within 24 hours of the tenderer submitting his timber control licence to purchase, so the plaintiff at once got his licence to purchase and forwarded the licence and the necessary draft. The receipt he was asked to sign (and which he did sign) was prepared by the auctioneers and is headed : " Sale by public tender under the Control of Timber (No. 21) Order, 1941 " and refers to the licence. Then the left hand column has the amount 5*s.* 6*d.*, then the lot No., then the price worked out by multiplying the estimated number of feet by the price offered—because that is what has to be paid—and for that first contract the sum demanded was £1,139 12*s.*, and the money was paid. The next two contracts are made in just the same way. On May 1, 1944, there was an offer for 39 lots indicated at 2*s.* 6*d.* per cube foot in every case, and that was accepted on the same date. On May 15 there was acceptance of the third offer, which was a small one for the 6 remaining lots, for £90 17*s.* 6*d.* Again I think the offers in every case for that lot were for 2*s.* 6*d.* except for one small lot which was 1*s.* 6*d.* It has been agreed in this case that all these three contracts are in exactly the same position, and that if the plaintiff is entitled to succeed—if he proves a breach of the first—so he is entitled to succeed on the second and third if he proves a breach of those.

Having entered into this first contract and got his delivery order, the plaintiff went to take possession and he wisely enough had the timber very carefully measured and checked board by board. He found that there was a shortage on his first delivery of some 25 per cent. and on May 10 he wrote to Messrs. Hibbard:

> I wish to inform you that my men when checking goods at Catford found a shortage of about 25 per cent., and I would be greatly obliged if you could send along to have same measured.

The reply to that letter did not come until May 15, when Messrs. Hibbard wrote :

> We are duly in receipt of yours of the 10th inst. with respect to the alleged shortage in quantity in the lots you purchased, but we have to refer you to (1) that the quantities according to the tender were estimated only and were so printed ; also to (2) condition 5 of the non-prescribed conditions of sale. We shall esteem it a favour if you will kindly let us know as soon as you have removed all the timber at Catford . . .

In other words they took up the position that the contract was governed by condition No. 5, one of the non-prescribed conditions, and that the effect of that condition was that the plaintiff—who had paid on the estimated quantity—could recover nothing back however little timber there was in fact in that lot ; and from first to last the defendant has refused to take any step to assist the plaintiff in the measuring of the timber delivered ; he has left it to the plaintiff (who has had it very carefully checked I think in every case) and with one exception, which I will come to later, the defendant has refused to take any part in the measurements which the plaintiff has made.

Evidence was called before me to prove the shortage. Taking the first contract it was proved that all the timber they had went to three different customers. What are called specifications—rather complicated documents for the uninitiated to understand—were put in showing the actual measurements of every piece of timber received by the plaintiff ; and I am satisfied that there is no reason whatever for doubting the accuracy of those measurements. As soon as the details were ascertained with regard to every contract, copies of the specifications were sent to the defendants so that at the earliest opportunity he had the precise measurements before him, and I repeat the defendant never took the trouble to check a single one of them. The result in my judgment is this: The plaintiff has proved that under the first contract he paid for 4,144 cubic feet and in fact received 3,281.8 cubic feet so that there was a shortage of 862.2 cubic feet. As to the second contract, I am satisfied there was a shortage of at least 1,560 cubic feet—7,096 cubic feet were paid for and 5,532.47 cubic feet delivered, so there was a shortage of at least 1,500 cubic feet for which the plaintiff had paid 2*s.* 6*d.* per cubic foot. As to the third contract there is very little doubt about the figure there because the shortage was all on one lot which ought to have contained 240 cubic feet and in fact contained only 195 cubic feet. So that the amount which the plaintiff has overpaid and which he claims in this action is £437 19*s.*

The whole point in this case is whether a condition which I will read prevents the plaintiff from claiming that money. That condition was this:

> The lots are offered where and as they lie and each lot will be considered as being tendered for separately and the sum offered will be subject to no allowance for any faults, defects, errors of description, measurement, quantity or for any cause and without any warranty whatever.

I have not the slightest doubt (and I question whether it was intended to be seriously argued) that if it were not for that condition beyond all question the plaintiff would be entitled to recover this money. There is an offer for the stock. That does not mean the estimated stock; it means what it says, an offer for the stock at so much per cubic foot which was accepted. The plaintiff paid for a certain number, less was delivered, and quite plainly there has been a failure of consideration as to the missing timber.

In the course of the argument counsel for the defendant referred me to the case of *Covas* v. *Bingham* (1). In that case there had been a written contract for the purchase of "the cargo" of the Prima Donna, "now at Queenstown, as it stands, consisting of about 1,300 quarters Ibraila Indian corn, at the price of 30*s.* per imperial quarter," cost, freight and insurance to a safe port in the United Kingdom, "the quantity to be taken from the bill of lading, and measure calculated at 220 quarters = 100 kilos. Payment cash, on handing shipping documents." Payment was made against documents for the amount stated in the bill of lading and according to the bill of lading there ought to have been 220 quarters. In fact far less was delivered—the cargo consisted of less—and the purchaser was claiming the overpayment. It was held that on the construction of the contract the parties agreed to buy and sell the cargo at a price to be calculated from the quantity stated in the bill of lading and not to depend upon the actual quantity.

Now when it is examined it is quite plain that that case is against the defendant because there was not the slightest attempt to argue that the original estimate of about 1,300 quarters was to be the quantity paid for. The point was that construing the contract as a whole both parties agreed to be bound by what was in the bill of lading and in his judgment ERLE, J., said ((1853) 8 E. & B. 836, at p. 844):

> This contract is to be construed, according to the general rule, by giving effect if possible to every part of it. It begins "Sold 'the cargo' as it stands, consisting of about thirteen hundred quarters Ibraila Indian corn, at the price of thirty shillings per impl. quarter." Had it stopped there, it would have been a sale per quarter, and the price would have depended on the actual measurement.

That is exactly this case, leaving out condition 5. But the judge went on to say: (*ibid*):

> But then it goes on 'the quantity to be taken from the bill of lading.'

and based his decision on that. So far as the decision is any guide in this case, it makes it quite clear that apart from the condition, the plaintiff would be entitled to receive back the money which he had overpaid. Moreover the position in this case is strengthened by the terms of the Order which provide that the sale has to be per cubic foot; if you buy a lot whatever it may contain—as counsel for the defendant contends was done in this case: for example that the first lot was bought for £91 6*s.*, whatever it contained—a purchase of that sort would be a plain breach of the Order. It would open the door inexpressibly wide to an escape from the terms of the maximum price order. If a man has a turkey to sell and the maximum price is 5*s.* 8*d.* per lb., and he estimates the weight at 20lbs., and I buy it and it weighs only 12lbs., the price is much higher than it should be at 5*s.* 8*d.* per lb., and the seller would have no defence whatever to a prosecution; he would have received very much more than he is entitled to under the Order.

It is not an easy condition to construe but there are several well established principles for the construction of conditions incorporated in contracts of sale of this kind. The first to which I shall refer is laid down in the case of *Wallis* v. *Pratt* (2). It is a principle with which everyone is very familiar and I will read just one paragraph from LORD ALVERSTONE'S judgment. This was a case, it will be remembered, where they sold common English sainfoin on the condition that the sellers " give no warranty expressed or implied as to growth, description or any other matters." The seed delivered was not common English sainfoin but giant sainfoin, a different seed, and the point was whether the condition protected the sellers. In referring to the various sections of the Act LORD ALVERSTONE, C.J., said this ([1911] A.C. 394, at p. 398) :

> These sections have been all very clearly dealt with by the learned counsel at the Bar, and, as has been pointed out, in each and all of those sections there is the distinction between " warranty " and " condition " and the different consequences flowing from the one stipulation and the other. My Lords, all I can say is I think it is quite impossible to suggest that in the year 1906, when these parties made a contract whereby they required that the goods should be common English sainfoin, and the sellers put in a stipulation that they would not give any warranty, express or implied, it was intended that it was always to be understood that they were not making themselves liable in regard to any condition as to the goods or for the consequences of a breach of the condition.

—in other words if you merely exclude liability for breach of warranty, you are not excluding liability for breach of a condition.

I was referred to another case, *Szymonowski* v. *Beck* (3), a decision of the Court of Appeal. There goods had been sold subject to the following condition :

> The goods delivered shall be deemed to be in all respects in accordance with the contract, and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract.

I need do no more than refer to two passages from the judgments in this case, the first from that of BANKES, L.J. ([1923] 1 K.B. 457, at p. 464) :

> A buyer has, in the event of his seller breaking his contract, a *prima facie* right to avail himself of one or other of several alternative remedies, and if the seller desires by a clause in the contract to restrict the buyer's right to those remedies he must say plainly whether he intends to deprive the buyer in certain events of all those remedies or only of one or more of them, and if so of which.

The second passage is one from the judgment of SCRUTTON, L.J. (*ibid.*, at p. 466) :

> . . . if a party wishes to exclude the ordinary consequences that would flow in law from the contract that he is making he must do so in clear terms.

That case went on appeal to the House of Lords, and that view was upheld.

If there is a sale of a fixed quantity of goods and there is a short delivery, the remedies of the purchaser are these : he can reject or he can take and pay for what he receives at the contract rate, and he can claim damages for the non-delivery. If he has paid in advance and there is a short delivery he can recover the price which he has paid for the goods not delivered.

Now let me see how far this condition excludes those remedies. The words are :

> The lots are offered where and as they lie and each lot will be considered as being tendered for separately and the sum offered will be subject to no allowance.

It is quite plain that the sum offered is 5*s.* 6*d.* per cubic foot for the stock. It does not say " the price paid " or " the sum received." It says " the sum offered " which is quite different. The sum offered was 5*s.* 6*d.* per cubic foot for the stock which was there and the sum paid, taking the first lot, for example, had been £91 6*s*. for the lot. That was not "the sum offered" at all but was the price paid, and this condition refers only to "the sum offered." The words are very ungrammatical :

> . . . and the sum offered will be subject to no allowance for any faults, defects, errors of description, measurement, quantity.

—I suppose that means subject to no allowance for deficiency in quantity—"or for any cause and without any warranty whatever." The word "warranty" is used, but no word to cover breach of a condition.

It seems to me that what has been effected is this : if there is a short delivery as the amount was not a firm contractual amount, the plaintiff would not be entitled to reject. Further than that he would not be entitled to claim damages for that which has not been delivered, and then seek to set off those damages against the price, against the sum offered. He has to take what is delivered and pay for it ; he has no claim for damages for short delivery. But there is not a word there to my mind which deprives him of his right to recover that which he has paid for timber which has not in fact been delivered. If it was really intended to let a purchaser understand that he had to pay for these lots on the basis that the estimated quantities were correct, it would have been very easy to say so :

> . . . the sum paid will be subject to no deduction whatever because the amount set out in the specification is not in fact there . . .

something of that sort. In fact nothing of the kind is there, and I think that this condition does not deprive the plaintiff of his right to receive money back for timber which has never been delivered.

Supposing that I am wrong in that view, then a rather interesting situation arises. Supposing it does mean that nothing can be recovered for short delivery, counsel for the plaintiff says that the condition would be inconsistent with the prescribed conditions of sale which incorporate the Order, and require that the timber is to be sold at so much per cubic foot—that means at so much per cubic foot delivered, not at so much per cubic foot, the quantity being guessed at by the seller.

Counsel for the defendant on the other hand says : if it means that, it would make it an illegal contract ; the purchaser then has been a party to an illegal contract and he cannot recover the money back. I do not think that argument is sound. I think that counsel for the plaintiff's point is a perfectly good one in so far as the condition is inconsistent with the prescribed conditions, it forms no part of the contract, and therefore the contract remains a perfectly legal contract whereby the buyer is to pay at so much per cubic foot for the timber delivered.

There is this further point. It was impossible for the plaintiff to prove with regard to which of these lots the shortage occurred. There is a good 20 per cent. shortage on the whole, and it is, therefore, perfectly clear that there must have been a 20 per cent. shortage and probably more on some. To illustrate this let me take the first lot. If that were 20 per cent. short delivered the price per cubic foot would be 6*s*. 10*d*., and some fraction, and would be above the maximum price, which is 6*s*. 6*d*. It is perfectly plain that if the average under delivery is 20 per cent., on some of these lots the maximum price must have been exceeded. That is another consideration which one has to bear in mind.

I base my judgment on this, that apart from the condition the plaintiff's case would be clear. I hold that the condition does not deprive him of his right to get his money back for what has not been delivered ; and if it did, and in so far as it did, it formed no part of the contract because it was inconsistent with the prescribed conditions. I give judgment, therefore, for the plaintiff for £437 19*s*., with costs.

Judgment for the plaintiff with costs.

Solicitors : *Tarlo, Lyons & Co.* (for the plaintiff) ; *Sidney Pearlman* (for the defendant).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

WILSON & MEESON (a Firm) *v.* PICKERING.

[Court of Appeal (Lord Greene, M.R., and Morton, L.JJ.), January 22, February 7, 1946.]

Bills of Exchange—Signed blank crossed "not negotiable" cheque—Blanks fraudulently filled in by agent—Drawer not estopped—Payee a "person" within Bills of Exchange Act, 1882 (c. 61) s. 81.

Estoppel—Estoppel in pais—"Estoppel by negligence"—Signed blank crossed "not negotiable" cheque—Blanks fraudulently filled in by agent—Drawer not estopped from denying authority.

A partner in the appellant firm signed, on behalf of the firm, a blank crossed cheque form with the words "not negotiable" printed on it and the words "clients' a/c" stamped below the signature. The cheque form was then handed to a secretary with instructions to fill it up for £2 and to insert the name of the Commissioners of Inland Revenue as payees. The secretary, who was indebted to the respondent in the sum of £54 4s., fraudulently filled in the cheque for that amount and inserted the name of the respondent as payee. The respondent, through her bankers, obtained payment of the cheque thus forged and in the county court successfully resisted the claim of the appellants to recover the amount of it from her as damages for conversion or as money had and received for the use of the appellants.

It was contended on behalf of the appellants that the respondent obtained no title to the cheque by reason of the Bills of Exchange Act, 1882, s. 81. On behalf of the respondent it was contended (i) sect. 81 of the Act had no application where the person taking a cheque marked "not negotiable" was himself the payee named on the cheque; (ii) alternatively, the appellants were estopped from denying the authority of the secretary to fill in the blanks in favour of the respondent, or the authority of the appellant's bankers to pay the amount of the cheque to the respondent:—

Held: (i) there was no reason for excluding this case from the operation of sect. 81 of the Act; both the secretary and the respondent were "persons" within the meaning of the section; the secretary had no title to the cheque and the respondent did not have a better title than the secretary.

(ii) the application of the principle of estoppel to instruments handed to an agent in blank in order that they might be filled in was confined to the case of negotiable instruments; the instrument in this case was not, and was never intended to be, negotiable and the estoppel relied upon could not be admitted.

(iii) the type of estoppel known as "estoppel by negligence" could not arise because the appellant was under no duty to the respondent, neither had she been prejudiced, and the real cause which led to the receipt of the money by the respondent was the forgery committed by the secretary.

Lloyds Bank, Ltd., v. *Cooke* (5) *distinguished.*

[**EDITORIAL NOTE.** The defence of estoppel fails in this case where it is raised by the payee of a cheque in an action to recover the money by the plaintiff, whose signature had been forged. In the circumstances the payee had suffered no loss within the principle of *Lickbarrow* v. *Mason* (2) and as the cheque was marked "Not negotiable" the payee had no better title than the forger. "Person" in sect. 81 of the Bills of Exchange Act includes the payee of a cheque who takes it from a forger.

As to Liability on Blank and Incomplete Instruments, see HALSBURY, Hailsham Edn., Vol. 2, p. 630, para 867; and for Cases, see DIGEST, Vol. 6, pp. 73-75, Nos. 585-589.]

Cases referred to:

*(1) *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.*, [1938] 1 All E.R. 52; [1938] A.C. 287; Digest Supp.; 107 L.J.P.C. 25; 158 L.T. 269.

*(2) *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63; 6 Digest 456, *2911*; 6 East 20n.; *revsd. sub nom. Mason* v. *Lickbarrow* (1790), 1 Hy. Bl. 357 Ex. Ch.; *revsd. and venire de novo awarded sub nom. Lickbarrow* v. *Mason* (1793), 4 Bro. Parl. Cas. 57 H.L.; *subsequent proceedings* (1795), 5 Term Rep. 683; 6 Term Rep. 131.

(3) *R. E. Jones, Ltd.,* v. *Waring and Gillow, Ltd.,* [1926] A.C. 670; Digest Supp; 95 L.J.K.B. 913; 135 L.T. 548.

*(4) *Swan* v. *North British Australasian Co.* (1863), 2 H. and C. 175; 6 Digest 73, *585*; 2 New Rep. 521; 32 L.J. Ex. 273.

*(5) *Lloyds Bank, Ltd.,* v. *Cooke,* [1907] 1 K.B. 794; 6 Digest 74, *587*; 76 L.J.K.B. 666; 96 L.T. 715.

(6) *Carr* v. *London and North Western Ry. Co.* (1875), L.R. 10 C.P. 307 ; 21 Digest 288, *1020* ; 44 L.J.C.P. 109 ; 31 L.T. 785.

(7) *Brocklesby* v. *Temperance Building Society*, [1895] A.C. 173 ; 1 Digest 317, *379* ; 64 L.J. Ch. 433 ; 72 L.T. 477.

(8) *Freeman* v. *Cooke* (1848), 2 Exch. 654 ; 21 Digest 287, *1019* ; 6 Dow and L. 187 ; 18 L.J. Ex. 114 ; 12 L.T.O.S. 66.

(9) *Smith* v. *Prosser*, [1907] 2 K.B. 735 ; 6 Digest 73, *584* ; 77 L.J.K.B. 71 ; 97 L.T. 155.

(10) *Paine* v. *Bevan and Bevan* (1914), 110 L.T. 933 ; 6 Digest 74, *588*.

(11) *Great Western Ry.* v. *London and County Banking Co.*, [1901] A.C. 414 ; 6 Digest 442, *2842* ; 70 L.J.K.B. 915 ; 85 L.T. 152.

(12) *France* v. *Clark* (1884), 26 Ch. D. 257 ; 6 Digest 75, *589* ; 53 L.J. Ch. 585 ; 50 L.T.1.

APPEAL by the plaintiffs from an order of His Honour Judge Hancock, made at Wandsworth County Court and dated Nov. 12, 1945. The facts are fully set out in the judgments.

C. E. Garland for the appellants.

J. L. Poole for the respondent.

Cur. adv. vult.

LORD GREENE, M.R. : A partner in the appellant firm signed on behalf of the firm a blank crossed cheque form with the words " not negotiable " printed on it. The firm had two accounts at their bank, one of which was a clients' account, and the words " clients' a/c " were stamped below the signature. The cheque form was then handed to a Mrs. Paice, who was an employee of the firm, with instructions to fill it up for £2 and to insert the name of the Commissioners of Inland Revenue as payees. Mrs. Paice was indebted to the respondent in a sum of £54 4s. ; she fraudulently filled in the cheque for that amount and inserted the name of the respondent as payee. The respondent, through her bankers, obtained payment of the cheque thus forged and in the county court she successfully resisted the claim of the appellants to recover the amount of it from her as damages for conversion or as money had and received. It was conceded that the respondent acted in good faith, notwithstanding the curious nature of the instrument, particularly the words " clients' a/c " stamped upon it. She was not called.

The respondent relies on what is described as a common law estoppel the effect of which is said to be that the appellants are, as against the respondent, precluded from denying the authority of Mrs. Paice to fill in the blanks in the cheque in favour of the respondent or the authority of the appellants' bankers to pay the amount of the cheque to the respondent. No reliance is placed on any special provision in the Bills of Exchange Act and it is not suggested that sect. 20 of that Act has any bearing on the case. The respondent merely says " I have received money from your bankers on your cheque and you the appellants are precluded from alleging that I had no title to the cheque or that the bankers paid me the money without your authority." The defence in the circumstances is singularly devoid of merits and in my opinion it fails on more than one ground.

In order to clear the ground it is worth pointing out that this is not a case where a customer is suing his bankers for having honoured a cheque filled in without his authority. To such a case very different considerations apply since there is a duty in the customer to take care which arises from the relationship of banker and customer (see, for example, *Mercantile Bank of India* v. *Central Bank of India* (1) [1938] 1 All E.R. 52 at p. 60, *per* LORD WRIGHT delivering the judgment of the Privy Council). No similar duty exists in the present case as between the appellants and the respondent. The circumstance, therefore, that the bank, if it had been sued by the appellants, might have successfully defended the action cannot avail the respondent. The only party who can rely upon an estoppel is the party who has been misled.

Counsel for the respondent, as one branch of his argument, endeavoured to establish a case of what is generally called " estoppel by negligence " and the well-known observation of ASHURST, J. in *Lickbarrow* v. *Mason* (2), (2 Term Rep., 63, at p. 70) was cited, namely :

> Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

I doubt whether there is any general proposition in the books which requires so much qualification as this saying of ASHURST, J. It is perhaps singularly inappropriate in the present case if only for the reason that the respondent, who is claiming for herself an enrichment to which she had no right, can scarcely be described as a person who " must suffer " when all that she is asked to do is to repay the money to the person from whom she obtained it. But it is sufficient for present purposes to say that this type of estoppel can only arise where there is some duty toward the person who seeks to rely upon it : see *R. E. Jones Ltd.* v. *Waring & Gillow, Ltd.* (3) [1926] A.C. 670, *per* LORD SUMNER at p. 693; cited by LORD WRIGHT in the *Mercantile Bank of India* case (1) ([1938] 1 All E.R. 52, at p. 58). There is a further reason why this type of estoppel cannot be relied on in the present case since the real cause which led to the receipt of the money by the respondent was the forgery committed by Mrs. Paice (see the judgments of the Exchequer Chamber in *Swan* v. *North British Australasian Co.* (4) (1863) 2 H. & C. 175, *passim* and particularly the passage from the judgment of BLACKBURN, J., cited by LORD WRIGHT in the *Mercantile Bank of India* case (1) ([1938] 1 All E.R. 52, at p. 59). These matters are treated so fully by LORD WRIGHT in the *Mercantile Bank of India* case (1) that I make no apology for referring to them here in a rather summary manner.

But the principal argument on behalf of the respondent was based on the decision of this court in *Lloyds Bank, Ltd.* v. *Cooke* (5) which the county court judge held to be conclusive of the case. The facts in that case were as follows. Cooke had applied to Lloyds Bank for an overdraft of £1,000 which the bank agreed to allow him on the security of a promissory note to be signed by (among others) one Sanbrook. Cooke then went to Sanbrook and asked him to join in giving promissory notes to the bank as security for an advance which he falsely said would be £500. On Sanbrook's agreeing, Cooke induced him to sign two blank stamped pieces of paper on the understanding that Cooke would fill up each of them as a promissory note for £250 payable to the bank. Cooke filled up one of these pieces of paper as a promissory note for £1,000, the stamp being sufficient to cover that amount, signed it and handed it to the bank who made the promised advance. In an action by the bank against Sanbrook, LAWRENCE, J., gave judgment for Sanbrook which was reversed on appeal. The case was not covered by the Bills of Exchange Act, s. 20, and it was argued on behalf of Sanbrook that the subject of signature on blank paper was exhaustively covered by that section, and that accordingly there was now no room for the operation of any estoppel at common law. This argument was rejected and the case was decided on the basis of a common law estoppel whereby Sanbrook was precluded as against the bank from denying the validity of the note which was, of course, a forgery.

One distinction between that case and the present leaps to the eye. There the bank had acted upon the representation to its prejudice in that it made the advance of £1,000 to Cooke. In the present case there is no allegation in the defence that the respondent acted upon the representation to her prejudice. Nor is there any other material in the case to suggest that she in fact did so. I do not see how it could be suggested that by accepting the cheque from Mrs. Paice she had in some way prejudiced her position *vis-a-vis* Mrs. Paice. It could not possibly be suggested that the debt owing by Mrs. Paice to the respondent was extinguished by the acceptance of the cheque since the cheque was a forged instrument and the respondent's acceptance of it was procured by the fraud of Mrs. Paice. If it had been shown that in reliance on the cheque the respondent had refrained from suing Mrs. Paice or given her further credit, the position might well have been different. But there is no suggestion of the kind. These considerations are, in my opinion, sufficient to dispose of the case. It is a fundamental rule with regard to estoppel *in pais* that a party is only entitled to rely on such an estoppel if he can show that on the faith of the representation he has acted to his prejudice, and it is perhaps sufficient to refer in support of this proposition to the principles enunciated by BRETT, J., in *Carr* v. *London & North Western Ry. Co.* (6) (L.R. 10 C.P. 307, at pp. 316, 317).

Quite apart from this I am of opinion that *Lloyds Bank Ltd.* v. *Cooke* (5) does not govern the present case. COLLINS, M.R., in that case thought that the case was governed by the authority of *Brocklesby* v. *Temperance Permanent Building Society* (7), which, if I may respectfully say so, appears to me to have been a very different class of case. But in any event the authority of *Cooke's* case (5) cannot in my opinion be extended beyond the particular facts there in question. The application of the principle of estoppel to instruments handed to an agent in blank in order that they may be filled in by him has been much debated in the past. The view which so far as my researches go appears to me to have the weight of judicial opinion behind it is that, apart of course from some specific representation of authority or some holding out or some special character of the agent from which his authority would naturally be inferred, the rule that a person who signs an instrument in blank cannot be heard, as against a person who has changed his position on the faith of it, to assert that the instrument as filled in is a forgery or that it was filled in in excess of the agent's authority, is confined to the case of negotiable instruments. I may refer in particular to *Swan* v. *The North British Australasian Co. Ltd.* (4). The instrument in *Cooke's* case (5) was such a negotiable instrument. There appear to me to be good reasons why such an estoppel, which seems to result in an exception to the accepted notions that a forged document can convey no title, should be recognised in the case of negotiable instruments. As BLACKBURN, J., said in *Swan's* case (4) (2 H. & C. 175, at p. 183):

> It is sufficient to point out that a party signing in blank a cheque or bill or other negotiable instrument does intend that it shall be filled up and delivered to a series of holders and therefore he stands to all those holders in the position indicated in the first branch of the judgment in *Freeman* v. *Cooke* (8).

At pp. 184, 185, BYLES, J., said this:

> The object of the law merchant, as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip or stamped paper (which transaction being a forgery would in ordinary cases convey no title) may give a good title to any sum fraudulently inscribed within the limits of the stamp, and in America, where there are no stamp laws, to any sum whatsoever. Negligence, in the maker of an instrument payable to bearer, makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence or stolen from him, still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stops short of fraud he has a title. So that the argument from negotiable instruments if it were applicable might be retorted, for there, as here, a plaintiff who has been guilty of negligence may prevail against a defendant who has been defrauded without any negligence of his own at all. The truth is that in the case of a bill of exchange or promissory note, as well as in the case of a deed, the law respects the nature and uses of the instrument more than its own ordinary rules.

To take a more recent case, decided subsequently to *Lloyds Bank* v. *Cooke* (5), I find in the judgments of this court in *Smith* v. *Prosser* (9) what appears to me to be a clear indication that in the opinion of all the members of the court this class of estoppel is confined to the case of negotiable instruments. In the present case the cheque was on its face expressed to be "not negotiable," the result of which was that it was deprived of the peculiar characteristic that makes it possible for a transferor of a negotiable instrument to confer a better title than he has himself. The consequences of marking the cheque "not negotiable" are to be found in the Bills of Exchange Act, 1882, s. 81, which provides as follows:

> Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Now it is understandable that there should be a special rule of estoppel in the case of negotiable instruments which, broadly speaking, pass like currency from hand to hand. They are in a sense dangerous things since if a doubt exists as to the right of a holder in due course to rely on their apparent authenticity consequences will follow highly prejudicial to the confidence which is required for the due conduct of commercial affairs. It seems natural, therefore, that, broadly speaking, a person who puts an inchoate instrument of that nature into circulation must be taken to have authorised whatever is subsequently inserted in it in order to make it a complete instrument. I think therefore that as this was not and was never intended to be a negotiable instrument the estoppel relied upon could not in any event be admitted.

As BAILHACHE, J., held in *Paine* v. *Bevan* (10), even in the case of negotiable instruments the estoppel does not operate in favour of a holder who has not given value. This is, I think, another way of stating the application of the rule that a person can only set up an estoppel where he has acted on the faith of the alleged representation to his detriment. The defendants in *Paine* v. *Bevan* (10) were in no better position than that of donees of the cheque, which is precisely the case with the respondent here.

The last argument to which I need refer was that advanced on behalf of the appellants, namely, that in any event the respondent obtained no title to the cheque by reason of the Bills of Exchange Act, s. 81. On behalf of the respondent it was said that the section has no application where the person taking a cheque marked " not negotiable " is himself the payee named on the cheque. I can see no justification for writing into the section a qualification of this kind since the words appear to me to be clear and unambiguous. In the present case the respondent " took " such a cheque and she was undoubtedly a " person." She took the cheque from Mrs. Paice who, again, was undoubtedly a " person." Mrs. Paice had no title to the cheque and accordingly in the very words of the section the respondent did not have a better title than Mrs. Paice.

The appeal is allowed with costs.

Morton, L.J. : The facts in this case were agreed before the county court judge, and are as follows :

The appellants are estate agents and they employed a Mrs. Paice as a confidential secretary. The appellants had two banking accounts with the National Provincial Bank, Ltd., their own account and their clients' account. In Oct. 1944, Mr. Wilson, a member of the appellant firm, signed a cheque on behalf of the firm and handed it to Mrs. Paice, instructing her to fill in the Commissioners of Inland Revenue as payees and £2 as the amount of the cheque. The cheque was crossed in print " not negotiable " and was stamped " clients' account." It was intended to be used in payment of a debt due to the Inland Revenue from a client of the firm. Mrs. Paice, being indebted to the respondent, Mrs. Pickering, to the amount of £54 4s. for a personal debt, filled in the name of Mrs. Pickering as the payee and inserted the amount of £54 4s. Mrs. Pickering was not a creditor of the appellants or of any of their clients. It was admitted that it was Mrs. Paice's duty to complete the cheque by filling in the name of the payee and the amount, in accordance with the instructions given to her, and it was also admitted that there was no bad faith on the part of Mrs. Pickering. Apart from this last admission, I should have thought the behaviour of Mrs. Pickering was open to considerable suspicion ; a person acting in good faith might have found it hard to believe that the appellant firm really intended to pay, with moneys taken out of their clients' account, a debt owing from Mrs. Paice to Mrs. Pickering. Mrs. Pickering paid the cheque into her own banking account and collected the money from her bank. The appellants now claim the sum of £54 4s. as damages for conversion of the cheque or alternatively as money received by the respondent for the use of the appellants. The judgment of the county court judge is recorded in his notes as follows :

> Principle of *Lloyds case* applies. Estopped by giving authority to Mrs. Paice. Judgment for defendant with costs.

The case referred to is *Lloyds Bank Ltd.* v. *Cooke* (5).

From that decision the plaintiffs appeal, and counsel for the appellants contends, on their behalf, that this matter is concluded by the Bills of Exchange Act, 1882, s. 81, which is in the following terms :

> Where a person takes a crossed cheque which bears on it the words " not negotiable " he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

It is conceded by counsel for the respondent that the cheque was a forged document, and that Mrs. Paice must be regarded as having stolen it before she handed it to the defendant. He contends, however (1) that sect. 81 has no application to the payee of a cheque, and that the words " a person " in the section cannot include the payee ; (2) alternatively, that the appellants are estopped from alleging that Mrs. Paice had no title to the cheque.

As to the first point, it is no doubt true that when the drawer puts the words " not negotiable " on a cheque his object is, as a rule, to ensure that it is not cashed by anyone except the payee (see *Great Western Railway* v. *London and*

County Banking Co. (11) [1901] A.C. 414, at p. 422). In my view, however, there is no good reason for excluding from the operation of the section a case such as the present, where the name of the payee has been fraudulently inserted by a forger, and the forger, having stolen the cheque, hands it to the payee. I see no reason why, in such a case, the payee should have a title to the cheque better than the title of the person from whom he took it. The present case comes exactly within the terms of sect. 81, unless we accept the invitation of counsel for the respondent to construe the very wide words " a person " as excluding the payee, and I cannot so construe them, in the absence of any compelling reason. The result is that, unless the appellants are in some way estopped from giving the true facts in evidence in this case, they must succeed.

As I have already said, the facts were agreed, but counsel for the appellants does not contend that this point prevents the respondent from relying upon an estoppel, if she would otherwise be able to rely thereon. For my part, however, I cannot see that any estoppel arises in the present case. In the case of *Lloyds Bank Ltd.* v. *Cooke* (5) already cited, the document signed by the defendant (to quote COLLINS, M.R., [1907] 1 K.B. 794, at p. 803),

> . . . was intended to have all the properties of a negotiable instrument and as such to be capable of passing from hand to hand as part of the currency, . . .

Each member of the court laid stress upon the negotiable character of the document, and FLETCHER MOULTON, L.J., quoted ([1907] 1 K.B. 794 at pp. 806, 807) the judgment of LORD SELBORNE, L.C., in *France* v. *Clark* (12) (26 Ch.D. 257, at p. 262):

> The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bona fide* holder for value without notice; . . .

The present case stands on a very different footing. Having regard to sect. 81 of the Act, the words " not negotiable " amounted to an express statement, to any person taking the cheque, that he would get no better title than that possessed by the person from whom he took it. The respondent took the risk of Mrs. Paice having no title to the cheque, and Mrs. Paice in fact had no title. I would add that in the present case I can draw no distinction between the title to the cheque itself and the title to the money obtained or represented by it (see *per* LORD HALSBURY, L.C., in *Great Western Railway Co.* v. *London and Counties Banking Co. Ltd.* (11) [1901] A.C. 414, at p. 418).

For these reasons I am of opinion that the defence to this action fails. It is therefore unnecessary for me to consider certain further contentions put forward on behalf of the appellants.

In my judgment the appeal should be allowed, and judgment entered for the appellants for £54 4s., with costs here and below.

Since writing this judgment, I have had the privilege of reading the judgment of LORD GREENE, M.R., wherein he gives additional reasons why the respondent in this case cannot rely on any estoppel. With these reasons, and with his judgment as a whole, I respectfully agree.

Appeal allowed with costs.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellants); *H. N. Robbins* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

STARR *v.* THE MINISTER OF PENSIONS.
NUTTALL *v.* THE MINISTER OF PENSIONS.
BOURNE *v.* THE MINISTER OF PENSIONS.

[King's Bench Division (Denning, J.), February 26, 1946.]

Emergency Legislation—Pensions—Claims in respect of disablement or death attributed to war service—Pensions Appeal Tribunal -Appeal from decision of Minister -Burden of proof—Minister's reasons embodying medical opinion —Medical opinion conclusive only if authenticated by medical man—" Evidence "—Pensions Appeal Tribunals Act, 1943 (*c.* 39), *s.* 1, *Sched., para.* 5 (2), (3)—*Pensions Appeal Tribunals* (*England and Wales*) *Rules*, 1943 (*S.R. & O.*, 1943, *No.* 1757), *rr.* 12 (6), 13, 14, 15, 16—*Royal Warrant concerning Retired Pay, Pensions, etc., Dec.*, 1943 (*Cmd.* 6489), *art.* 4 (1), (2), (3).

Art. 4 (2) of the Royal Warrant, of Dec., 1943, expressly states that in no case shall there be an onus on a claimant to pension to prove the fulfilment of the prescribed conditions under art. 4 (1) thereof, and the benefit of any reasonable doubt shall be given to the claimant.

Art. 4 (3) of the Warrant lays down that where the injury or disease which has led to discharge or death during war service was not noted in any medical report made at the commencement of war service, the claimant is entitled to a pension unless the evidence shows that the prescribed conditions under art. 4 (1) are not fulfilled.

Opinions of medical experts on medical questions, unless duly authenticated, cannot, if embodied in the reasons of the Minister of Pensions for rejecting a claim, be described as " evidence " under art. 4 (3). If, however, the claimant expressly or impliedly admits that such opinions are correct, the admission itself is evidence.

Re Moxon (1) *applied.*

[**EDITORIAL NOTE.** It is now clearly established, by the decision of Tucker, J., in *Re Moxon* (1), and by the decision of Denning, J., in the present case, that medical opinions embodied in the Minister's report to the Pensions Appeal Tribunal are not " evidence " for the purpose of art. 4 (3) of the Warrant. Such evidence must be logically probative and must, therefore, be authenticated by a medical man. This view is in accordance with the views of the Court of Session expressed in *Irving's* case ([1945] S.C. 21) and *Mitchell's* case ([1945] S.C. 131).

The rejection of such evidence may leave the Tribunal without any evidence on which to act but the court points out, as was held in *Re Moxon* (1) that they are not entitled in such circumstances to act on the evidence of their medical assessor, whose functions are judicial, except in the one case under rule 16 where the claimant consents to be medically examined by him.

For the Pensions Appeal Tribunals Act, 1943, and The Pensions Appeal Tribunals (England and Wales) Rules, 1943, see HALSBURY'S STATUTES, Vol. 36, pp. 480, 747.]

Cases referred to :

*(1) *Re Moxon*, [1945] 2 All E.R. 124 ; *sub nom. Moxon* v. *The Minister of Pensions*, [1945] K.B. 490 ; 173 L.T. 56.

*(2) *Taylor* v. *Minister of Pensions*, [1946] S.L.T. 63.

Cases Stated by a chairman of a Pensions Appeal Tribunal under the Pensions Appeal Tribunals Act, 1943, s. 6. In Starr's case, the appellant, a retired naval officer, rejoined the Royal Navy in Oct., 1940, at the age of 66. In 1943 he was discharged on account of glaucoma of both eyes which was not noted on the medical report made on him on enlistment. His claim to a pension was based on aggravation of glaucoma and also on aggravation of high blood pressure. A report from the Royal Naval Hospital showed that the condition of his eyes had been aggravated by his return to naval service and carrying on in a post which entailed strain and worry to an elderly man. A similar report was also given by an opthalmic specialist. In support of his claim on account of aggravation of high blood pressure, the appellant submitted a report from his own doctor. Notwithstanding these reports the Minister rejected the claim. The Pensions Appeal Tribunal, in dismissing the appeal, found that there was no medical evidence that the complaints had been affected by war service. In Nuttall's case, the appellant was called up for military service on Aug. 24, 1939. The disability on account of which he was discharged on Oct. 15, 1941, was disseminated sclerosis, which was not noted in any medical report made on him at the commencement of his war service. The Minister of Pensions, although admitting that the disease had been aggravated by war service, decided that it was not attributable to war service and rejected the appellant's claim to a pension. From this decision the appellant appealed to the Pensions Appeal Tribunal who, without deciding whether there was any evidence to negative the probability that the disease was due to war service, dismissed the appeal on the ground that there was no medical evidence to support the claim. In Bourne's case, the appellant was the widow of an officer, who served in the Royal Engineers from Dec., 1940, until his death from cancer in 1944. The disease was not noted on the medical report made on enlistment. The appellant's claim to a pension was rejected by the Minister. The Pensions Appeal Tribunal dismissed the appeal from the Minister's decision on the ground that there was sufficient evidence, duly authenticated by a medical man, to disallow the claim.

A Melford Stevenson, K.C., and *T. J. Kelly* for the appellant (Starr).
W. Gorman, K.C., and *G. Glynn Blackledge* for the appellant (Nuttall).
A. Melford Stevenson, K.C., and *F. R. McQuown* for the appellant (Bourne).
Hon. H. L. Parker for the respondent (Minister of Pensions).

DENNING, J.: These three cases bring into prominence the great changes brought about in the latter half of 1943 in regard to war pensions. Previously a claimant was not entitled to a pension unless there was "good and sufficient evidence that his disability was in fact attributable to war service": see art. 5 (2) of the Royal Warrant of Jan., 1943; but, at the end of 1943, the position was radically changed. By art. 4 (2) of the Royal Warrant of Dec., 1943, it was expressly stated that "in no case shall there be an onus on any claimant . . . to prove the fulfilment" of the prescribed conditions "and the benefit of any reasonable doubt shall be given to the claimant."

There is, therefore, now no burden on any claimant to adduce evidence. He must, of course, make his claim, but it is the duty of the appropriate service department to submit to the Minister of Pensions all the evidence available, whether for or against the claim, including the claimant's medical history. The claimant may adduce any evidence he wishes, and the Minister may submit any medical question to a medical officer. Then, upon all the evidence, the Minister has to decide whether or not the disease is attributable to war service or the other relevant conditions are fulfilled. His function in this respect is quasi-judicial. He may be able to come to a determinate conclusion without reasonable doubt, but, if the evidence leaves him in reasonable doubt, then the claimant must be given the benefit of the doubt. This means that he must not decide against the claimant on a mere balance of probabilities. There must be a real preponderance of probability against him such as to exclude reasonable doubt. That is a rule as to the weight of evidence which applies in all cases: but in one special category the Warrant introduces an additional element in favour of the claimant.

By art. 4 (3) of the Warrant of Dec., 1943:

> Where an injury or disease which has led to a member's discharge or death during war service was not noted in a medical report made on that member on the commencement of his war service . . .

he is entitled to a pension "unless the evidence shows" that the prescribed conditions are not fulfilled. In cases falling in that category, therefore, there is a compelling presumption in favour of the claimant to which effect must be given unless the contrary is shown. That presumption takes the place of evidence. The effect of it is that the claimant succeeds unless each one of the prescribed conditions is negatived by evidence. The amount of evidence required is, again, a real preponderance of probability such as to exclude all reasonable doubt. The evidence must show, by a real preponderance of probability, that the disease was not attributable to war service or aggravated by it, as the case may be. The distinction between art. 4 (2) and art. 4 (3) is that, in order to defeat a claimant, in cases under art. 4 (2) the evidence against him must overthrow any evidence in his favour, whereas, in cases under art. 4 (3), it must also overthrow the presumption in his favour.

Another matter on which the Warrant of Dec., 1943, makes a change is the certifying authority. Previously the decision was entrusted to a medical officer or board of medical officers appointed or recognised by the Minister.

If they "certified" that the disability was attributable to military service, the claimant was entitled to a pension, but, if they did not certify, he had no remedy: see arts. 2 (3), 4, 5 of the Warrant of Jan., 1943. At the end of 1943 the position was changed. The decision is now entrusted to the Minister. If he certifies that the disablement is attributable to war service, the claimant is entitled to a pension. If he rejects the claim on the ground that it is not attributable to war service the claimant has a right of appeal to a Pensions Appeal Tribunal. Many of the claims involve both questions of fact and also medical questions, to say nothing of legal questions on the interpretation of the Warrant. In so far as they involve questions of fact or legal questions, the Minister must now decide these himself; but, in so far as they involve medical questions, he must submit those questions to a medical officer or board of medical officers, and his ultimate determination must be in accord with their certificate: see arts. 2 (2) (*b*) and 4 of the Warrant of Dec., 1943. For instance, if the certificate of the medical officer shows that the answer to the medical question was open to reasonable doubt, the Minister must give the claimant the benefit of that doubt. The substantial change is that the certificate of the medical officers is now confined to medical questions and does not extend to entitlement. That is the province of the Minister or some person acting under his directions: see art. 69 of the Warrant of Dec., 1943.

If the Minister should reject the claim and the claimant appeals to the Pensions Appeal Tribunal, the issue before the Tribunal is whether the claim was rightly rejected: see the Pensions Appeal Tribunals Act, 1943, s.1. The hearing of the appeal is a judicial inquiry. The chairman is a lawyer, and with him sit a medical man and a service man. The appeal is a fresh hearing. The Tribunal have to see for themselves whether the prescribed conditions are fulfilled, and in so doing they must give to the claimant the benefits of art. 4 (2) and (3) of the Warrant. The Minister is the respondent to the appeal, but it is his duty to act impartially. He must put before the Tribunal all the relevant facts relating to the appellant's case. When a medical question is involved, therefore, it is his duty to submit to the Tribunal the certificate of his medical officers on which he rejected the claim. Although he was bound to determine the matter in accordance with their certificate, the Tribunal are not so bound. They can disregard it in the light of other medical evidence. The evidence in the case may be given in documents or orally, but every document must be made available to both sides and each side may put questions to any witness called by the other side: see the Pensions Appeal (England and Wales) Tribunals Rules, 1943, rr. 12 (6), 13, 14. If the Tribunal allow the appeal, the Minister must give a certificate of entitlement in accordance with the decision of the Tribunal on the matter: see art. 4 (2) (a) of the Warrant of Dec. 1943.

The cases before me show that the procedure I have outlined has not been followed in regard to matters which involve a medical question. Although the Minister may have submitted the medical question to his medical officers and obtained their views, he has not submitted their certificate on it to the Tribunal. He has apparently adopted their views as his own and embodied them as his own views among the reasons for his own decision. By so doing he has made much trouble for himself, because their views as such do not appear, and his own views on a medical question cannot be said to be evidence. However wide a meaning is given to the word "evidence" in art. 4 (3), it is plain that only that is evidence which is logically probative. Speaking generally, opinions on a medical question are of no value unless they are the opinions of medical experts, and, in order to have probative force, they should be authenticated by a medical man. Unless the views expressed in the reasons for the Minister's decision have been so authenticated, they cannot properly be described as "evidence" in any sense of the word; but, of course, if the appellant expressly or impliedly admits that the opinions are correct, the admission itself is evidence.

On rejecting the Minister's "reasons" as evidence, the Tribunals have on occasions found themselves without any evidence in support of the decision of the Minister, and the medical member, in that situation, has sometimes expressed an opinion on the medical question in favour of the Minister's decision; but that, again, is not evidence. The function of the medical member, like that of the other members, is judicial. It is not to supply evidence but to adjudicate on the evidence. In so doing he will, of course, help the other members of the

Tribunal to understand the medical evidence and assess its value, which is a very important function. It is impossible, however, to treat any independent opinion of his own, expressed privately to his colleagues, as evidence. That would be contrary to the statutory rules, which are careful to see that each side is informed of the evidence and given an opportunity to deal with it : see para. 5 (2), (3), of the Schedule to the Pensions Appeal Tribunals Act, 1943, and the Pensions Appeal Tribunals (England and Wales) Rules, 1943, rr. 12 (6), 14 and 15. Even if his opinion is expressed orally to the parties at the hearing it cannot be considered as evidence, because he cannot be cross-examined upon it, as the rules contemplate a witness may be : see r. 13 ; and an opinion expressed at that stage gives the parties no opportunity to consider it or comment on it, as the rules contemplate they should have in regard to any medical advice received by the Tribunal : see sect. 5 (3) of the Schedule and r. 15. The rules do not contemplate that the opinion of the medical member shall be evidence, except in the one case where the claimant consents to be medically examined by him : see r. 16.

I find myself, therefore, in agreement with the views expressed by TUCKER, J., in *Moxon's* case (1), subject to the qualification expressed by the Court of Session in *Taylor's* case (2) to the effect that, when the claimant, by leaving the views of the Minister or medical member unchallenged, expressly or impliedly admits the correctness of them, the admission is itself evidence.

Those being the principles, I proceed to consider the individual cases.

STARR'S CASE.

This officer rejoined the Navy in Oct. 1940, when nearly 66 years old. In Oct, 1943, he was found permanently unfit for all naval service and discharged. His disability was recorded as glaucoma of right and left eyes. He claims on account of aggravation of glaucoma and also on account of aggravation of high blood pressure (hyperpiesia). It was glaucoma which lead to his discharge. That disease was not noted in any medical report made on him on the commencement of his war service. In respect of glaucoma, therefore, art. 4 (2) and 4 (3) of the Order in Council apply. The hyperpiesia did not lead to his discharge, and in respect of that disease art. 4 (2) only applies.

In regard to glaucoma, the facts are that in May, 1943, he went into the Royal Naval Hospital, where it was reported that

> . . . this officer's eyes are in such a condition that invaliding is strongly recommended. The condition has been aggravated by return to naval service and the carrying out of a post entailing worry and strain in an old man. He had no definite signs or symptoms of glaucoma prior to his recall to service.

On Oct. 13, 1943, on his discharge, he was seen by a surgeon commander opthalmic specialist, who reported that

> . . . his last post entailed a considerable amount of worry to him, and as worry is a well known contributory factor in glaucoma, and his eyes had not troubled him before rejoining, the condition is held to have been aggravated by naval service.

Notwithstanding these reports by naval doctors, the Minister rejected the claim. His reasons were :

> Captain Starr's invaliding disability is one of primary glaucoma, a pre-service condition of a slowly progressive type. No acute attack occurred in service, and for these reasons the Minister is of the opinion that the condition is unconnected with service. The effect of worry, a point which has been raised, might be to produce an attack of acute symptoms but no such attack occurred.

The Minister did not disclose the source of his views, which were, of course, in direct conflict with those of the naval doctors.

Captain Starr appealed, and challenged the Minister's statements. He said :

> I respectfully dispute the statement that no acute attack occurred in the service, since such an attack occurred between Dec., 1942, and Apr. 1943.

In support of his appeal he submitted a report from his own doctor, who had examined his eyes in 1943, 1944 and 1945, and who said :

> Although it cannot be said that his glaucoma was due to naval service, I have no doubt that his vision deteriorated partly as a result of the strenuous services in the Navy.

At the hearing of the appeal, therefore, the evidence was all one way. Captain Starr had in his favour the presumption of art. 4 (3) and evidence from two naval doctors (one of them an opthalmic specialist) and his own doctor, all of whom had had him under observation and examined him with care. On the other side there were the unsupported statements in the decision of the Ministry.

Secondly, with regard to hyperpiesia, Captain Starr was suffering from hyperpiesia on May 28, 1942. Shortly after his discharge in Oct., 1943, he became severely incapacitated by it. In Feb., 1944, he had symptoms of a slight stroke, and his condition markedly deteriorated. The Minister rejected his claim for hyperpiesia. His reason was :

> This is a progressive condition secondary to arterial degeneration and associated with advancing years. There was no cardio-vascular catastrophe on service, nor any acute onset of symptoms, and, in the Ministry's view, therefore, this disability is unrelated to service.

Captain Starr appealed and challenged the Minister's statements. He submitted a report from his own doctor saying :

> I consider that the most serious alteration in his condition as the result of naval service during this war has not been the change in his eye condition but in his blood pressure and its results. There have been serious cerebral effects.

Although in respect of hyperpiesia Captain Starr had no presumption in his favour, nevertheless there was no onus on him, and he had the report of his own doctor in his support. On the other side there was the unsupported statement in the decision of the Minister.

The decision of the Tribunal was given orally on Apr. 24, 1945, when the chairman, in accordance with r. 17, indicated their reasons in these words :

> We have very carefully considered this, but are afraid we cannot find any set medical grounds supporting the contention that either of these complaints have been affected by service. We have assumed throughout that he did strenuous service for his age. The ground for objection is a medical one—strain does not worsen the condition, it either produces a catastrophe or it does not, and the appeal must be disallowed.

Captain Starr was dissatisfied with that decision as being erroneous in point of law and applied to the Tribunal for leave to appeal, which they granted.

In my opinion the decision was erroneous in point of law, and for two reasons : (1) the Tribunal put upon the claimant an onus which was unjustified. The question was not whether there was " any set medical grounds supporting his contention " but whether there were any negativing it : (2) there was no evidence to support the decision. The view that " strain does not worsen the condition, it either produces a catastrophe or it does not " was not supported by the opinion of any medical man. The only basis for it was the Minister's decision or the medical member's advice, neither of which can be regarded as evidence ; and, indeed, it was in contradiction of the medical evidence which was before the Tribunal.

The case stated sets out a good deal of argument in addition to the facts, and I prefer to take the reasons given on Apr. 24, 1945, as the real basis of the decision. That was the decision with which Captain Starr was dissatisfied. If it was erroneous in point of law it cannot be made good by the way the case is stated. The function of the case stated is to set forth the facts on which the decision was based. On those facts, when proper regard is had to art. 4 (2) and (3), there was nothing sufficient to negative the claim of aggravation. I, therefore, allow the appeal, and the Minister must give a certification of aggravation.

Appeal allowed.

NUTTALL'S CASE

This man was in the Territorial Army before the war, and on Aug. 24, 1939, was called out for military service. On Oct. 15, 1941, he was discharged from the Army. His disability was recorded as disseminated sclerosis, and that was the disease which led to his discharge. The disease was not noted in any medical report made on the man on the commencement of his war service. Art. 4 (3) of the Royal Warrant therefore applies.

The Tribunal found that the cause of disseminated sclerosis is unknown, but the view generally accepted by the medical profession is that the disease is due to an infection of the nervous system by some agent the nature of which is unknown. Although the cause of the disease is unknown, the evidence accepted by the Tribunal showed that " it is noticeable how often the first or successive attacks may follow one of many quite independent illnesses, such as jaundice, influenza or bronchitis or a period of exceptional mental or physical strain," and that "fatigue, overwork, intercurrent illnesses are known to influence the condition unfavourably."

During service this man had been subjected to extraordinary physical and mental strain and loss of sleep, and claimed that the disease was attributable to his war service. The Minister admitted that the disease had been aggravated by war service, but said it was not attributable to war service. The Minister's reason was :

> The clinical findings in the appellant's case, the course of his disability and the known pathology of the condition afford no indication that any specific factor in service is responsible, and for these reasons the Ministry consider that the disability is not attributable to service.

That reasoning puts the burden the wrong way. The question was whether there was evidence that no factor in service was responsible.

The claimant appealed to the Tribunal, who dismissed the appeal, on Dec. 14, 1944, and, in accordance with r. 17, gave their reasons, and gave them in writing. They also appear to have put the burden the wrong way. They said :

> From a medical point of view there is no evidence to support a claim of attributability.

The real question, of course, was whether there was any evidence to negative attributability. The claimant was dissatisfied, and applied for leave to appeal, which the Tribunal granted. In as much as the cause of disseminated sclerosis is an infection of the nervous system by some unknown agent, this was peculiarly a case in which the presumption availed the claimant, and there was little enough to rebut it. The Tribunal were, however, greatly influenced by the fact that "the disease is no more common in the Army than in civil life."

In as much, however, as that finding was found solely on a statement made by the medical member, which was not evidence, they should have disregarded it. Even if it was admissible, however, it is difficult to see what bearing it has. The evidence showed that the disease affects particularly young adults in the prime of life and in otherwise normal health ; and, when one remembers that the great majority of this age group were serving in the forces or in work in civil life involving comparable risks, the fact that the disease was no more common in one than the other leads nowhere. A disease such as tetanus or tuberculosis may be no more common in the Army than in civil life, but that does not prove that it is not attributable to war service.

It seems to me plain that there was no evidence to negative the claim that the disease was attributable to war service. There was certainly not sufficient to rebut the presumption. I, therefore, allow the appeal, and a certificate of attributability must issue.

Appeal allowed.

BOURNE'S CASE

Captain Bourne served from Dec., 1940, until his death on Sept. 7, 1944. The disease which led to his death was cancer. It was not noted on any medical report made on him on the commencement of his service. The Minister rejected the widow's claim and the Tribunal dismissed her appeal but granted leave to appeal. The question stated in the case is whether there was sufficient evidence upon which the Tribunal could disallow the appeal. That means, in point of law was there any evidence reasonably sufficient to rebut the presumption in the claimant's favour.

The evidence was that of one of the Minister's medical officers, and was given in this way. The Minister first prepared the following reason for his decision :

> Carcinoma at this site arises in all walks of life and is in no way peculiar to service in the forces. Although in this case the disease became manifest in service, in the Ministry's view, in the light of modern medical knowledge, there were no factors of the deceased's service in the present war which could have played a part in the onset or inevitable progression of the fatal disease.

Then the Awards Division submitted it to the Medical Services Division, saying :

> Will you please be good enough to say whether you agree in the terms of the final decision in this case.

The Medical Services Department reported back : "Medically agreed," signed by Dr. Sims. The Tribunal thought that the opinion of Dr. Sims might well, and with advantage, have been supported by more detailed reasons, and I agree with them ; but it is authenticated by a medical man and was, I think, evidence.

The claimant did not adduce any evidence in answer, but argued that, as the aetiology (cause) of cancer is unknown, it was impossible for anyone to say with any reasonable degree of certainty that no factor or incident in the deceased's service had operated to cause or hasten the progress of the disease. That was really an argument going to the value of Dr. Sim's evidence, and was just the kind of point upon which the Tribunal could and did take the advice of their medical member. Upon so doing, the Tribunal rejected the argument. They pointed out that, while the precise cause of cancer may remain obscure, there may be adequate material of a scientific or statistical nature, as known to the medical profession, to enable doctors to exclude external factors as having any influence upon the disease in a case of this nature. They were satisfied that the opinion of Dr. Sims was in accordance with probability and represented good medicine, in the sense that the great majority of modern doctors with any specialised knowledge of this disease would agree with it. They, therefore, dismissed the appeal. In my opinion there was sufficient evidence before the Tribunal to enable them to come to the conclusion they did, and I dismiss the appeal.

Appeal dismissed.

Solicitors: *Fowler, Legg & Co.* (for the appellants, Starr and Bourne); *Hyman Isaacs, Lewis & Mills*, agents for *Herbert J. Davis, Berthen & Munro*, Liverpool (for the appellant, Nuttall); *Treasury Solicitor* (for the respondent).

[*Reported by* W. J. Alderman, *Barrister-at-Law.*]

PROPERTY HOLDING CO., LTD. *v.* MISCHEFF.

[King's Bench Division (Henn Collins, J.), February 25, 28, 1946.]

Landlord and tenant—Rent restriction—Furnished letting—"Attendance"—"Furniture"—Whether substantial part of rent for attendance and use of furniture—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2), proviso (i)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10.

The defendant was sub-tenant of a flat in London until Sept. 29, 1944, when his underlease expired. Thereafter he continued in possession, claiming that, as the rateable value of the premises was less than £100, he was entitled to continue in occupation as a statutory tenant. The rent paid by the defendant was £275 a year until Oct., 1943, when it was increased to £375 a year. In an action brought by the plaintiffs to recover possession of the premises the question for determination was whether or not the premises fell within the exception introduced by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), proviso (i) as amended by sect. 10 of the 1923 Act. The plaintiffs relied on the fact that they provided both attendance and furniture. The attendance was of four kinds: the presence of hall porters, the removal of refuse, the cleaning and servicing of the halls, stairways and passages common to all tenants, and the provision of central heating and constant hot water. The furniture was of two categories—that which furnished the parts of the building common to all tenants (carpets, curtains and a settee) and articles of which the defendant had exclusive use within the flat. The flat was furnished by the plaintiffs with linoleum or rubber floorcloth, a kitchen cabinet for kitchen utensils, a refrigerator (the electric current for which was supplied by the plaintiffs free of charge) and a fitted bathroom cabinet and mirrors:—

Held: (i) none of the items relied on by the plaintiffs constituted "attendance" within the meaning of sect. 10 of the 1923 Act.

(ii) the articles of furniture in the parts of the building common to all tenants were, for the purposes of the Rent Restrictions Acts, amenities and not "furniture" of which the tenant had the use.

(iii) the articles in the flat of which the defendant had exclusive use were "furniture" within the meaning of sect. 10 of the 1923 Act, and as the amount of rent which could be fairly attributable to the use of that furniture formed a substantial portion of the whole rent, the premises were therefore not controlled and the plaintiffs were entitled to possession.

[**EDITORIAL NOTE.** This is a case of very great importance to the landlords and tenants of service flats. While the articles in question may admittedly be regarded as "furniture" within the *dicta* in *Gray* v. *Fidler* (1) it is difficult to describe them as "something substantial in the way of furniture" within the decision in *Crane* v. *Cox* (1923) 92 L.J.K.B. 544. Such articles as fitted mirrors, refrigerators and kitchen cabinets are commonly expected in good class service flats and no tenant of such a flat would regard himself as being, in popular language, the tenant of a "furnished flat." The question of furniture and furnishings of that part of the building used in common with the other tenants does not appear to have been previously decided, but it would seem to be reasonable to regard these as amenities which they are held to be, and not furniture for which rent is paid.

AS TO PREMISES LET AT RENT INCLUDING ATTENDANCE AND USE OF FURNITURE, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 559-561,, Nos. 7068-7084.]

Case referred to:

*(1) *Gray* v. *Fidler*, [1943] 2 All E.R. 289; [1943] 1 K.B. 694; 169 L.T. 193.

ACTION by the lessor to recover possession of a flat. The facts are fully set out in the judgment.

J. Scott Henderson, K.C., and *R. Stock* for the plaintiffs.

F. A. Amies (for *W. A. L. Raeburn*) for the defendant.

Cur. adv. vult.

HENN COLLINS, J.: The defendant was in possession as sub-tenant of flat No. 19, Albion Gate, down to Sept. 29, 1944, on which date his underlease expired. Thereafter he has continued in possession and claims the right to do so on the ground that the rateable value of the premises being, as in fact it is, less than £100 the premises are controlled by the Rent and Mortgage Interest Restriction Acts, 1920 to 1939, and that he is therefore entitled to continue in occupation as a statutory tenant. The rent which the defendant was paying under the sub-lease was £275, which was the rent which his lessor paid to the plaintiffs until Oct., 1943, when it was increased, as from Mar., 1944, to £375. The covenants and all other conditions are the same in the head lease and the underlease.

The question for determination is whether the premises in question are or are not controlled, and that in turn depends upon whether they fall within the exception introduced by the Rent and Mortgage Interest Restriction Act, 1920, s. 12 (2), proviso (i), as amended by sect. 10 of the Act of 1923. The effect of those two sections, read together, is that premises which would otherwise fall within the control do not do so if *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture, and the amount of rent which is fairly attributable to the attendance or the use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

The plaintiffs rely upon the fact that they provide both attendance and furniture. The attendance is of four kinds—the presence of hall porters, the removal of refuse, the cleaning and servicing of the halls, stairways and passages common to all tenants, and the provision of central heating and constant hot water. These latter have been held by a decision binding upon me [see *Engvall* v. *Ideal Flats, Ltd.* (1945) 1 All E.R. 230] not to constitute attendance, and I therefore dismiss them from consideration without comment, beyond saying that the amount of the rent fairly attributable to them, having regard to the value of them to the tenant, would form a substantial portion of the whole rent.

Taking next the presence of the hall porters, the plaintiffs undertake to use every precaution to employ no one but a competent and trustworthy person as resident porter, but beyond that their obligation does not go. Though the porter may, and no doubt does, make himself obliging to the tenants, he has no duty to perform for them, and I do not think that such attendance as he chooses to give can be said to be any part of that for which the tenant pays his rent.

Much the same considerations apply to the removal of refuse. The receptacles are in practice removed from the back doors of the flats, by someone employed by the plaintiffs, to the point of collection by the local authority, but this service is not stipulated for in the lease, and the tenant would have no valid ground of complaint if he was left to make his own arrangements for this to be done. I do not think "attendance" can be extended to anything to which the tenant is not contractually entitled.

I take the same view with regard to the servicing, including the lighting and heating, of the parts of the building common to all the tenants. These do not, in my judgment, constitute attendance within the meaning of the section;

nor, if this is material, as I think it is, does the lease make any provision for them.

That brings me to the use of the furniture. This may be divided into two categories: that which furnishes the parts of the building common to all tenants, and things of which the tenant has the exclusive use within the flat. Whether these latter are "furniture" I will consider in a moment, but, taking first the furnishings (carpets, curtains, and a settee) the use of which he shares with others, they are in no sense let to the tenant, nor has he any contractual right to insist that they shall be there, and I do not think that in any real sense any part of what he pays as rent is attributable to them. They are no doubt amenities by which the landlords attract tenants, and equally, no doubt, the landlords expect to recoup their expenses out of the total rents received, but this is equally true of, say, mahogany doors or tasteful and expensive decorations. The fact that the landlords have chosen to have carpets, which can fairly be called furniture on the stairs and passages, instead of having the stairs and passages made of suitable material which would not require to be covered, does not seem to me to alter the principle. They remain, for the purposes of the Rent Acts, amenities and not furniture of which the tenant has the use.

The other category comprises certain articles in the flat, of which the tenant has the exclusive use. The flat is furnished by the plaintiffs with linoleum in the three bedrooms, the kitchen and the maid's bathroom, and rubber floorcloth in the best bathroom and the lobby, also with a kitchen cabinet in which to keep all kitchen utensils, and a refrigerator, which is plugged to the wall and which is enclosed in the cabinet. The electric current for the refrigerator is supplied without charge by the plaintiffs. There is also supplied by the plaintiffs a fitted bathroom, cabinet and mirrors. These are all in some degree fixed to the freehold, but this does not prevent them from being furniture if they are so in the popular usage of that word: see *Gray* v. *Fidler* (1). They are all, in my judgment, things which tenants of such flats as these would themselves supply, in one form or another, if the landlord did not, and if they could get them, and they are all, in my judgment, within what is today comprehended in the word "furniture." The cost of them today is somewhere about £200. I find that 15 per cent. on that sum, namely £30 per annum, is fairly attributable to the use of them and of that value to the tenant. Of the total rent of £275, £73 is attributable to rates, leaving £202 as rent for the premises and furniture. Is £30 a substantial proportion of £202? I think it is, and I therefore hold that the premises in question are not controlled. It follows then that the plaintiffs are entitled to possession and to *mesne* profits as claimed.

Judgment for the plaintiffs with costs.

Solicitors: *Markby, Stewart & Wadesons* (for the plaintiffs); *J. M. Menasse and Co.* (for the defendant).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

BRITISH IRON & STEEL CORPORATION, LTD. *v.* HALPERN.

[King's Bench Division (Lewis, J.), December 14, 1945.]

Landlord and tenant—Notice to quit—Lease for fixed term then quarterly—Notice served before expiration of fixed term—Validity.

The defendant held certain premises under a lease from the plaintiff for a term of 2 years from June 24, 1943, and then quarterly, subject to 3 calendar months' notice on either side, expiring on any quarter day. The plaintiff, on June 21, 1945, served on the defendant notice to quit the premises on Sept. 29, 1945. In an action by the plaintiff to recover possession of the premises, it was contended on behalf of the defendant, that the plaintiff was not entitled to give notice before the expiration of the fixed term of 2 years:—

Held: although the notice was in a sense too early it might have been given on June 28, 1945, to expire on Sept. 29, 1945, and was therefore a valid notice to quit.

Herron v. *Martin* (1) followed.

Gardner v. *Ingram* (2) and *Re Lancashire and Yorkshire Bank's Lease, Davis (W.) & Son.* v. *Lancashire and Yorkshire Bank* (5) *distinguished.*

[**EDITORIAL NOTE.** It was held in *Gardner* v. *Ingram* (2) and *Re Lancashire & Yorkshire Bank's Lease* (5) that where a term of five years is determinable by notice after the expiration of three years, the term cannot be determined except by a notice given after the expiration of the three years. On the other hand, it was held in *Herron* v. *Martin* (1), in which the above cases were apparently not considered, that when the term was for three years and so on from year to year, determinable by one year's notice to quit, notice given before the expiration of the three years was valid. In the case under consideration Lewis, J., holds that the notice, although given too early, was valid by reason of the decision in *Herron* v. *Martin* (1).

As to Time for Giving Notice to Quit, see HALSBURY, Hailsham Edn., Vol. 20, pp. 130-132, para. 140 ; and for Cases, see DIGEST, Vol. 31, p. 439, Nos. 5847-5853.]

Cases referred to :

*(1) *Herron* v. *Martin* (1911), 27 T.L.R. 431 ; 31 Digest 440, *5865*.
*(2) *Gardner* v. *Ingram* (1889), 61 L.T. 729 ; 31 Digest 446, *5931*.
(3) *Thompson* v. *Maberly* (1811), 2 Camp. 573 ; 31 Digest 439, *5847*.
(4) *Brown* v. *Symons* (1860), 8 C.B.N.S. 208 ; 34 Digest 55, *296* ; 29 L.J.C.P. 251 ; 2 L.T. 323.
*(5) *Re Lancashire & Yorkshire Bank's Lease, Davis (W.) & Son* v. *Lancashire & Yorkshire Bank*, [1914] 1 Ch. 522 ; 31 Digest 439, *5853* ; 83 L.J. Ch. 577 ; 110 L.T. 571.

Action to recover possession of leasehold premises. The facts are fully set out in the judgment.

L. Horniman for the plaintiff.

A. Safford for the defendant.

Lewis, J. : This is a case which raises some difficulty on the proper construction of a clause in a lease dated Sept. 1, 1943, by which one Samuel Waller, as lessor, let to the defendant, as lessee, part of certain premises situated at No. 7, Park Lane, in the county of London :

> To hold the same unto the lessee for the term of two years from the 24th day of June one thousand nine hundred and forty three and then quarterly subject to three calendar months' notice on either side expiring on any quarter day.

Under the terms of that lease the defendant went into possession, and before the 2 years contemplated by that lease, namely, June 24, 1945, had expired, the lessor assigned the premises, together with others, to the present plaintiffs, and thereby the present plaintiffs have the right to bring this action, which is for an order for possession of the premises together with mesne profits at the rate of £375 per annum from Sept. 29, 1945.

What happened was this. On June 21, 1945, a notice was served on the defendant, as follows :

> I hereby give you notice to quit and deliver up to me or to whom I may appoint on Sept. 29, 1945, possession of the premises at 7, Park Lane, in the city of Westminster, being office No. 3 on the third floor which you hold of me as tenant. Dated this 21st day of June, 1945.

The reply to that letter was on July 19, 1945, when the solicitors to the defendant wrote :

> Our client Mr. Halpern has sent us your letter of the 20th ultimo enclosing a notice to quit. We would point out however that the notice is not in order as our client was a quarterly tenant from June 24 and the earliest date on which notice can be given is for Dec. 25 next. You will appreciate that our client will be put to serious inconvenience under present conditions and we shall be glad to know whether you have any other offices available as intimated in your letter.

The lessee has remained in possession in the meantime, hence this action.

It is said on behalf of the plaintiffs that this case is covered by *Herron* v. *Martin* (1), which was decided by Darling, J. The head-note reads :

> By an agreement a farm was let to the defendants for a period of 3 years commencing on Mar. 25, 1907, and so on from year to year until the tenancy should be determined by either party giving to the other one year's notice in writing. On Mar. 21, 1910, the plaintiffs gave the defendant a notice to quit on Mar. 25, 1911 :—*Held* : the notice so given was good.

Unfortunately there is not a very full report of that case, and, as has been said by counsel for the defendant, with perfect truth, it does not appear from that report that two cases, or certainly one case, upon which counsel relies in this case, was ever mentioned to Darling, J. It certainly appears that Darling, J.'s attention was not called to *Gardner* v. *Ingram* (2). According to that report, Darling, J., gave no reasoned judgment but, after hearing counsel for the plaintiffs and for the defendants, said (27 T.L.R. at p. 431):

> There seems to be no definite authority, but I think you are right. There will be judgment for possession, but leave to appeal.

There is no further report upon that case, but it is conceded that that case was, on May 17, 1911, approved by the Court of Appeal. Whether the Court of Appeal had the case of *Gardner* v. *Ingram* (2) before them, I do not know, but the Court of Appeal has said that the decision of Darling, J., in the case of *Herron* v. *Martin* was right: see Foa on Landlord & Tenant, 6th Ed., p. 119.

What is said on the other side is, that you cannot deal in a case of this sort with a clause in the terms of the present lease, and give a notice to quit until the "original term"—if I may use that expression—has expired. This term of 2 years expired on June 23, 1945, and before that time a notice was given, namely, on June 21, to terminate the agreement in Sept. The clause does not provide that one quarter's notice should be given, but that 3 calendar months' notice should be given. Therefore, other things being equal, notice would be given on June 28, as 3 calendar months' notice was required, and not a quarterly notice, and counsel for the defendants has pointed out that *Gardner* v. *Ingram* says that in these circumstances such a notice as was given in this case is wrong.

Gardner v. *Ingram* (2) deals with a lease for 5 years, and the head-note reads as follows:

> By an agreement for a lease for 5 years it was provided that the tenancy might be determined "after the expiration of 3 years out of the 5 years" by 6 months' notice in writing at the corresponding quarter day at which the tenancy commenced. The tenant entered into possession on Sept. 29, 1885, and on Mar. 23, 1888, gave notice to the landlord in the following terms: "Kindly take notice that I intend to surrender to you the tenancy of this house on or before Sept. 29, 1888": —*Held*: the notice to quit was equivocal in its terms, and therefore bad.

Pausing there a moment, the judgments given by Lord Coleridge, L.C.J., and Bowen, L.J., deal more particularly with the first point, namely that the notice was equivocal, but Lord Coleridge, L.C.J., with the agreement of Bowen, L.J., who did not give any reasons, seems to have said that on the terms of that clause the agreement was for a term of 4 years certain. The clause, which is set out in full on p. 729 of the report, is this:

> The tenancy might be determined after the expiration of the term of 3 years out of the term of 5 years hereinbefore mentioned by 6 calendar months' notice in writing from either of the said parties to the other of them, and that such notice must expire at the corresponding quarter day at which the tenancy commenced.

The case having been argued, Lord Coleridge, L.C.J., said in the course of his judgment:

> Mr. Cross relied on the case of *Thompson* v. *Maberly* (3), where Lord Ellenborough, C.J., stated that if premises are taken for "twelve months certain and six months' notice to quit afterwards," the tenancy may be determined by a six months' notice expiring at the end of the first year. That case is not, however, quite satisfactory, as it appears to have been decided on the meaning of the word certain, and as Lord Campbell points out in a note, the decision was for the plaintiff on another point, so that Lord Ellenborough's observation was *obiter*. It is true that in the case of *Brown* v. *Symons & Another* (4) in the Common Pleas, which was an apprenticeship case and turned upon the words "for twelve months certain", *Thompson* v. *Maberly* (3) was cited in the argument, and was not disapproved of.

That is the reasoning by which Lord Coleridge, L.C.J., came to the conclusion that the agreement was, in fact, for 4 years certain.

That case was followed by Eve, J., in the *Lancashire & Yorkshire Bank's Lease* case (5). The head-note reads:

> By a lease dated Feb. 21, 1911, certain premises were demised by the defendants to the plaintiffs for a term of five years from Mar. 25, 1911, at a yearly rent of £225 to be paid by equal quarterly payments on the usual quarter days. The lease contained a proviso that "after the expiration of the first three years of the term hereby granted, if the lessees so desire to determine this lease, and shall give to the lessors six calendar months' previous notice in writing of such desire, such notice to determine on any quarter day . . . then and immediately on the expiration of such notice this present demise shall cease and be void." On Nov. 14, 1913, the plaintiffs gave notice in writing to the defendants that it was their intention to quit and deliver up possession of the

premises on June 24, 1914. On a summons taken out by the plaintiffs to determine whether the notice was good :—*Held* : the case was indistinguishable from *Gardner* v. *Ingram* (2), and the notice in question was invalid. The earliest day on which the lease could be terminated was Sept. 29, 1914.

EVE, J., said ([1914] 1 Ch. 522 at p. 525) :

> If this question of construction were free from authority, I am by no means certain that my decision would take the form which. since there is authority upon the point, A I feel that it must take. I think, after a careful examination of the proviso in the lease here, it is impossible to distinguish this case from that of *Gardner* v. *Ingram* (2), upon which Mr. Rutherford relies. I need not read the proviso over again, but it comes, I think, to this, that the term thereby created shall cease and determine if, after the expiration of the first three years thereof, the lessees shall so wish, and shall give to the lessors six calendar months' notice in writing of that wish, and then, in their favour, there is added this, that such notice need not expire on the anniversary of the day on which the tenancy commenced, but may expire on any one of the usual quarter B days. So read the clause in this lease is indistinguishable from the clause construed in *Gardner* v. *Ingram* (2) by LORD COLERIDGE, C.J., and BOWEN, L.J.

Then he deals with *Gardner* v. *Ingram* (2) and says at the end of his judgment ([1914] 1 Ch. 522 at p. 526) :

> For these reasons I come to the conclusion that the contention of the landlords here is right, and that, on the summons, I must hold that the notice purporting to determine C this tenancy on June 24, 1914, is invalid, and that the earliest date on which the lessees can determine the tenancy is Sept. 29, 1914. The costs must follow the results.

Those two cases are relied upon by counsel for the defendant, and he says the present case is on all fours with that case, and that I ought to follow the case tried by EVE, J., who followed *Gardner* v. *Ingram* (2).

I do not think this case is distinguishable from *Herron* v. *Martin* (1) but I do think there is a distinction between the effect of the clause in this case and the D clause in *Gardner* v. *Ingram* (2) and the clause in the *Lancashire & Yorkshire Bank's Lease* case (5). I think this clause means this : This lease is for 2 years, and after the expiration of 2 years the lessee may continue to occupy the premises on a quarterly basis, and if a quarter's notice is given to determine after the 2 years, then that is a good notice—assuming that the length of the notice is 3 calendar months after the expiration of the 2 years' term—and, therefore, although the notice was given on June 21 and it was given in one sense, too early, it might E have been given on June 28 to expire in Sept., and I think that is the distinction between this case and the case of *Gardner* v. *Ingram* (2) upon which reliance is placed.

I must decide in favour of the plaintiffs. There will be an order for possession and costs.

Judgment for plaintiff with costs.

F Solicitors : *Allen & Overy* (for the plaintiff) ; *Emanuel, Round & Nathan* (for the defendant).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

Re BOURNE'S SETTLEMENT TRUSTS, BOURNE *v.* MACKAY AND OTHERS.

G

[COURT OF APPEAL (Lord Greene, M.R., Morton and Tucker, L.JJ.), February 12, 13, 1946.]

Perpetuities—Accumulations—Statutory periods—Settlement—Fund for benefit of settlor's grandchildren already living at date of settlement—Annual sum to be paid to each grandchild on attaining 18*—Remainder of income to be accumulated,* H *in separate fund, from date of settlement until youngest grandchild attained* 23*—Donees of both funds to be chosen by trustees from among grandchildren and their children—" Raising portions "—Life of settlor only period available —Trustee Act,* 1925 (*c.* 19), *s.* 31*—Law of Property Act,* 1925 (*c.* 20), *s.* 164 (1) (*a*), (*d*), 2 (ii) (*a*).

The settlor settled £7,000 upon trust for the benefit, in the first instance, of seven named grandchildren of whom the eldest was 7 years old and the youngest one month old at the date of the settlement. Subject to the payment of £52 a year to each grandchild on attaining 18, the income of the fund was, from the date of the settlement, to be accumulated in a separate fund, called the income fund. The date of final distribution of both funds was the date on which the youngest surviving grandchild attained 23. Before the date of final distribution, the trustees were empowered to give each grandchild on or after attaining 23 that grandchild's share of the £7,000 together with £500 out of the income fund. The class among which the income fund was divisible at the date of final distribution consisted of such of the seven grandchildren as were living at the time and the children of any grandchild who had died. In the case of the capital fund, the class consisted of such of the seven grandchildren as were living at the time and the children of any that were dead and also of the children of the grandchildren who were still living. In the case of each fund, the trustees had an absolute discretion as to which member or members of the class in question should take, and in what proportion. It was contended on behalf of the Crown that the Law of Property Act, 1925, s. 164 (1) (*a*), applied and that the fund could not be accumulated for a period longer than the life of the settlor, with the result that the property passed on the death of the settlor and estate duty was chargeable thereon under the Finance Act, 1894, s. 1. On behalf of the beneficiaries it was contended that, since the trustees could apply the accumulated fund as a portion by exercising the power to pay out £500 therefrom to a grandchild, the object of the provision for accumulation was to create a fund for " raising portions " within the meaning of subsect. (2) (ii) (*a*) of sect. 164, so that sect. 164 did not apply and the direction to accumulate was valid. It was further contended that, if the direction to accumulate was held to be void for the excess beyond a period allowed by sect. 164 (1), the period in para. (*d*) of sect. 164 (1) was the appropriate one during which accumulation could be allowed, because, had there been no trust to accumulate, the grandchildren could, under the Trustee Act, 1925, s. 31 (1) (ii), have asked for the income to be paid to them on the youngest attaining 21 :—

Held : (i) the direction to accumulate was not a provision for " raising portions " within the meaning of subsect. (2) (ii) (*a*) of the Law of Property Act, 1925, s. 164, notwithstanding the fact that the trustees were empowered under the settlement to pay out £500 from the accumulated fund to a grandchild. The document must be construed at its date, and whether the provision was used for " raising portions " or not depended entirely on the discretion of the trustees at some future date. The accumulation was therefore void under sect. 164 (1) of the Act except for a period allowed by the Act.

(ii) the appropriate period during which the income could be accumulated was not that in para. (*d*) of sect. 164 (1), because the grandchildren were not " entitled to the income directed to be accumulated." Under the trusts of the settlement, the intermediate income might go to someone other than the recipient of the capital, and therefore the Trustee Act, 1925, s. 31, did not apply, because, under subsect. (3) thereof, the section only applied in the case of contingent interests where the trust carried the intermediate income.

(iii) since the accumulation was to take effect from the date of the settlement, the appropriate period during which it could be allowed was that in para. (*a*) of the Law of Property Act, 1925, s. 164 (1), *i.e.*, the life of the settlor. The property, therefore, passed on the death of the settlor and estate duty was chargeable thereon on her death, under the Finance Act, 1894, s. 1.

[**EDITORIAL NOTE.** This case construes the exception to the restriction on the accumulation of income in the Law of Property Act, 1925, s. 164 (2) (ii). It is held that " provision for raising portions " cannot be construed as meaning a provision for creating a fund available for portions, and accordingly a provision under which trustees have a mere power to deal with the accumulations in such a way that the result could be described as a portion, is not within the exception. It is essential that the fund *must* be applied to portions, and can be dealt with in no other way, if the exception is to apply.

Since, under the settlement considered in this case, the trustees had a discretion as to the division of the fund among the class indicated, none of the members can be said to be a person who would be entitled to the income directed to be accumulated.

Sect. 164 (1) (*d*) is, therefore, inapplicable, and the life of the settlor is the appropriate period during which accumulation can legally be made under sect. 164 (1) (*a*).

As to Limits of Period of Accumulation, see HALSBURY, Hailsham Edn., Vol. 25, pp. 168-171, paras. 287-289, and para. 292; and for Cases, see DIGEST, Vol. 37, pp. 136, 137, Nos. 642-657, and pp. 144-146, Nos. 706-718.

As to Provisions for Raising Portions, see HALSBURY, Hailsham Edn., Vol. 25, pp. 178-181, paras. 303-307; and for Cases, see DIGEST, Vol. 37, pp. 139-143, Nos. 668-689.]

Case referred to:

(1) *Thellusson* v. *Woodford* (1805), 11 Ves. 112; 37 Digest 63, *67*; 1 Bos. & P.N.R. 357; *affg.* (1799), 4 Ves. 227.

Appeal by the beneficiaries under a settlement from an order of Evershed, J., dated July 6, 1945. The facts are fully set out in the judgment of Lord Greene, M.R.

John Pennycuick for the trustees.

C. L. Fawell for the beneficiaries under the settlement.

J. H. Stamp for the Crown.

Lord Greene, M.R.: The question submitted for the decision of the court by the originating summons was whether or not estate duty was chargeable under the Finance Act, 1894, s. 1, on the occasion of the death of the settlor, Mrs. Clara Louisa Bourne, on the footing that the settled property passed on her death. That question involves two questions on the true construction and application of the Law of Property Act, 1925, s. 164, which replaced the provisions of the Thellusson Act which itself invalidated certain types of trusts for accumulation.

The settlement is of an unusual and complicated nature, and I do not propose to go through it in detail. There are certain broad points which may usefully be mentioned. It settles the sum of £7,000 for the benefit, in the first instance, of seven named grandchildren, the eldest of whom was, at the date of the settlement, about 7 years old, and the youngest of whom at the date of the settlement was about a month old. As each of those grandchildren attained the age of 18, he or she became entitled to a sum of £52 a year out of the income of the settled property. Meanwhile, and subject to that, the income of the settled property was to be accumulated. It was to be accumulated in a separate fund which the settlor calls the income fund. The ultimate destination of both the £7,000 capital and the income fund is provided for in cl. 1 (3) and (5) of the deed. But there is an interim provision under which the trustees are empowered to transfer to each of the seven grandchildren his or her share of the £7,000 together with a sum of £500 out of the income fund. The earliest date at which that transfer could be made was on the grandchild attaining the age of 23 years. That was a mere power, and the trustees could elect, in the case of a grandchild, to continue to pay £52 a year down to the date of final distribution. The date of final distribution of both funds, the £7,000 and the income fund is the date on which the youngest surviving grandchild attains 23. The class among whom the income fund is divisible is such of the seven grandchildren as shall be living at the distribution date, and the children of any of those grandchildren who should then be dead. The class in the case of the capital fund of £7,000 is precisely the same, save that children of grandchildren are members of the class, or may be members of the class, notwithstanding that their parents may be alive at the distribution date.

The trusts in relation to those classes, one of which, as will be seen, is rather broader than the other, are not trusts by way of absolute gift; in each case there is a complete and absolute discretion given to the trustees as to which grandchildren or great-grandchildren are to share in the two funds, and in what proportions. It would be possible for the trustees under those trusts, when the time for distribution arrived, to hand to each grandchild, assuming all seven were alive, one-seventh of the capital plus one-seventh of the income which had been accumulated. It would be possible for the trustees to give the entirety of both funds to one grandchild, or to one great-grandchild. On the other hand, it would be possible for the trustees to give the whole of the capital fund to one member of the class, and the whole of the income fund to another member of the class. Indeed, if the children of living grandchildren alone were selected as the beneficiaries in respect of the captial fund, as they are not members of the class specified in respect of the income fund, that result would happen, because you would then get the whole of the income fund going one way, and the whole of the capital fund going another. There are various possibilities, but I have picked out these for a reason which will appear presently.

At this stage I can perhaps conveniently deal with a suggestion of counsel for the beneficiaries under the settlement to the effect that the paramount object of this settlement could be in some way ascertained and attributed to one particular exercise of the trustees' discretion. I cannot find that there is any paramount object in this settlement, save the object that the destination of these funds shall be such as the trustees in their discretion shall decide. It seems to me that any purpose which falls within the four corners of that discretion is just as much paramount as any other purpose, and it is impossible to say of any one purpose that it is more paramount than another. That is sufficient to bring me to the other arguments which have been addressed to us.

The relevant section of the Law of Property Act, 1925, is sect. 164. Subsect. (1) prescribes the statutory limits which are imposed upon the power to direct accumulations. The first argument addressed to us was based upon the terms of subsect. (2) which operates to exclude from those restrictive provisions certain matters mentioned in the subsection. Accordingly, if counsel for the beneficiaries is right in his argument that this case falls under subsect. (2), the second question in the appeal, which arises under subsect. (1), does not fall for consideration. But, in my opinion, subsect. (2) has no application to the present case. That was the view of EVERSHED, J., and, in my opinion, he was perfectly right. The words of subsect. (2) on which counsel for the beneficiaries relies are these :

> This section does not extend to any provision . . . (ii) for raising portions for (*a*) any child, children or remoter issue of any grantor, settlor or testator.

That language has been criticised as not being very clear, but it has to a certain extent been clarified by judicial decision. The section does not say : " Any provision for the benefit of any child." Something more must be found before the exception operates. The provision must be one " for raising portions." The phrase " raising portions " is a technical phrase in conveyancing. A more accurate way to express the intention of the legislature might possibly have been to use the phrase " for creating portions."

Counsel for the beneficiaries says that the phrase really means : " A provision for creating a fund available for portions." In other words, if you find that the object of the accumulation is to create a fund which it will be possible for somebody to use for portions, or to apply for portions, that brings the exception into operation. Applying it to the present case, he says : Here is a fund raised by means of accumulations. It is possible for the trustees to apply that fund as a portion by exercising the power to hand over £500 out of that fund to a grandchild under cl. 1 (4) of the settlement. When the ultimate distribution is regarded (he says) this income fund could be paid to a child who was given by the trustees no interest in the capital fund.

It has been settled quite clearly that the phrase " raising portions " does not cover the case where all that is done is to treat accumulations as, and deal with them as, an addition to capital. Indeed, if that were what the phrase meant, any accumulation for the benefit of children would have fallen within the exception. The authorities come to this : that accumulations do not fall within this language unless they are themselves, as separate items, used for the purpose of portions. This must not be merely by way of addition to a capital gift.

To my mind, the point comes down to a narrow one : Is counsel for the beneficiaries right in treating as included in this exception any provision available for portions if the person given the necessary power chooses to make them available ? That is the position here. As I have just pointed out, the trustees could, if they chose, direct this income fund in such a way that the entirety of it would go to a beneficiary taking no interest at all in capital. If the settlement itself had so directed, I apprehend that that would have been a portion because it would not have been a mere addition to capital. On the other hand, it is perfectly possible for the trustees, in their discretion, to hand over the whole of the income fund and the whole of the capital fund to the same person. If the settlement itself had so provided, such a provision in the settlement, according to the authorities, would not have been a provision for raising portions. Similarly, the trustees could have divided it up into sevenths, giving to each a portion of the capital fund, and a portion of the income fund. That again would not have been raising portions. Where the settlement merely makes it possible to take any of these courses, and merely gives a power to deal with the accumulations so that the result could be described as a portion, it does not, in my opinion, satisfy the section. You cannot predicate of the provision in the settlement that it is a provision for " raising portions " when whether it is so used depends entirely on the discretion of some third person, who may use it in that way or who may not.

That brings me back to the argument of counsel for the beneficiaries about the paramount intention. He argued that the paramount intention was to create portions. I cannot find any paramount intention of that character in this deed. He said that, in regard to the £500, the paramount intention was to give £500 to each grandchild on attaining 23. The trustees, however, merely had a power to do that. The settlement, far from manifesting an intention that that was to be paramount, in my opinion, manifested exactly the opposite, because the settlor was in fact saying : " I am not going to decide what is the best thing to do in the future. I am unable to lay down any rules, but I leave it entirely to my trustees to decide what is the best thing to do." Counsel for the Crown also pointed out that the £500 only falls to be given out of the income fund in company with the grandchild's one-seventh share of the capital fund. I do not pursue that view because there is a little complication in it, and it does not follow that the £500 would be equal to, or would be more or less than, the share of the income fund attributable to the £1,000. I do not think it necessary to go into that because, as I construe subsect. (2) of the Law of Property Act, 1925, s. 164, the provision here is not a provision for " raising portions," for the reason that the document must be construed at its date, and it is not possible to say of the provisions therein contained anything more than that they may or may not be used for raising portions, according as the trustees at some future date in their absolute discretion decide.

I might perhaps add this. Sect. 164 (1) lays down the policy of the legislature which came into existence as a result of the well known and surprising *Thellusson* case (1). Subsect. (2) is an exception to that matter of policy. In my opinion, its scope is quite definitely limited to transactions in respect of which it is possible to assert from their very nature that they possess the specified quality. The first of the provisions which are excepted is the provision :

> . . . for payment of the debts of any grantor, settlor, testator or other person.

If counsel for the beneficiaries is right, it would, apparently, follow that a provision which might or might not be used for the payment of such debts at the discretion of some third person, a trustee or somebody else, would fall within the exception. As the debts mentioned are the debts of any person, not merely of the testator, it would apparently be possible, on that basis, to direct, for a long period, a perfectly valid accumulation, which might or might not be applied for the payment of the debts of some heavily indebted stranger, according to the discretion of the trustees or some third person. That surely cannot be right. It must be possible, in a case which is alleged to come under the exception, to state of the provision that, from its nature, it is a provision for payment of debts, *viz.*, one which must be applied for that purpose. Similarly, it seems to me that a provision for " raising portions " means a provision which, on the true construction of the document, must be applied to that purpose. It does not include one which may be applied for a different purpose altogether.

The next controversy arises on the Law of Property Act, 1925, s. 164 (1), which lays down four alternative periods for which an accumulation may validly be made. It has been decided, many years ago, that an accumulation which goes beyond whatever may be the appropriate period is not absolutely bad, but is only bad for the excess. The problem which the legislature has laid down for the court under sect. 164 (1) is to discover the period which is appropriate to the particular case. The first thing to do is to look at the date from which, according to the settlement, the accumulations were to begin. In the present case, they were to begin at once. Accordingly, para. (*b*) of sect. 164 (1) can be put out of the way altogether because it says :

> . . . a term of 21 years from the death of the grantor, settlor or testator.

That cannot possibly be appropriate to a settlement which directs the accumulations to begin, not at the death of the settlor, but immediately the settlement is executed. Similarly, para. (*c*) also disappears out of the picture. The controversy is between paras. (*a*) and (*d*) of sect. 164 (1).

It was held by Evershed, J., that the appropriate period was that in para. (*a*), *viz.*, " the life of the grantor or settlor." Counsel for the beneficiaries argues that the appropriate provision is para. (*d*) :

> . . . the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would for the time being, if of full age, be entitled to the income directed to be accumulated.

He says that that is the appropriate period because it is possible to fit in the whole of the provisions of this deed so as to be consistent with the language of that paragraph. Evershed, J., rejected that view and held that the life of the grantor or settlor, being the only period then left, must be taken as the proper period. It follows from that, of course, that the property passed on the death of the settlor under the Finance Act, 1894, s. 1.

Looking at para. (*d*) of the Law of Property Act, 1925, s. 164 (1), the first thing that strikes one is this. If the settlement alone be looked at, it is impossible, in my opinion, to say that any of these grandchildren, or anybody else, would, for the time being, if of full age, be entitled to the income directed to be accumulated. It is only when they attain 23 that they become entitled to it. But, more than that, no grandchild can say, according to the trusts of the settlement, that he is entitled to anything, because *non constat* that a grandchild will ever get anything under the exercise of the trustees' discretion. The whole of the fund may go to the great-grandchildren, for all one can tell. It seems to me, therefore, that the language is quite inapt, taken by itself, to cover the present case.

But counsel for the beneficiaries has raised an ingenious argument which, I think, was not in terms raised before Evershed, J. It is that the position is altered by reason of the Trustee Act, 1925, s. 31. That section enacted, with some amplification, what used to be common form clauses in an ordinary settlement. It provides :

> (1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property (i) during the infancy [the income may be applied for maintenance] . . . (ii) if such person on attaining the age of 21 years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsect. (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest.

Counsel for the beneficiaries says : " You have to approach this question by finding what would have happened if there had been no accumulations directed. If no accumulations had been directed, when the youngest grandchild had attained 21, the seven grandchildren together would have been in a position to say ' Pay the income to us '." He further says—and I am afraid I do not quite follow the reason for this—that the position must be examined without reference to any possible great-grandchildren. I am not quite sure why that should be so. But, disregarding great grandchildren for the moment, his difficulty appears to me to arise when we come to sect. 31 (3) which provides :

> This section applies in the case of a contingent interest [these interests were contingent] only if the limitation or trust carries the intermediate income of the property . . .

Counsel for the beneficiaries says that that requirement is satisfied in the present case because the trusts, looking at them as a whole, in relation to the income and in relation to the capital are the same, subject to this, that the trustees can send the funds in two quite different directions, if they please. That seems to me quite fatal to the argument. Unless you can say of the intermediate income that it is carried within the meaning of subsect. (3), that subsection takes the case out of the section altogether. How can it be said in this case that the trust carries the intermediate income of the property in any sense at all when the intermediate income, according to the trusts, may go to somebody totally different from the recipient of the capital, and may never go to any one of the seven grandchildren who, counsel for the beneficiaries says, are the only people we ought to consider for the purposes of this argument ?

The real position is that, at the moment when the youngest grandchild attains 21, it is impossible to say that the income is going to be carried to that grandchild, or to any other grandchild, or to all the seven grandchildren, because it may very well go to somebody totally different. In other words, the income may not follow the corpus. It seems to me that the phrase "carries the intermediate income" implies that the income follows the corpus. That is the connection in which, so far as I know, it is always used in speaking of legacies which do or do not carry intermediate income, and of contingent interests under which intermediate income may or may not be carried. Here you have the possiblility of a complete severance between capital and income. For that reason, it seems to me that the section does not apply.

I entirely agree both with the decision and the reasoning of EVERSHED, J., and this appeal must be dismissed.

MORTON, L.J.: I entirely agree. If I delivered a judgment, I should only be repeating in less felicitious language what has already been said by LORD GREENE, M.R.

TUCKER, L.J. I agree.

Appeal dismissed. Costs to be paid out of the settled property.

Solicitors: *Biddle, Thorne, Welsford & Barnes* (for the trustees and the beneficiaries); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-law.*]

tinguished. ANSELL *v.* MINISTER PENSIONS. [1948] 2 All E.R. 789.

SHIPP *v.* THE MINISTER OF PENSIONS
THE MINISTER OF PENSIONS *v.* PRETTY

[KING'S BENCH DIVISION (Denning, J.), January 29, 30, 1946.]

Royal Forces—Pension—Disability existing before or arising during war service aggravated by and remaining aggravated by war service—Appeal—Jurisdiction—Pensions Appeal Tribunals Act, 1943 (c. 39), *s.* 1, 5—*Royal Warrant concerning Retired Pay, Pensions, etc.*, 1943 (*Cmd.* 1943, No. 6489), *arts.* 2 (3), 4.

The appellant, Shipp, was discharged from the army on Dec. 5, 1940, on account of defective vision, which had admittedly originated in infancy. A claim to a pension, made on Dec. 4, 1940, was rejected by the Minister of Pensions. A further claim made on June 1, 1944, was also rejected by the Minister, and on this occasion an appeal was made to a Pensions Appeal Tribunal. The terms of reference were (*a*) whether the appellant's disability, defective vision, was attributable to war service, and, if not (*b*) whether it existed before or arose during war service and had been and remained aggravated thereby. The tribunal found as a fact that the disability had been aggravated by, and had remained aggravated by, war service until Dec. 1943, and allowed the appeal in respect of the earlier part of the period covered by the claim in respect of which the claim had been wrongly rejected by the Minister.

The respondent, Pretty, was discharged from the army on Sept. 28, 1943, the disease which led to his discharge being duodenal ulcer, which was not noted in the medical report made on him at the commencement of his war service. On Sept. 22, 1944, a Pensions Appeal Tribunal decided that the respondent's duodenal ulcer was not attributable to war service, but existed before or arose during war service and had been aggravated by such service, and, on Sept. 28, 1943, the date of the respondent's discharge, remained aggravated thereby. The Minister of Pensions thereupon awarded a pension to the respondent with effect from Sept. 29, 1943, to Sept. 21, 1944. The Minister refused to make any further award and the respondent again appealed to a Pensions Appeal Tribunal. The Tribunal was asked to decide whether the respondent's disability, duodenal ulcer, remained aggravated on Sept. 22, 1944, or any later date. The Tribunal decided that they had no jurisdiction to decide whether or not the respondent's disability remained aggravated on Sept. 22, 1944, or any later date. The appeals raised a question as to the true interpretation and application of the words of the Pensions Appeal Tribunals Act, 1943, s. 1, and art. 4 of the Royal Warrant concerning Retired Pay, Pensions, etc., of Dec. 4, 1943, with regard to cases where the disablement was due to disease which existed before or arose during war service " and has been and remains aggravated thereby " :—

Held : (i) on a true interpretation of the section and the article, the Minister, and on appeal, the Pensions Appeal Tribunal, could deal not only with existing disablement and aggravation, but also past disablement, and past aggravation.

(ii) in the case of the appellant, Shipp, having regard to the claim which was made in Dec., 1940, the only matter before the Minister and before the Tribunal was whether his bad eyesight was aggravated at that time by his war service, and the Tribunal ought not to have gone on to limit their award to any particular period ; the Tribunal had therefore exceeded its jurisdiction and the appeal should be allowed.

(iii) in the case of the respondent Pretty, the Tribunal were wrong in point of law in holding that they had no jurisdiction to deal with his claim that from Sept. 22, 1944, onwards his disease had been aggravated by war service ; they had jurisdiction to deal with it and the appeal should therefore be allowed.

[**EDITORIAL NOTE.** It is inequitable that a right to a pension should be lost because the aggravation of a disablement has ceased before the time for adjudication by the Minister. It is held, therefore, that the Minister has to that extent jurisdiction to adjudicate upon a past disablement or aggravation. An award once given extends into the future and may be the foundation of an appeal to the Pensions Appeal Tribunal against a decision of the Minister that the disablement has ceased.

For the Pensions Appeal Tribunal Act, 1943, s. 1, see HALSBURY'S STATUTES Vol. 36, p. 482.]

Appeals by way of case stated from the decisions of Pensions Appeals Tribunals the facts are sufficiently set out in the judgment.

Rt. Hon. H. U. Willink, K.C., and *H. V. Lloyd-Jones* for the appellant Shipp.

C. L. Henderson, K.C., and *Hon. H. L. Parker* for the Minister of Pensions.

G. H. Crispin for the respondent Pretty.

Denning, J. : These two cases raise a question as to the true interpretation and application of the words of sect. 1 of the Pensions Appeal Tribunals Act, 1943, and art. 4 of the Royal Warrant of Dec. 4, 1943, with regard to cases where the disablement is due to disease which existed before or arose during war service " and has been and remains aggravated thereby." A good deal of confusion seems to have arisen on the true interpretation of those words, particularly the words " and remains," and the case stated asks for a decision as to which of the various interpretations which are submitted are correct in law, or what other interpretation is correct ; and before I deal with the particular cases I shall endeavour to answer that question.

The aggravation of disease owing to war service may exist on a man's discharge from the army, but the aggravation may end before a claim is made ; or it may end after the claim is made, but before the Minister gives his decision certifying it or rejecting it. A literal interpretation of sect. 1 of the 1943 Act and art. 4 of the Royal Warrant appears to indicate that aggravation must remain at the date of the Minister's decision ; but that is an interpretation which I reject, because it cannot have been intended. It is a general principle that a man who makes a claim is not to be prejudiced by any delay of the adjudicating authority, and it is impossible to take the date of the Minister's decision as the material date. The suggestion has been made that it should be the date of the claim itself, so that the aggravation must remain at that date, but there is no justification for that suggestion in the language of the Warrant. It also produces injustice, because there is no reason why a man who may be delayed in making his claim should be deprived of his rights. The key to the right interpretation, in my view, is to be found in art. 2 (3) of the Royal Warrant, which says :

> Any condition or requirement laid down in this our warrant for an award, or the continuance of an award, shall, except where the context otherwise requires, be construed as a continuing condition or requirement.

It follows that the conditions or requirements in art. 4 are to be construed as continuing conditions or requirements, and " continuing " relates both to the past and to the present. Art. 4 deals with what, no doubt, was considered to be the usual case, where the aggravation is in fact continuing at the time when the Minister gives his certificate. But, having regard to art. 2 (3), I think it must be applied in a continuing sense, by making it applicable, not only to existing disablement and existing aggravation, but also to past disablement and past aggravation. So, in my view, not only does it read, in relation to the present, as it stands,

> Provided it is certified that the disablement is due to a wound, injury or disease which (i) is attributable to war service; or (ii) existed before or arose during war service and has been and remains aggravated thereby.

But it also must be read in relation to the past, in this way:

> Provided it is certified that the disablement was due to a wound, injury or disease which (i) was attributable to war service; or (ii) existed before or arose during war service and had been and remained aggravated thereby.

That is, remained during the period of disablement.

I think the section must be read in the same way as the Warrant. It follows that not only existing disablement and aggravation can be dealt with by the Minister, and on appeal by the Tribunal, but also past disablement and past aggravation. The Minister cannot give a certificate as to future aggravation or future disablement, because it is not possible to deal in advance with that matter; but once a certificate of existing disablement and aggravation is given, an award can be made which will continue in the future. If the Minister should stop payment on the ground that aggravation has ceased, the man can make a fresh claim, saying that the aggravation remains, and, if it is rejected, he can appeal to the Tribunal.

So I find that it is possible on the wording of the Warrant and the Act for a certificate to be given in respect of a past period, as, for instance, where disablement is not claimed to be continuing, or where it is claimed to be continuing but found not to be so. The matter, of course, has to be dealt with in relation to the claim. Sect. 1 of the Act shows that the issue before the Minister is whether to grant or reject the "claim," and the issue before the Tribunal is whether the "claim" was rightly rejected. If a man puts in his claim at the time of his discharge, as in Shipp's case, saying that he is disabled, and that it is due to disease which existed before war service and has been and remains aggravated thereby at the date of his claim, which in his case was Dec. 4 or 5, 1940, then that is the matter to be determined, and upon which the Minister has to certify or reject, or on appeal the Tribunal has to decide; and in Shipp's case that was all the Minister or the Tribunal should have dealt with. If the claim had been only made by him in June of 1944, and made then for the first time, the man would probably have made his claim then that the disease had been aggravated by war service, and remained at that date aggravated by war service. If that was the matter before the Minister and before the Tribunal, a decision could be given as to whether it remained aggravated at that date, and if it had ceased, the proper period could be assessed in respect of which the aggravation had continued.

In Pretty's case the Tribunal on Sept. 22, 1944, determined that his disease had been aggravated by war service as on Sept. 28, 1943, the date of his discharge from the army; they did not determine anything as to any period, and the Minister eventually refused to pay any pension after Sept. 22, 1944, because he thought that the aggravation had passed away. The decision of the Tribunal was on Sept. 22, 1944. They had no jurisdiction to deal with the future, and, as I have said, they only dealt with the matter as at Sept. 28, 1943. But when the Minister, as from Sept. 22, 1944, declined to pay the pension, on the ground that the aggravation had ceased, Pretty made a fresh claim, on which he could require the Minister to adjudicate, and on appeal he could go again to the Tribunal. In that way the Tribunal had jurisdiction to determine whether the aggravation continued after Sept. 22, 1944.

It has been suggested in the course of argument that some of these appeals should be to a Tribunal constituted under sect. 5 of the Pensions Appeal Tribunals Act, 1943, when that section is brought into operation. But I would point out that there is a difference between the question of aggravation (which involves the question whether the aggravation is due to war service) and the question of disablement. Sect. 5 is only dealing with the question of disablement, which, as the definition in the Warrant shows, is really a medical matter; whereas aggravation by war service is not solely a medical matter, because it involves the question of causation. When the matter gives rise to any question whether a disease remains aggravated by war service, that is a matter in which the appeal is properly to a Tribunal under sect. 1 of the Act, and not under sect. 5. I visualise that most cases arising under sect. 5 would be cases where the man's disablement was not merely an aggravated disease, but a disease attributable to war service, and in such a case, when the question arose as to whether disablement had come to an end, it would not be a question of causation due to war service, but it would be a medical question, and that question would come under sect. 5 of the Act.

I think that covers the points which have been raised before me. My decision in Pretty's case is that I hold that the Tribunal were wrong in point of law in holding that they had no jurisdiction to deal with Pretty's claim that from Sept. 22, 1944, onwards his disease had been aggravated by war service. They had jurisdiction to deal with it, and I allow the appeal.

In Shipp's case I have already answered the question, saying what, in my view, is the correct interpretation of sect. 1 of the Act and of the Royal Warrant. On the facts of that case, having regard to the claim which was made by Shipp in Dec., 1940, the only matter before the Minister and before the Tribunal was whether his bad eyesight was aggravated at that time by his war service, and the Tribunal in the circumstances ought not to have gone on to limit their award to a particular period. That was not before them; and, indeed, it has been pointed out to me that the surgeon who gave an opinion on behalf of Shipp, did not deal with the period at all, he only dealt with the question of aggravation by war service. It would be contrary to justice to limit the period, when Shipp had no notice that that point was to be considered, and no opportunity of dealing with it. This means that the Tribunal exceeded its jurisdiction, and on that ground I allow the appeal.

Appeals allowed.

Solicitors: *Ranger, Burton & Frost* (for the appellant Shipp); *Culross & Co.* (for the respondent Pretty); *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

NOTE.

WOODS *v.* DUNCAN AND OTHERS

DUNCAN AND ANOTHER *v.* HAMBROOK AND OTHERS.

DUNCAN AND ANOTHER *v.* CAMMELL LAIRD & CO., LTD.

[House of Lords (Viscount Simon, Lord Russell of Killowen, Lord Macmillan, Lord Porter, Lord Simonds), February 27, 1946.]

The House of Lords allowed the appeal of Lieutenant Woods against the decision of the Court of Appeal, reported [1944] 2 All E.R. 159, on the ground that the negligence alleged against him had not been established. In all other respects the decision of the Court of Appeal was affirmed.

Rt. Hon. Sir Donald Somervell, K.C., and *Hon. H. L. Parker* for Lieutenant Woods and the personal representatives of Hambrook.

Sir Walter Monckton, K.C., *Geoffrey Hutchinson, K.C.*, and *E. Holroyd Pearce* for Duncan and Craven.

F. A. Sellers, K.C., and *H. I. Nelson, K.C.*, for Cammell Laird & Co., Ltd.

G. H. B. Streatfeild, K.C., and *Hon. H. Fletcher Moulton* for Wailes Dove Bitumastic, Ltd.

Solicitors: *Evill & Coleman* (for Duncan and Craven); *Carpenters*, agents for *Laces & Co.*, Liverpool (for Cammell Laird & Co., Ltd.); *Radford, Frankland & Mercer*, agents for *Maughan & Hall*, Newcastle-upon-Tyne (for Wailes Dove Bitumastic, Ltd.); *Treasury Solicitor* (for Lieutenant Woods and the personal representatives of Hambrook).

Re HERBERT, HERBERT *v.* BICESTER (LORD) AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), January 25, 29, 30, 31, 1946.]

Settlements—Settled land—Statutory powers of tenant for life—Limitation against exercise of powers—Bequest of fund upon trust to apply part of income, at trustee's discretion, for outgoings of real estate settled under same will—Income not so required to be paid to tenant for life of the settled land—Gift over of whole fund on sale of settled land—Settled land sold under statutory powers—Gift over of fund void—Tenant for life to continue to receive income—Settled Land Act, 1925 (*c.* 18), *s.* 106.

By his will the testator settled B. manor estate. He then gave to his trustees the sum of £50,000, defined as "the maintenance fund," upon trust to apply the income thereof as the trustees should think fit towards the payment of certain outgoings of B. manor estate and "to pay any part of the said income not in their opinion required for the aforesaid purpose" to the tenant for life. On the sale of B. manor house, or on the expiration of a period limited so as to avoid infringement of the rule against perpetuity (whichever should be the earlier date), the maintenance fund was to fall into the residue, which was disposed of under the will. The testator died in 1939. The tenant for life sold B. manor estate under the powers conferred on him by the Settled Land Act, 1925. The question to be determined was whether the income of the maintenance fund continued to be payable to the tenant for life, by reason of sect. 106 of the 1925 Act, or whether the fund had fallen into the testator's residuary estate according to the expressed intention of the testator that it should do so:—

HELD: since the provision tended to induce the tenant for life not to exercise his statutory power of sale, the Settled Land Act, 1925, s. 106, applied. The land having already been sold, the income of the fund would continue to be payable to the tenant for life during the remainder of his life.

Re Ames, Ames v. *Ames* (1) followed.

[**EDITORIAL NOTE.** The provisions of the Settled Land Act, 1925, s. 106, making void any disposition tending to induce the tenant for life to abstain from exercising his statutory powers, is difficult to construe, in view of the vagueness of the word "tending," which is not a term of art. VAISEY, J., finds that there is no distinction between the provision for the payment of any part of the income not in the opinion of the trustees "required" to pay outgoings, and the provision in *Re Ames* (1) for the payment of "surplus" and accordingly, following *Re Ames* (1), the whole of the income continues payable to the tenant for life, by virtue of sect. 106, in frustration of the intention of the testator.

It may be pointed out that in the headnote to *Re Ames* (1) the word "balance" is used, whereas in the will the word was "surplus." VAISEY, J., however, holds that there is no material difference in the two words.

AS TO PROHIBITION AGAINST EXERCISE OF STATUTORY POWERS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 697, 698, para. 976; and FOR CASES, see DIGEST, Vol. 40, pp. 743, 744, Nos. 2736-2752.]

Cases referred to:

*(1) *Re Ames, Ames* v. *Ames*, [1893] 2 Ch. 479; 40 Digest 744, *2746*; 62 L.J.Ch. 685; 68 L.T. 787.

*(2) *Re Smith, Grose-Smith* v. *Bridger*, [1899] 1 Ch. 331; 40 Digest 744, *2747*; 68 L.J.Ch. 198; 80 L.T. 218.

(3) *Re Patten, Westminster Bank* v. *Carlyon*, [1929] 2 Ch. 276; Digest Supp.; 98 L.J.Ch. 419; 141 L.T. 295.

(4) *Re Simpson, Clarke* v. *Simpson*, [1913] 1 Ch. 277; 40 Digest 752, *2819*; 82 L.J.Ch. 169; 108 L.T. 317.

ADJOURNED SUMMONS to determine whether, in the events which had happened, a provision in the will of Sir Sydney Herbert was void by reason of the Settled Land Act, 1925, s. 106. The facts and the relevant provisions of the will are fully set out in the judgment.

H. O. Danckwerts for the plaintiff, the tenant for life of the settled land.

Wilfrid Hunt for the tenant for life of the residuary estate.

J. A. Wolfe for the trustees.

VAISEY, J.: This case raises a question under the Settled Land Act, 1925, s. 106, which is, for all practical purposes, identical with the Settled Land Act, 1882, s. 51, so that the decisions of the court under the last-mentioned section are equally applicable to the section now in force. The testator, Sir Sidney Herbert, made his will on Dec. 8, 1938. By cl. 1 he appointed his cousin, Sir George Sidney Herbert, and Lord Bicester to be trustees for the purposes of the Settled Land Act, 1925. After making dispositions to which I need not refer, he gave to his trustees the Boyton Manor estate in the county of Wilts, which he defined by reference to the parishes in which that estate was situate, upon trust, in the first place, for Sir George Sidney Herbert, for life, with remainder to his sons, in tail male, with remainder upon trust for the plaintiff, the Hon. David Alexander Reginald Herbert, for life with divers remainders over. By cl. 12 of his will the testator gave to his trustees free of duty the sum of £50,000, which he defines as "the maintenance fund," to be held upon the following trusts: until the expiration of a period limited so as to avoid infringement of the rule against perpetuity, or until his house called Boyton Manor should be sold, whichever should be the earlier date, which date is called "the date of termination," upon trust first to apply such part of the income arising from the maintenance fund as his trustees should think fit towards the payment of certain outgoings of the Boyton Manor estate, with power to apply part of the capital of the maintenance fund for expenditure of a capital nature at their discretion. Then:

> . . . to pay any part of the said income not in their opinion required for the aforesaid purpose to the person for the time being having an interest in possession under the trusts declared in cl. 11 hereof [*i.e.*, the trusts affecting the Boyton Manor estate].

As from the date of termination, the maintenance fund was to fall into and form part of the testator's residuary estate. The residue was given upon trust for conversion and upon further trusts to pay the income to the defendant, Lord Bicester, for life with other provisions to take effect after his death.

The testator died on Mar. 22, 1939. His will was duly proved by Sir George Herbert and Lord Bicester. A vesting assent in favour of Sir George Sidney Herbert was duly executed, but he, the first tenant for life under the settlement, died without issue, never having been married, on Jan. 30, 1942. Thereupon the limitation in favour of the plaintiff took effect so that the plaintiff is now the tenant for life in possession of the estate. A vesting assent in his favour has been duly executed and the story concludes with the fact that the Boyton Manor estate has been sold by the plaintiff and is now represented by a sum of capital money.

The question which arises is now not exactly as stated in the summons because the sale had not been effected at the date of the issue of the summons. The question as it now presents itself is whether the Boyton Manor estate having now been sold by the plaintiff pursuant to the powers conferred on him under the Settled Land Act, 1925, the income of the maintenance fund mentioned in cl. 12 of the will continues to be payable to the plaintiff during the remainder of his life, or whether, on the contrary, the maintenance fund has fallen into the testator's residuary estate according to the expressed intention of the testator that it should do so. There is no question of construction so far as the will is concerned. There can be no doubt that, according to what the testator wished, now that the estate has been sold, the maintenance fund was intended and is expressly directed to fall into residue.

I have now to consider whether that intention has been frustrated and set aside by the terms of the Settled Land Act, 1925, s. 106. Sect. 106 provides:

> (1) If in a . . . will . . . a provision is inserted (*a*) purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life . . . to exercise any power under this Act . . . or (*b*) attempting, or tending, or intended by a limitation, gift, or disposition of . . . real or . . . personal property . . . to prohibit or prevent him [*i.e.*, the tenant for life] from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act. . . that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void. (2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any such power or right as aforesaid shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right, discharged from liability to determination or cesser by or on his exercising the same.

It will be observed that in this will all that is given to the tenant for life during the continuance of his ownership of the Boyton Manor estate is such part of the income as is not, in the opinion of the trustees, required for the purpose of discharging outgoings, and so forth, and it has been argued before me (and it is an argument to which, it seems to me, a good deal of weight ought to be attached) that as soon as the estate was sold there was no room for the exercise of any opinion by the trustees, and that, therefore, the direction to pay the income to the person for the time being interested in the estate in possession was something which could not, according to its terms, take effect. If the matter had been free from authority, and I were able to deal with it without regard to previous decisions of the court, I should, I think, have been considerably influenced by that consideration.

I was referred to certain decided cases, and in particular to *Re Ames*, *Ames* v. *Ames* (1). The headnote, so far as it relates to the point which now falls to me to decide, is not quite accurate:

> Personal estate was bequeathed on trust to apply the income in keeping up a sea wall and ornamental grounds on settled real estate and on trust to pay the balance of the income to the tenant for life of the real estate during lives in being and 21 years, with a proviso that, if the tenant for life should become disentitled to the possession or income of the real estate, the settled personal estate should sink into the residue.

It was held in that case by NORTH, J.:

> . . . that this proviso was void under the Settled Land Act, 1882, s. 51, and that the tenant for life who had sold the real estate was still entitled to the income of the personal estate.

The inaccuracy of the headnote consists in the reference to the word "balance" because the actual words of the will are these: first, there is the direction to apply income in keeping up the sea wall and other matters connected with the settled estate, walks, drives, orchards, woods, and so forth, and then there is a provision in these words:

> And if in any year during the continuance of the aforesaid trust (which trust I declare shall be deemed to commence from the period of my death), there shall be any surplus dividends unapplied to the purposes aforesaid or any of them, such surplus dividends shall at the expiration of every such year be paid to the person who under or by virtue of the trusts and provisions of my said will and this or any other codicil or codicils thereto shall for the time being be entitled to the possession or to the receipt of the rents and profits [of the settled property].

I am not sure that there is much difference between "balance" and "surplus", but each of those words presupposes a primary expenditure which is first to be brought into account before ever a balance or a surplus can be ascertained. While I think there is very little difference between "balance" in the headnote and "surplus," which appears in the words of the will itself, I am equally unable to see any real distinction between "balance," "surplus" and "any part of the . . . income not" in the opinion of the trustee "required." Each of those expressions seems to me to presuppose what I have called a primary expenditure, and yet in *Re Ames* (1) it was held by NORTH, J., whose decision I should only distinguish if I could see adequate grounds for it, that, notwithstanding any such consideration, sect. 51 of the Act of 1882, corresponding, as I have said, with sect. 106 of the Act of 1925, operated to frustrate the express intentions of the testator.

Another case which bears upon the point is *Re Smith, Grose-Smith* v. *Bridger* (2) which differed from *Re Ames* (1) chiefly in that the settlement of the personal estate, with the proviso for the determination of the trusts in the case of a sale, was effected through another instrument from that which effected the settlement of the estate. That having been done by the testator's will, it was his widow who attempted to put a veto on the sale.

Dealing with the matter as best I can, and with the somewhat strange words with which the section opens, I find myself obliged to decide whether this provision attempts or tends, or is intended, to have the deterrent effect which the section indicates. I am not sure that it attempts anything. I am not sure that it is intended to do so, and it may have been the testator's intention not so much to prevent a sale under the Act as to enable successive tenants for life to live in the settled mansion house, or, at any rate, to assist them to do so. But, in view of the decisions in *Re Ames* (1) and *Re Smith* (2) I cannot avoid coming to the conclusion that, whatever was intended by the words in question, it does tend to induce the tenant for life not to exercise his powers of sale under the

Act. I have tried to discover some other Act of Parliament in which the word "tend" or "tending" is to be found. There may be many such, but I have not succeeded in finding any. "Tending" is an extremely vague and an extremely wide word. Whatever other tendency the "disposition" may have had, in my judgment it does incline towards inducement to a tenant for life not to sell the property if, in his discretion, he thinks proper to do so. It may well be that the tenant for life would have sold in any event. It may be that this provision makes no difference to the decision which he would have reached. It may be that he never thought about it. But the tendency of the provision seems to me, in the light of the two cases which I have mentioned, to be a tendency inclining towards an inducement that the tenant for life should retain, and not sell, the settled property.

The decision of Romer, J., in *Re Patten, Westminster Bank* v. *Carlyon* (3) contains nothing which seems to me inconsistent with the conclusion at which I have arrived. There are numerous other decisions, including that of *Re Simpson, Clarke* v. *Simpson* (4), to which I do not propose specifically to refer.

The result is that, much as I should enjoy the mental exercise of attempting to distinguish this case from *Re Ames* (1) and *Re Smith* (2), I do not think that any such attempt on my part would be fruitful or justified, and that any distinction between this case and those cases would merely be to create confusion and uncertainty. I am therefore, in my judgment, bound to answer the question which has been put to me by declaring that, the Boyton Manor estate having now been sold pursuant to the powers conferred upon the plaintiff by the Settled Land Act, 1925, the income of the maintenance fund mentioned in cl. 12 of the will will continue to be payable to the plaintiff during the remainder of his life.

Declaration accordingly. Costs of all parties to be taxed as between solicitor and client paid out of the testator's residuary trust fund.

Solicitors: *Nicholl, Manisty, Few & Co.* (for the plaintiff and the trustees); *Slaughter & May* (for the tenant for life of the residuary estate).

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*]

MILLS & ROCKLEYS, LTD. *v.* LEICESTER CITY COUNCIL.

[King's Bench Division (Lord Goddard, L.C.J., Humphreys and Henn Collins, JJ.), January 28, 29, 1946.]

Town and Country Planning—Advertisements—Power of local authority to prohibit the use of a wall of dwelling-house for advertising purposes—"Structure"—Town and Country Planning Act, 1932 (c. 48), *s.* 47 (5), (8)—*Town and Country Planning* (*Interim Development*) *Act,* 1943 (c. 29), *ss.* 5, 15 *Sched.* I.

The appellants, a firm of advertising contractors, were the owners of a dwelling-house and they proposed to use the exterior wall of the house for the display of pictorial advertisements. The house was within the area which, under a scheme to be prepared under the Town Planning Acts, 1932-1943, was to be protected in respect of advertisements. The respondents, as the interim development authority, served the appellants with a notice, under the Town and Country Planning (Interim) Development Act, 1943, s. 5, of their intention to make an order prohibiting the use of the exterior wall of the house for the purposes of advertising. On appeal to a court of summary jurisdiction, the justices held that the respondents were entitled to take the proposed action. From this decision a case was stated for the opinion of the High Court at the request of the appellants:—

Held: sect. 5 of the 1943 Act must be read subject to the provisions of sect. 47 (8) of the 1932 Act, which did not empower a local authority to prohibit or control in advance a prospective advertisement or the use of a building for its display. The appellants were therefore entitled to the relief asked for and the notice served by the respondents must be set aside.

Per Lord Goddard, L.C.J., "Structure" means something which is constructed, and therefore includes a wall.

[**EDITORIAL NOTE.** Under the Town and Country Planning Act, 1932, a local authority may serve notice requiring the removal of unsightly advertisements set up in an area to which a scheme applies. They may not, however, forbid the erection of structures for the purpose of advertising, which appears to enjoy a very advantageous position under the Act. In view of this express prohibition an authority cannot pray in aid sect. 5 of the Town and Country Planning (Interim Development) Act, 1943, to restrain the use of a structure for advertising, since an interim scheme under that Act may not include something expressly prohibited by the principal Act. The purpose of sect. 5 is to enable a local authority to restrain the use of land, while a scheme is being prepared, in a manner which will be contrary to the provisions of the scheme when made.

As to Advertisements, see HALSBURY, Hailsham Edn., Vol. 32, pp. 238-240, paras. 356-361 ; and for Cases, see DIGEST, Vol. 38, pp. 178, 179, Nos. 201-204.]

Special Case stated by the justices for the city of Leicester under the Summary Jurisdiction Acts, 1857-1879. The facts are fully set out in the judgment of Lord Goddard, L.C.J.

A. M. Lyons, K.C., and *J. P. Stimson* for the appellants.

Roger Willis for the respondents.

Lord Goddard, L.C.J. : This is a special case stated by the justices of the city of Leicester in a proceeding taken under the First Schedule to the Town and Country Planning (Interim Development) Act, 1943. The matter arises in this way. On Nov. 29, 1944, the town clerk of Leicester served upon the appellants, who were the owners of a dwelling-house known as No. 320 Narborough Road in the city of Leicester, a notice which stated that

> . . . the interim development authority do hereby prohibit the following development, namely, the use of the exterior wall facing towards Haddenham Road of the dwelling-house known as No. 320 Narborough Road, Leicester, for advertising purposes.

The notice went on to state

> . . . the grounds on which the said authority propose to make this order are as follows : 1. That a resolution to prepare a scheme under the Town and Country Planning Act, 1932, is in force with respect to an area within which the said dwelling-house is situate. 2. That the said development began to be carried out after July 22, 1943 [which was the date when the 1943 Act came into operation]. 3. That the said development is not in accordance with the terms of the interim development order. 4. That no permission has been given under the said order for such development. 5. That the Leicester City Council acting as aforesaid are satisfied that it is necessary and expedient to make the said order having regard to the provisions proposed to be included in the said scheme [those seem to me to be very material words] namely, that the said area within which the said dwelling-house is situate shall be specified in the said scheme as land to be protected under the Town and Country Planning Act, 1932, in respect of advertisements.

In other words, the council gave notice to the tenant and the owners of the house that in the interim scheme which they were preparing they were proposing to prohibit the use of this house, or the wall of this house, for the purposes of advertising. There is no question but that the appellants in this case, Mills and Rockleys, Ltd., intended to use and had begun to prepare the exterior wall of this house for the purpose of an advertising station.

The First Schedule to the 1943 Act provides :

> 2. If any person served with such a notice aforesaid desires to dispute any allegation contained therein, he may, by written notice served on the clerk of the court and on the interim development authority within twenty-eight days from the date of the service . . . appeal to a court of summary jurisdiction . . . and the interim development authority shall not take the proposed action pending the final determination or withdrawal of the appeal. 3. If on any such appeal the court of summary jurisdiction are satisfied that the interim development authority are entitled to take the proposed action on the grounds specified in the notice, they shall dismiss the appeal and shall by their order empower the authority after the expiration of the said period of twenty-eight days, to remove or pull down the building or work, or to execute the required alterations or works or, as the case may be, shall by their order prohibit the building or land from being used after the period aforesaid without the permission of the authority or in contravention of any conditions subject to which that permission was granted, but, if they are not so satisfied, they shall allow the appeal . . .

In other words, the paragraph of the Schedule in effect gives a court of summary jurisdiction a power to grant an injunction against the carrying out of the proposed works which are stated to be in contravention of, or not in accordance with, the interim scheme which has been prepared, and may prohibit the further continuance of those works. The appellants took these proceedings because they wished to challenge the authority of the city council, as the interim development authority, to prohibit them from using this wall as an advertising station.

The Town and Country Planning (Interim Development) Act, 1943, s. 15, provides that that Act " and the principal Act " [which is the Town and Country Planning Act, 1932] " may be cited together as the Town and Country Planning Acts, 1932 and 1943." It does not say in so many words that they are to be read together, but they are to be cited together, and the 1932 Act is " the principal Act." One has to see, in the first place, whether any provisions of the principal Act are repealed or amended by the 1943 Act, and certain provisions of the principal Act are repealed by sect. 2 of the 1943 Act ; but sect. 47 of the 1932 Act is not, so far as I can see, or as has been pointed out to the court, affected in any way by the 1943 Act. Section 47 of the 1932 Act deals with the powers of a town and country planning authority with respect to advertisements, and by sect. 47 (1) it is provided that

> Where it appears to the responsible authority that an advertisement displayed or a hoarding set up in the area to which a scheme applies seriously injures the amenity of land specified in the scheme as land to be protected under this Act in respect of advertisements, the authority may serve . . . upon the owner of the advertisement . . . a notice requiring him to remove it . . .

I may say here that there is no provision in the Act, so far as the court is aware, dealing expressly with the inclusion in a scheme of provisions with regard to advertisements, but the Act is wide enough, I think, to make it clear that a local authority can say, in preparing a scheme, that a certain part of their district, or the whole of it, is to be protected with regard to advertisements. In other words it gives them the power to take proceedings and exercise the powers which are given by sect. 47 in regard to advertisements which are unsightly or unsuitable in any part of the district which they like to specify.

There is no question raised here but that Narborough Road, Leicester, is a district which has been protected so far as advertisements are concerned. Sect. 47 (1) as I have just said, provides that if an advertisement which can be objected to on what I may call aesthetic grounds, or affecting the amenities of the district, is put up, the local authority can require that it shall be taken down, and, by other provisions in the section, if the owner does not take it down they can go to the court and get an order, and then the expenses of taking down the advertisement have to be paid by the person who ought to have taken it down. Sect. 47 (5) provides that

> Where a scheme specifies any land in the area to which the scheme applies as land to be protected under this Act in respect of advertisements, the scheme may contain provisions enabling the responsible authority subject to such conditions as may be specified in the scheme to authorise the display of any particular class of advertisements, either unconditionally or subject to any conditions in respect of the position or manner in which, or the period during which, the advertisements may be displayed, and conferring upon any person aggrieved by a decision of the responsible authority in relation to such authorisation as aforesaid a right of appeal to a court of summary jurisdiction.

That is a subsection which enables the authority to authorise advertisements, subject to conditions. It is impossible to read that subsection as authorising the local authority to prohibit advertisements, which is the very antithesis of authorising advertisements.

Then in sect. 47 (8) one finds it is provided that

> Save as provided by this section, [that is to say, saving the rights of the authority to object to a particular advertisement once it is up] a scheme shall not contain any provision prohibiting or controlling the erection or use of structures for the purpose of advertising . . .

Those words seem to me as clear as any words can be—that Parliament has chosen to put advertising space or sites in a peculiarly favourable position, and it has said that a scheme which a town planning authority prepares is not to interfere with the use of structures for the purpose of advertising or advertising stations. That is no doubt a very valuable privilege which is given to advertising, but Parliament has seen fit to insert that, for good reasons, and it may be that they considered sufficient protection was given to the neighbourhood by the powers of the local authority to object to particular advertisements when they were put up and also by their power to impose certain conditions with regard to the use of advertising stations. Except for the provisions which are contained in the earlier subsection, it is perfectly clear that the scheme must not contain a provision which prohibits or controls, otherwise than is provided in the section, the erection or use of structures for the purpose of advertising. That is just exactly what the interim scheme in this case does: it prohibits the use of this particular wall as an advertising station.

When I turn to the 1943 Act, I can find nothing in that Act which refers to this sect. 47 or cuts down or limits the emphatic prohibition which sect. 47 (8) contains. Sect. 5 of the 1943 Act in effect says this, that where an interim order is made, and the authority are preparing a scheme (which will afterwards have to be submitted to the Minister and approved by him before it becomes finally binding) no one shall carry out development of land and put land to a particular use in a manner which will be contrary to the provisions of that scheme. In other words, "Prevention is better than cure." Where the local authority is getting out a scheme, they are not going to have, says Parliament, builders and owners of property developing their land contrary to the ideas that are contained in that scheme merely because the scheme has not yet been finally approved; because if the scheme is finally approved you would have the state of affairs that while it has been under discussion development has been going on in a manner contrary to the ideas and so forth which are contained in the scheme which it is expected or hoped will be approved. Part of sect. 5 enables the authority "where the development consists of any use of the land or any building thereon, by order" to "prohibit that use, and, where necessary, reinstate the land," which is what has been done here: they have prohibited the use of this land, or this wall, for advertising purposes. But there is nothing in sect. 5 of the 1943 Act which affects sect. 47 of the 1932 Act, and accordingly it follows that, with regard to any interim scheme which the local authority or the town planning authority may prepare and which will be an interim scheme under the 1943 Act, it is quite clear that that scheme must not "contain any provision prohibiting or controlling the erection or use of structures for the purpose of advertising." It is useless to inquire why that special protection is given to advertising; the statute clearly does give it; and of course if the scheme does prohibit something which the statute says shall not be prohibited, it follows that the owner has a right to complain to the court and say "I ask you to set aside this order and to declare that the town planning authority cannot impose this term upon me."

The order of the magistrates in this case has, it seems to me, not given effect to sect. 47 (8) because they have in terms prohibited the owners of this property from using it as an advertising station, in spite, as I say, of the clear provisions of this section. Counsel for the respondents, who has put the matter as clearly as it can be put, has really had to base his argument mainly upon the use of the word "structure" in the subsection, and he says that that does not apply to the wall of a house. I am bound to say that I cannot understand that argument. A "building," by the definition section of the Act, includes a "structure," and therefore things which would not ordinarily be called "buildings" are included in that term where the word "building" is found in the Act. But to say that a wall is not a "structure" seems to me to be really impossible. "Structure" means something which is constructed. It is not everything that is "constructed" that would ordinarily be called a "building," but every building is a "structure." I can see no ground for saying that the use of a wall, is not the use of a structure and therefore it can be prohibited as an advertising station under the Act.

I called attention, in the course of the argument, to another prohibition which is contained in the 1932 Act, that is to say sect. 12 (3), which prevents a scheme applying to agricultural land. So that there, at any rate, are two things which the Act says are not to be included in the scheme at all—agricultural land and advertising stations. Therefore it follows that if a scheme does include in it provisions regarding agricultural land or advertising stations, so far as that is concerned the scheme is bad and cannot be enforced.

For these reasons, in my opinion, the justices came to an incorrect conclusion, and this appeal must be allowed. It follows that the relief asked for in the complaint filed before the justices must be granted, and that the notice (I think this is the right order to make) of Nov. 29, 1944, served by the respondents on the appellants, must be set aside. The justices tell us that their decision was "that the respondents were entitled to take the proposed action," and we hold that the respondents were not entitled to take the proposed action.

Humphreys, J.: I agree that the appeal should be allowed, and the order referred to in the case, an order prohibiting the use of the exterior wall for advertising purposes, set aside. I do not desire to add anything to the judgment of Lord Goddard, L.C.J., with which I entirely agree.

Henn Collins, J.: I agree. I think the first and the fundamental question is whether the 1943 Act has enlarged the ambit of schemes, or the powers to make schemes in respect of advertisements, beyond the provisions of the principal Act of 1932. The 1943 Act provides, by the interpretation section, sect. 14 (3), in these terms:

> Any reference in this Act to the principal Act . . . [that is, the Act of 1932] shall . . . be construed as a reference to that Act . . . as amended by . . . this Act.

There is no express amendment, such as in regard to advertisements, in the 1943 Act of the 1932 Act, and therefore *prima facie* when they are to be read together, the governing Act is the principal Act. Sect. 5 (1) of the 1943 Act is that under which the resolution of the order complained of purported to have been made, and that provides that

> If while a resolution to prepare or adopt a scheme under the principal Act is in force with respect to any area, any development of land within that area is carried out after the commencement of this Act otherwise than in accordance with the terms of the interim development order or of permission granted under that order, then, subject to the provisions of this section, the interim development authority may, if they are satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the scheme . . . (*b*) where the development consists of any use of the land . . . by order prohibit that use . . .

The controlling words of that section lie, it seems to me, in the latter part of sub-sect. 1, that the authority "may if they are satisfied that it is necessary or expedient so to do having regard to the provisions then proposed to be included in the scheme," because one cannot conceive that they could find it "necessary or expedient" to include in the scheme anything which they had no power to include. That therefore throws one back on the principal Act, and one has to ascertain whether, under the principal Act, they could make an order prohibiting the use of the side of the dwelling-house for the purposes of an advertisement.

The principal Act, by sect. 11, specifies certain things which must be contained in a scheme; by sect. 12, certain things that may be included; and there is, for our purposes, a provision in sect. 47 (8) as to a particular matter which shall not be included in a scheme, and the section is in these terms:

> Save as provided by this section, a scheme shall not contain any provision prohibiting or controlling the erection or use of structures for the purpose of advertising . . .

Reading those two Acts together, and stopping there for a moment, it is quite clear that an order prohibiting the use of this particular side of this dwelling-house for the purposes of an advertisement could form no part of the scheme, under the principal Act. Counsel for the respondents was driven back to saying that this, though a hoarding, was not a "structure" within the meaning of the Act, but that view does not commend itself to my mind. I think it is quite clear that under the principal Act no such order as has been made could have been made, and that the principal Act is dominant, with respect to the ambit of a scheme, subject to any amendment which the later Act has provided. But no amendment has been made in respect of advertisements.

Appeal allowed with costs here and in the court below.

Solicitors: *Field, Roscoe & Co.*, agents for *Stone & Co.*, Leicester (for the appellants); *Field, Roscoe & Co.*, agents for *L. J. McEvoy*, Town Clerk, Leicester (for the respondents).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

FITZSIMONS *v.* FORD MOTOR CO., LTD. (AERO ENGINES)

[COURT OF APPEAL (Scott and Somervell, L.JJ., and Vaisey, J.), February 6, 22, 1946.]

Workmen's Compensation—Accident—Disease as injury caused by accident—Succession of accidental injuries—Cumulative effect—Vibrations caused by rapidly rotating instrument—"Raynaud's disease."

Judgments—Judicial decisions as authorities—Decision of Court of Appeal inconsistent with the decision of House of Lords.

The appellant was employed by the respondents, from Sept., 1943, as a rotary fettler. His work consisted in holding, tightly gripped in the left hand, a hand machine, which was electrically operated and vibrated 2,800 revolutions a minute, whilst with his right hand he pressed it against the material to be cut, using the weight of his body to increase the pressure, After about a year the appellant found his hand going dead. On the morning of Mar. 14, 1945, he got a "dead hand" 3 times, and from that time was incapacitated, totally until June 18, 1945, and thereafter partially. Medical evidence was to the effect that the appellant's condition was known as "Raynaud's disease," and that each vibration caused by the rapidly rotating instrument was a tiny blow to the appellant's hand and arm, transmitted to the nerves, causing small damage to their tissues, and ultimately cutting off the flow of blood needed to keep the hand in a healthy condition. In an action for compensation under the Workmen's Compensation Act, 1925, the county court judge held that to constitute an injury by accident within the Act the workman must be suddenly and decisively attacked at his work, and that the gradual ruining of the appellant's blood vessels did not bring him within the Act. On appeal the respondents relied on decisions of the Court of Appeal which were inconsistent with decisions of the House of Lords:—

HELD: (i) the use of the instrument involved a succession of accidental injuries to the appellant and he was entitled to an award.

Burrell (Charles) & Sons, Ltd. v. *Selvage* (3) *followed.*

(ii) it was the duty of the Court of Appeal to refuse to follow decisions of its own which were inconsistent with decisions of the House of Lords.

[**EDITORIAL NOTE.** It is held that decisions of the Court of Appeal that an injury caused by the cumulative effect of a succession of accidents is not an injury by accident are inconsistent with the decision of the House of Lords in *Burrell* v. *Selvage* (3), which the court accordingly follows in preference to its own earlier decisions, in accordance with the principles recently recapitulated in *Young* v. *Bristol Aeroplane Co.* ([1944] 2 All E.R. 293).

AS TO DISEASE AS INJURY BY ACCIDENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 819-821, para. 1157; and FOR CASES, see DIGEST, Vol. 34, pp. 271-273, Nos. 2302-2310.]

Cases referred to:

*(1) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230; 34 Digest 464, *3799*; 74 L.J.K.B. 474; 92 L.T. 578; 7 B.W.C.C. 1, H.L.; *affg., S.T. sub nom. Higgins* v. *Campbell & Harrison, Ltd., Turvey* v. *Brintons, Ltd.*, [1904] 1 K.B. 328, C.A.

*(2) *Innes (or Grant)* v. *Kynoch*, [1919] A.C. 765; 34 Digest 272, *2308*; 88 L.J.P.C. 85; 121 L.T. 39; 12 B.W.C.C. 78.

*(3) *Burrell (Charles) & Sons, Ltd.* v. *Selvage* (1921), 90 L.J.K.B. 1340; 34 Digest 272, *2309*; 126 L.T. 49; 14 B.W.C.C. 158, H.L.; *affg.*, S.C. *sub nom. Selvage* v. *Burrell (Charles) & Sons, Ltd.*, [1921] 1 K.B. 355, C.A.

*(4) *Steel* v. *Cammell, Laird & Co., Ltd.*, [1905] 2 K.B. 232; 34 Digest 271, *2302*; 74 L.J.K.B. 610; 93 L.T. 357; 7 B.W.C.C. 9.

*(5) *Williams* v. *Guest, Keen & Nettlefolds*, [1926] 1 K.B. 497; 34 Digest 272, *2310*; 95 L.J.K.B. 676; 134 L.T. 459; 18 B.W.C.C. 535.

*(6) *Cole* v. *London & North Eastern Ry. Co.* (1928), 21 B.W.C.C. 87; Digest Supp.

APPEAL by the applicant from an award of His Honour JUDGE FRASER HARRISON made at the Salford County Court and dated Oct. 26, 1945.

F. W. Beney, K.C., and *H. Burton* for the appellant.

F. E. Pritchard, K.C., and *J. S. R. Abdela* for the respondents.

Cur. adv. vult.

SCOTT, L.J. [delivering the judgment of the court]: This is an appeal by the workman from a judgment of His Honour JUDGE FRASER HARRISON who held that the injuries to his left hand suffered by him in the employment of the respondents were not caused by accident. In our opinion there was no evidence to support that finding. The workman had been employed by the respondents from about Sept., 1943, as a rotary fettler. His work consisted in holding a hand machine, tightly gripped in the left hand, which was electrically operated and vibrated at 2,800 revolutions a minute, whilst with his right hand he pressed it against the material to be cut, using the weight of his body to increase that pressure. After about a year the workman began to find the tips of the fingers of the left hand going dead in the morning. He showed it twice A to the respondents' doctor but was told it was not a "dead hand," and each time he returned to work. Finally, on Mar. 14, 1945, he got a note from his own doctor, and on Mar. 15 took it to the respondents' doctor, after trying to work that morning and 3 times getting a "dead hand." From that time on he was incapacitated, totally until June 18, 1945, and thereafter partially. The only question before the judge was whether it was an injury "by accident."

The doctor called for the workman examined him in June, 1945, and gave evidence that his condition was known medically as "Raynaud's disease," caused partly by loss of blood in the tissues which caused the hand to go white, and partly by loss of blood in the nerves causing spasm or cramp in the blood vessels, damaging them and so constricting the flow of blood. The first cause, he said, is an upsetting of the balance of nervous control of the blood vessels, due to the tight grasping of a rapidly rotating instrument. Every time the tool is used the condition gets worse. It is the vibrations which cause the condition of the nervous system and not the vibrations acting on already diseased nerves. From the medical point of view the accident occurs when the workman uses the tool and the change takes place inside the limb. Every time he has to do the work the disease gets worse. The doctor would not have considered it unreasonable if the workman had given up work in Dec., 1944.

The facts are thus quite clear and undisputed. The judge accepted them as we have stated them, but held that to constitute an injury by accident within the Act the workman must be "suddenly and decisively attacked at his work," and in effect that the gradual ruining of his blood vessels did not bring him within the Act. In our opinion he was wrong in so holding. Each vibration caused by the rapidly rotating instrument was, as it were, an infinitesimal blow to the man's hand and arm, transmitted to the nerves, causing an infinitely small damage to their tissues, and in the end cutting off the flow of blood needed to keep the hand in a healthy condition. Some men may have better powers of resistance to such attacks than others, but the mere fact that the breakdown does not occur until the cumulative effect of the tiny blows from the vibrations produces a certain degree of alteration in the nerves does not affect the character of the cause.

In *Brintons, Ltd.* v. *Turvey* (1), decided under the Act of 1897, and in *Grant* v. *Kynoch* (2), it was held that diseases caused by germs entering the body may be accidents within the Acts. In these cases there was a particular time, ascertainable or not, when the infection entered and the disease started. Does the fact that the disease or condition causing the disability is gradual in its onset and is the result of the cumulative effect of successive occurrences prevent its being accidental ? In our opinion it does not. In *Burrell* v. *Selvage* (3) a girl worker was over a long period of time getting slight cuts, which gradually caused poisoning. LORD STERNDALE, M.R., said ([1921] 1 K.B. 355, at p. 365) :

> I cannot see that the fact that the condition results from several accidents prevents it from resulting from accident within the meaning of the statute.

That view was upheld in the House of Lords. LORD BUCKMASTER said (14 B.W.C.C. 158, at p. 161) :

> It has been decided by your Lordship's house in the case of *Grant* v. *Kynoch* (2), and also in *Brintons, Ltd.* v. *Turvey* (1) that disease arising out of and in the course of an employment may in certain circumstances be regarded as an accident within the meaning of the statute, and be made the proper subject-matter of a claim for compensation. In the present case there is no dispute that the disease from which the respondent suffered is a disease which distinctly arose out of the injuries that she received while in the course of her employment, and it cannot be disputed that her cut and abrased fingers were on each occasion what would be called an accident within the meaning of the statute. The only question, therefore, for consideration is whether, when the disease is due not to one specific and definite accident but to a series of

> accidents, each one of which is specific and ascertainable though its actual influence on the resulting illness cannot be precisely fixed the workman is disentitled to the benefit of the statute. My Lords, I cannot find any words in the statute which permit of such a construction. In the present case personal injury was suffered, it was suffered by accident, and the accident is no less accidental because it occurred on a series of occasions instead of on one; it follows that the claim to compensation was properly established. I have only to add that I find that this opinion is in exact agreement with the line of reasoning adopted by the learned county court judge and the Court of Appeal, and, having regard to the fulness of the judgment of that court, in the terms of which I entirely agree, there is nothing further that I desire to add. The other noble Lords concurred.

The respondents relied chiefly on *Steel* v. *Cammell Laird* (4). In that case a worker using white and red lead, with which to smear rope-yarn for caulking, gradually became poisoned by getting it into his system. The Court of Appeal held that there was no injury by accident, and as one reason for that conclusion pointed out that if a gradual process could be an accident the workman would never know when to give notice of his claim. That ground is not, in our view, consistent with the decisions of the House of Lords. In *Williams* v. *Guest Keen* (5) the court merely followed *Steel's* case (4); and in *Cole* v. *London & North Eastern Ry. Co.* (6), it merely followed *Williams* v. *Guest Keen* (5), ATKIN, L.J., saying (21 B.W.C.C. 87, at p. 94):

> If we were not bound by authority, I think there is a great deal which might be said for this workman.

In this state of the authorities we think it is our duty to follow *Burrell* v. *Selvage* (3) and hold that the use of the drill involved a succession of accidental injuries to the workman and that he is entitled to an award.

Appeal allowed with costs.

Solicitors: *Rowley, Ashworth & Co.*, agents for *Rowley, Ashworth & Co.*, Manchester (for the appellant); *John Whittle Robinson & Bailey*, Manchester (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILSON *v.* CHATTERTON.

[COURT OF APPEAL (Scott and Somervell, L.JJ., and Vaisey, J.), February 7, 8, 28, 1946.]

Workmen's Compensation—Accident—Epileptic drowned—No danger to normal healthy person—Disease not sole cause of death—Construction of statutes—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1).

Judgments—Judicial decisions as authorities—Previous decisions of Court of Appeal inconsistent with general principles laid down by House of Lords.

A workman, a known epileptic, while working in his employer's field, fell face downwards, in a fit, at a place where there was a rut half filled with water and was drowned. Death was due to asphyxia. The place at which he was working was dangerous to him, though there would have been no danger to a normally healthy person. The county court judge made his award, under the Workmen's Compensation Act, 1925, in favour of the employer, holding that on the facts as found by him the case was covered by *Lander* v. *British United Shoe Machinery Co., Ltd.* (1):—

HELD: (i) *Lander's* case (1) was inconsistent with the general principles laid down by the House of Lords and with other decisions of the Court of Appeal, and the court was therefore, in accordance with *Young* v. *Bristol Aeroplane Co., Ltd.* (5), bound to refuse to follow it.

(ii) unless a weakness or illness was the sole cause of an accidental injury to, or death of, a workman, the employer was liable.

(iii) the natural meaning of the positive words in the opening lines of the Workmen's Compensation Act, 1925, s. 1 (1), entitled the workman to judgment, and there were no sufficient grounds for implying the exception upon which the judgment in *Lander's* case (1) and the judgment in favour of the employer alike rested.

Lander v. *British United Shoe Machinery Co., Ltd.* (1) *not followed.*

[**EDITORIAL NOTE.** The real basis of the workmen's compensation legislation is formulated in sect. 1 (1) of the Act of 1925, which commences : " If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . ." In a sense this makes the employer an insurer, and in ascertaining causation the problem is analogous to that of ascertaining a loss under a policy of insurance. It follows that to escape liability an employer must show that a factor such as disease was not merely a contributory factor but the sole cause of the injury. There is no indication in the Acts that a workman is to be excluded from benefit by reason of disease, and it is held, therefore, that the reasoning which distinguished *Lander's* case (1) from *Wicks* v. *Dowell* (2) is unsound, and that *Lander's* case (1) should not now be followed.

As to Construction of the Workmen's Compensation Acts, see HALSBURY, Hailsham Edn., Vol. 34, p. 799, para. 1133 ; and for Cases see DIGEST, Vol. 34, pp. 238, 239, Nos. 2030-2042.]

Cases referred to :

*(1) *Lander* v. *British United Shoe Machinery Co., Ltd.* (1933), 102 L.J.K.B. 768 ; Digest Supp. ; 149 L.T. 395 ; 26 B.W.C.C. 411.

*(2) *Wicks* v. *Dowell & Co., Ltd.*, [1905] 2 K.B. 225 ; 34 Digest 266, *2265* ; *sub nom. Wilkes* v. *Dowell & Co.*, 74 L.J.K.B. 572 ; 92 L.T. 677 ; 7 B.W.C.C. 14.

*(3) *Martin* v. *Finch*, [1937] 2 All E.R. 631 ; Digest Supp. ; 156 L.T. 447 ; 30 B.W.C.C. 99.

*(4) *Ironmonger* v. *Vintner* (1938), 31 B.W.C.C. 90 ; Digest Supp.

*(5) *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293 ; [1944] 1 K.B. 718 ; 113 L.J.K.B. 513 ; 171 L.T. 113 ; 37 B.W.C.C. 51.

(6) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230 ; 34 Digest 238, *2035* ; 74 L.J.K.B. 474 ; 92 L.T. 578 ; 7 B.W.C.C. 1, H.L. ; *affg. S.C. sub nom. Higgins* v. *Campbell & Harrison, Ltd., Turvey* v. *Brintons, Ltd.*, [1904] 1 K.B. 328, C.A.

(7) *Lysons* v. *Knowles (Andrew) & Sons, Ltd., Stuart* v. *Nixon & Bruce*, [1901] A.C. 79 ; 34 Digest 238, *2032* ; 70 L.J.K.B. 170 ; 84 L.T. 65 ; 3 B.W.C.C. 1, H.L. ; *revsg.*, [1900] 1 Q.B. 780 ; *and revsg.*, [1900] 2 Q.B. 95.

(8) *Costello* v. *Pigeon (Owners)*, [1913] A.C. 407 ; 34 Digest 238, *2037* ; *sub nom. Costello* v. *Kelsall Brothers*, 82 L.J.K.B. 873 ; 108 L.T. 929 ; 6 B.W.C.C. 480.

(9) *Smith* v. *Coles*, [1905] 2 K.B. 827 ; 34 Digest 238, *2034* ; 75 L.J.K.B. 16 ; 93 L.T. 754 ; 8 B.W.C.C. 116.

(10) *Wood* v. *Wood* (1923) 93 L.J.K.B. 538 ; 34 Digest 238, *2042* ; 130 L.T. 305 ; 16 B.W.C.C. 208 .

(11) *Warner* v. *Couchman*, [1912] A.C. 35 ; 34 Digest 318, *2604* ; 81 L.J.K.B. 45 ; 105 L.T. 676 ; 5 B.W.C.C. 177, H.L. ; *affg.*, [1911] 1 K.B. 351.

(12) *Clover, Clayton & Co., Ltd.* v. *Hughes*, [1910] A.C. 242 ; 34 Digest 273, *2316* ; 79 L.J.K.B. 470 ; 102 L.T. 340 ; 3 B.W.C.C. 275.

(13) *Trim Joint District School Board of Management* v. *Kelly*, [1914] A.C. 667 ; 34 Digest 238, *2040* ; 83 L.J.P.C. 220 ; 111 L.T. 305 ; 7 B.W.C.C. 274, H.L. ; *affg.*, S.C. *sub nom. Kelly* v. *Trim Joint District School Board of Management*, 6 B.W.C.C. 921, C.A.

(14) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A.C. 443 ; 34 Digest 266, *2264* ; 72 L.J.K.B. 787 ; 89 L.T. 314 ; 5 B.W.C.C. 1.

(15) *Fife Coal Co., Ltd.* v. *Young*, [1940] 2 All E.R. 85 ; [1940] A.C. 479 ; Digest Supp. ; 109 L.J.P.C. 49 ; 162 L.T. 344 ; *sub nom. Young* v. *Fife Coal Co., Ltd.*, 33 B.W.C.C. 107.

(16) *Flanagan* v. *Ackers Whitley & Co.* (1926) 19 B.W.C.C. 399 ; Digest Supp.

(17) *McFarlane* v. *Hutton Brothers (Stevedores)* (1926), 96 L.J.K.B. 357 ; Digest Supp. ; 136 L.T. 547 ; 20 B.W.C.C. 222.

(18) *Moore* v. *Tredegar Iron & Coal Co. Ltd.* (1938), 31 B.W.C.C. 359 ; Digest Supp.

Appeal of applicant from an award of His Honour Judge Shove, made at Scunthorpe and Brigg County Court, and dated Oct. 29, 1945.

Marven Everett for the appellant.

F. W. Beney, K.C., and *Neil Lawson* for the respondent.

Cur. adv. vult.

Scott, L.J. [delivering the judgment of the court] : In the present case the deceased workman met with an accidental death by drowning. At that moment he was on his employer's premises doing his employer's work in accordance with his duty. He was working in a beet field. There had been wet weather and the furrows in the field had become filled with water. He was an epileptic. This was known to his employer but we do not think that knowledge increases, or that ignorance would diminish the employer's liability. He had an epileptic fit and fell face downwards at a place where there was a rut half full of water. His death was due to asphyxia. No doubt owing to his fit he was unable to move his face out of the water. The place was dangerous to him, though there would have been no danger to a normally healthy person.

The county court judge made his award in favour of the employer, holding that on the facts as found by him the case was covered by the decision of this court in *Lander* v. *British United Shoe Machinery Co., Ltd.* (1). In that case the workman, a known epileptic, had a fit while crossing a hard floor to the lavatory. He fell and fractured his skull on the hard floor. The floor was held to be not in itself dangerous to normal people. This court reversed the county court judge, holding that the workman could not recover, distinguishing *Wicks* v. *Dowell* (2), on the ground that the workman in that case, also an epileptic, was required to stand at a place which was dangerous in itself, namely, an open hatchway down which he fell as a result of a fit. In *Martin* v. *Finch* (3), and *Ironmonger* v. *Vintner* (4), also cases of epileptics, *Lander's* case (1) was considered by this court but distinguished on the facts. Counsel for the appellants in the present case also sought, as we think unsuccessfully, to distinguish *Lander's* case (1); but he also submitted that *Lander's* case (1) was wrongly decided and was inconsistent with general principles laid down by the House of Lords and with other decisions of this court. We agree with that submission, and act upon the liberty given us by the decision of this court in *Young* v. *Bristol Aeroplane Co., Ltd.* (5). There this court, whilst affirming the general rule that its own previous decisions are binding upon it, enunciated three exceptions, of which the first two were:

> (1) that the court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) that the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

We have come to the conclusion that we are free and indeed bound to refuse to follow *Lander's* case (1); the more so as the question at issue in the present appeal is of fundamental importance to the right understanding of the real basis of workmen's compensation, which is formulated in the first two and a half lines of sect. 1 (1), of the Act of 1925:

> If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . .

It is essential that these words should be construed as a whole with due regard to the light thrown upon each word by the other words associated with it. As an illustration of this aid to construction and the danger of disregarding it we would point out that insufficient attention is sometimes given to the word "caused" and its proper meaning. Except that the original Act—that of 1897—was restricted to certain categories of workmen, there has been no change in the language used by Parliament in these two and a half lines. The Acts of 1897, 1906 and 1925 are in that respect identical, and that language has to be construed in its ordinary and popular meaning: see *per* LORD HALSBURY, L.C., in *Brintons* v. *Turvey* (6) ([1905] A.C. 230, at pp. 232, 233), following the same train of thought as he expressed in *Lysons* v. *Knowles* (7) ([1901] A.C. 79, at p. 85). The same thought was subsequently expressed by LORD LOREBURN (who dissented) in *Costello* v. *Owners of the Ship Pigeon* (8) ([1913] A.C. 407, at p. 413), where, treating the legislation as remedial, he said:

> We ought not to read into it an exception without having in mind the nature of the remedy which is proposed by the Act itself.

A consequential principle of statute interpretation is involved. As was said by MATHEW, L.J., in *Smith* v. *Coles* (9) ([1905] 2 K.B. 827, at pp. 831, 832):

> This court would be slow to . . . introduce exceptions that have not been made by the legislature.

and by SCRUTTON, L.J., in *Wood* v. *Wood* (10) ((1923) 16 B.W.C.C. 208, at p. 216):

> I am rather disposed to think, though I do not know of any express authority for it, that, when you have an Act which is intended to lay down a general principle, you construe the exceptions rather against those who put them forward.

In our view the natural meaning of the positive words in the two and a half lines in question entitles the appellant to judgment, and we see no sufficient ground for implying the exception upon which the judgment in *Lander's* case (1) and the judgment below in favour of the employer alike rested.

The general purpose of the legislation was, beyond all doubt, to put upon the employer an obligation to pay to his workman or the workman's representatives compensation for the result of personal injuries incidental to his employment, for which no action for damages lay either at common law or for breach of statutory duty. In this sense it made the employer an insurer, and the insurance aspect is important, for it helps to guide interpretation where the statutory language is open to doubt. The object of the legislation was essentially social, and it was no part of the purpose of Parliament to make the economic burden rest finally on the back of the individual employer. It was realised from the start that the risk would be re-insured, as in fact happened, and through the insurance premiums, as an item in the cost of production or of services rendered, the community at large of course has had to carry the ultimate burden of the social reform in the price of goods or services. At an early stage in the judicial interpretation of the legislation, it was realised that the problem of ascertaining causation in the case of accidental injuries within the Act was analogous to the problem of ascertaining a loss under a policy of insurance. In other words the normal rule of *causa proxima* applied; see the judgments in the Court of Appeal in *Wicks* v. *Dowell* (2), where the court acted on the insurance principle. It is true that the words "arising out of and in the course of the employment" impose two conditions precedent to the statutory obligation of the employer, and that the words "out of" introduce a factor which might seem to throw back the inquiry into causation one step further from the final effect than the words "in the course of." But so to read the condition is, in our opinion, to mis-read it. It is only if the accidental injury has no causal connection with the employment at all that it can be said not to arise out of it, though it may occur in the course of it. It is for that reason that the employer cannot escape liability by showing that some factor such as disease is a predisposing or even contributing cause of the injury; he must show that it is the sole cause, as has been said frequently in decided cases.

The statutory language contains no words which qualify its absolute generality. Any person, man, woman or child, who is a workman, if employed is entitled to compensation for injury accidentally caused, which arises out of and in the course of the employment. There is no pre-requisite of a medical examination to qualify him for admission to the benefit of the Act. There is no hint of an exclusion from these benefits of any person because at the moment of injury he is suffering from disease, or any physical or mental disability which may render him more prone to accidental injury arising out of his employment. There are many cases cited in Willis's Workmen's Compensation, 37th Edn., pp. 8-14, which would have been decided adversely to the workman had such been the meaning of the statutory language. Indeed, the unqualified phrase "injury by accident" is inconsistent with such a reading of the statutory obligation on the employer. As was pointed out by Lord Loreburn, L.C., in *Warner* v. *Couchman* (11) ([1912] A.C. 35, at p. 38), the words are "injury by accident" not "by an accident." It suffices if the injurious event is in any reasonable sense accidental; and that event must be judged from the workman's point of view: *Clover* v. *Hughes* (12) ([1910] A.C., 242, at p. 245), and *Trim School* v. *Kelly* (13). Both those decisions are in our view directly relevant to the present case; indeed when considered in the light of *Fenton* v. *Thorley* (14), and *Fife Coal Co., Ltd.* v. *Young* (15), they are in truth conclusive in favour of the workman. *Flanagan* v. *Ackers Whitley* (16), *McFarlane* v. *Hutton* (17), and *Moore* v. *Tredegar Iron Co.* (18), are all decisions in which the Court of Appeal followed the principle, as we see it, laid down by the House of Lords in the decisions we have mentioned, and all three were cases in which the workman suffered from weakness or disease of the heart, and death occurred without his being subjected to any abnormal strain. The principle which emerges is that unless the weakness or illness of the workman is the sole cause of the accidental injury to, or death of, the workman, the employer is liable. We can see no difference in principle between a bodily condition involving recurrent fits of epilepsy on the one hand, and on the other the various contributing causes unconnected with the employment which were features of the decisions we have cited. Some of the relevant decisions appear in Willis's Workmen's Compensation, 37th Edn., in the sub-division of his text entitled "Personal Injury by Accident" (pp. 8 *et seq.*), and some in that of the words "Arising out of the Employment" (pp. 44 *et seq.*), but the dividing line between the two topics is artificial. What the court has to interpret is the whole of the complex conception expressed in the first two and a half lines of sect. 1 (1), and in our view it is dangerous and misleading to break that substantive provision up into bits, then to attempt to ascertain the meaning of each bit, and finally to add—or fail to add—the bits together in order to get the meaning of the whole. We infer that sick men and partially unfit and partly disabled men in employment were intended by Parliament to get the benefits of the Act just as much as the hale and hearty and perfectly fit men; for any intention of Parliament to exclude them must have found expression, and there is not a hint of it. The historic addition of industrial diseases was made not because diseased men had no right of recovery from their employer under the statutory provision of compensation for injury by accident, but because it so often happened in diseases of the types to which legislation was directed that the unfortunate workman did not know who was the employer for whom he was working when he first contracted the disease. It was chiefly, we think, to get over that difficulty that the disease provisions which now appear in Pt. II of the 1925 Act were passed.

In the case of *Ironmonger* v. *Vintner* (4), to which one of us was a party, it may be that the court did not realise how important and far reaching was the difference of principle between *Wick's* case (2) and *Lander's* case (1), and that for that reason the court was content to distinguish *Lander's* case (1) on the facts. The present appeal has, however, made it necessary to consider the issue of principle, and on principle we think that *Lander* (1) should now be treated as bad law. On this basis, for the reasons we have set out, we consider that the facts in the present case bring it within the words of the Act and that the appeal should be allowed with costs, and an award made in favour of the workman.

Appeal allowed with costs.

Solicitors: *Pattinson & Brewer*, agents for *Williams & Co.*, Peterborough (for the appellant); *Tuck & Mann*, agents for *Davies & Thornton*, Hull (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re KITSON & CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Tucker, L.JJ.), February 11, 13, 14, 15, 1946.]

Companies—Winding up—Shareholders' petition—Company formed to take over a business—Business sold after 46 *years—Construction of memorandum of association—Whether substratum gone—Just and equitable—Companies Act,* 1929 (*c.* 23), *s.* 168 (6).

The appellant company (K. & Co.) was incorporated in 1899. By the memorandum of association the objects of the company were stated in wide terms to be as follows: (i) to acquire and take over as a going concern a business, carried on elsewhere, under the style of K. & Co.; (ii) to carry on the business of general engineering. On July 10, 1945, the appellant company agreed to sell the business of K. & Co., its goodwill and all its assets. The company had, at the same time, a subsidiary, B. & Co., carrying on a similar type of business, but the premises were under requisition to the Admiralty. By reason of the sale of K. & Co., certain shareholders presented a petition, alleging that the substratum of the appellant company had failed and that it was just and equitable ~~to~~ wind it up. At the time of the sale of K. & Co., the then directors of the appellant company passed a resolution in which it was contemplated to discontinue the engineering business and to use the money of the appellant company to purchase shares in a group of companies more or less insolvent. In proceedings against the appellant company and its then directors, an affidavit to this effect was filed, as a result of which the resolution was withdrawn. At the time of the hearing of the petition those directors, with one exception, were replaced and an affidavit was filed by one of the present directors of the appellant company stating that it was the intention of the company to continue with the engineering business and to acquire the assets and undertaking of B. & Co., for the appellant company. The affidavit which formed part of previous proceedings was introduced in support of the petition for the purpose of showing that the appellant company had no intention of carrying on the business of engineering, and on those facts an order to wind up the appellant company was made. From that order, the appellant company appealed :—

Held : (i) since the main and paramount object of the appellant company was to carry on an engineering buinesss of a general nature the disposal of the business of K. & Co., which had been acquired about 46 years before, did not amount to a destruction of the substratum of the appellant company.

Re German Date Coffee Co. (1) *explained and distinguished.*

(ii) the intention of the board of directors, at a given moment, to discontinue the business of engineering had no effect on the determination of the question whether the substratum had gone.

[**EDITORIAL NOTE.** It is held that where a company is formed to carry on a particular type of business and, *inter alia*, to acquire an existing business, the subsequent disposal of the business acquired is not necessarily a failure of the substratum so as to be a ground for compulsory winding up. So long as the company can continue to carry on a similar type of business the position is distinguishable from that existing where the company is formed to acquire and work a particular mine, or a patent as in the *German Date Coffee* case (1). The material time for consideration is the date of the winding up petition, and if the company is then in a position to carry on a business within the principal object of its memorandum, it is quite irrelevant that the directors held a different intention at some earlier date.

As to Winding Up where Whole Substratum Gone, see HALSBURY, Hailsham Edn., Vol. 5, pp. 545-548, para. 885 ; and for Cases, see DIGEST, Vol. 10, pp. 821-826, Nos. 5353-5383.]

Cases referred to :

*(1) *Re German Date Coffee Co.* (1882), 20 Ch.D. 169 ; 10 Digest 823, *5361* ; 51 L.J.Ch. 564 ; 46 L.T. 327.

*(2) *Re Suburban Hotel Co.* (1867), 2 Ch. App. 737 ; 10 Digest 821, *5354* ; 36 L.J.Ch. 710 ; 17 L.T. 22.

*(3) *Cotman* v. *Brougham*, [1918] A.C. 514 ; 9 Digest 78, *286* ; 87 L.J.Ch. 379 ; 119 L.T. 162 ; *affg.* S.C. *sub nom. Re Anglo-Cuban Oil, Bitumen & Asphalt Co., Ltd.*, [1917] 1 Ch. 477.

Appeal by the respondents, Kitson & Co., Ltd., from a winding up order made by Uthwatt, J., and dated Dec. 17, 1945. The petition was presented by certain shareholders on the ground that the substratum of the company had gone. The facts are sufficiently set out in the judgment of Lord Greene, M.R.

J. B. Lindon, K.C., and *T. M. Shelford* for the appellants.

G. R. Upjohn, K.C., and *C. G. A. Cowan* for the respondents.

Lord Greene, M.R. : This is an appeal from an order of Uthwatt, J., as he then was, directing the compulsory winding-up of the company under the Companies Act, 1929, s. 168 (6), on the ground that it was just and equitable that the company should be wound up. I do not propose to go into the facts which gave rise to this litigation or which emerged in the course of it, save so far as may be necessary to explain the conclusions to which I have come. The ground upon which the respondents sought to have the company wound up is set out in the petition in para. 12 :

> By reason of the aforesaid matters the company has disposed of its assets, has ceased to carry on the principal objects for which the said moneys were provided, the whole substratum of the company has gone and it is not possible to carry out at a profit the essential purpose for which the company was formed ; and it is just and equitable that the company should be wound up.

That combination of words means, in my view, nothing more or less than that the substratum had gone.

Before us, counsel for the respondents wished to introduce a further ground on which he said it was just and equitable that the company should be wound up. That ground, to use his own words, was that the directors had so behaved that the shareholders had justifiably lost confidence in them. I express no opinion as to the sufficiency or insufficiency of such a ground to justify the winding up of a company, *i.e.*, whether those bare facts would be sufficient in any given set of circumstances or whether something in addition, like bad faith or oppression, might be required ; I do not go into it. It has not been argued, for this reason : counsel for the respondents set out some facts which he said could be collected from the evidence before the court and upon which he proposed to build that reason for winding up. We refused to allow him to go beyond the statements contained in his petition. It was quite manifest that the inference he was asking us to draw from the facts which he called to our attention was one which we should not be justified in drawing on the material which was before the court, A for this very simple reason, that, had it been put forward as a specific ground for winding up in the petition, it would have been possible for the company to have gone into the matter with great fullness and a great deal more evidence might have been filed and, indeed, there might have been cross-examination, particularly as the inference which counsel for the respondents said he was going to ask us to draw involved in one branch of it an inference of fraud. In those circumstances, it appeared to us to be quite impossible to allow him in this B court, on the meagre material to be found in the affidavits, on an issue which had never been raised before, to go into that question. As the result of this ruling of the court he confined himself loyally to the matters alleged in his petition.

The company was incorporated on Dec. 30, 1899 : that is forty-six years ago. Its name is Kitson & Co., Ltd., and under cl. 3 (1) of the memorandum of C association the objects for which the company was established are thus described :

> (1) To acquire and take over as a going concern the business now carried on at Airedale Foundry, Hunslet, in the city of Leeds, under the style or firm of "Kitson & Co.", and all or any of the assets and liabilities [and] to enter into the agreement.

Cl. 3 (2) begins :

> To carry on the business of locomotive engine manufacturers, ironfounders, mechanical D engineers and manufacturers of agricultural implements and other machinery, tool makers, brass founders, metal workers, boiler makers . . .

Cl. 3 (3) is :

> To carry on any business relating to the winning and working of minerals, the production and working of metals, and the production, manufacture and preparation of any other materials which may be usefully or conveniently combined with the engineering or manufacturing business of the company, or any contracts undertaken E by the company . . .

The first argument which counsel for the respondents put before us—and I think it is right to take this first, because it is logically first—is that the predominant object of the company was to acquire and take over and presumably to carry on the business of Kitson & Co., mentioned in cl. 3 (1) of the memorandum. The objects mentioned in cl. 3 (2) he said were merely subsidiary F to that. We have no real information as to what the business of Kitson & Co., was in 1899, save what appears in para. 4 of one of the director's affidavit sworn on Nov. 30, 1945, in which it is said :

> The business of the company is and has been since its incorporation that of engineers and manufacturers of engineering produce. Until 1938 the company was chiefly engaged in manufacturing locomotives but it has also from time to time (as conditions in the trade required) manufactured such things as machine tools, winders and mining machinery, . . .

G In this case what happened was this with regard to Kitson & Co., putting it quite shortly : On July 10, 1945, the company, which was still carrying on business under the name of Kitson & Co., at the Airedale works, entered into an agreement to procure the carrying out of a sale and purchase, but, in effect, subject to the confirmation of the shareholders, it would be an agreement for sale by the company, and for convenience I may so refer to it, because it was in H fact sanctioned by the shareholders. Under it the business of Kitson & Co. was agreed to be sold to a purchaser, its goodwill and all its assets, with one or two minor exceptions, and, so far as the business of Kitson & Co. was concerned, or what was left of it in 1945, it was assigned to a purchaser. That says counsel for the respondents, destroyed the substratum of the company, and he turns to the memorandum of association and says that it is in that sense that the memorandum of association must be construed, because the purchase of Kitson's business in 1899 was expressed to be the first in sequence of the company's objects and all other powers and objects specified in the memorandum must be regarded as ancillary to the carrying on of that business. In my opinion, that construction of the memorandum will really not bear examination. First of all, the form of the memorandum is the common form where a business is being acquired. It sets out in the usual way the acquisition of the business as the first step which the company is going to undertake. We are not considering now whether failure in 1899 to acquire the business of Kitson & Co. would have destroyed the substratum of the company. It might possibly have been thought that unless it got this business it was not really starting its career in the way in which the shareholders bargained it should be started; but the question we have to decide is whether, that business having been acquired 46 years ago, the disposal of it last year amounted to a destruction of the substratum. In my opinion, the main and paramount object of this company was to carry on an engineering business of a general kind. It was such a business that was carried on by Kitson & Co., and I cannot bring myself to construe this memorandum as limiting the paramount object and restricting the contemplated adventure of the shareholders to the carrying on of what could be called the business of Kitson & Co. The impossibility of applying such a construction seems to me to be manifest when one remembers that a business is a thing which changes. It grows or it contracts. It changes; it disposes of the whole of its plant; it moves its factory; it entirely changes its range of products, and so forth. It is more like an organic thing. Counsel for the respondents quoted to us a number of very well known authorities on which it has been held that on particular facts the substratum of particular companies had gone. I do not propose to examine those authorities, because they do not assist me in construing this particular memorandum. It must be remembered in these substratum cases that there is every difference between a company which on the true construction of its memorandum is formed for the paramount purpose of dealing with some specific subject-matter and a company which is formed with wider and more comprehensive objects. I will explain what I mean. With regard to a company which is formed to acquire and exploit a mine, when you come to construe its memorandum of association you must construe the language used in reference to the subject-matter, namely, a mine, and, accordingly, if the mine cannot be acquired or if the mine turns out to be no mine at all, the object of the company is frustrated, because the subject-matter which the company was formed to exploit has ceased to exist. It is exactly the same way with a patent, as, in the well known *German Date Coffee* case (1). A patent is a defined subject-matter, and, if the main object of a company is to acquire and work a patent and it fails to acquire that patent, to compel the shareholders to remain bound together in order to work some other patent or make some unpatented article is to force them into a different adventure to that which they contracted to engage in together; but, when you come to subject-matter of a totally different kind like the carrying on of a type of business, then, so long as the company can carry on that type of business, it seems to me that *prima facie* at any rate it is impossible to say that its substratum has gone. So far as this stage of the argument is concerned, it is to my mind quite impossible upon the true construction of this memorandum of association to limit the paramount object of this company to the specific business of Kitson & Co., so as to lead to the result that as soon as Kitson & Co.'s business was sold the substratum of the company had gone.

The position must be looked at, therefore, on the footing that the main and paramount object of the company is to carry on an engineering business. The company had a subsidiary—what is commonly called a 100 per cent. subsidiary—a company called Balmforth, carrying on a similar type of business, but for the moment having its factory and premises apparently under requisition to the Admiralty, who were said to have used them as a warehouse. I am not quite clear about that, but I do not think it matters; it was possessed of a factory and machinery. A question might have arisen, if the sole activity of the company was the holding of shares in the subsidiary, whether or not a case could be made out for winding up the company. I must not be taken as expressing the view that such a case could have been made out; but what happened was that while the petition was pending, and in between two adjournments, an agreement was entered into for the purpose of the company acquiring and taking over to itself the business of Balmforth. I have deliberately omitted at this stage the earlier history; all that I am concerned to examine for the moment is what the position of the company was at the date of the winding up order. This agreement was entered into subject to the consent of the shareholders. It seems to me that, if the agreement had gone through and this company had proceeded to carry on the business of Balmforth which it would acquire under the agreement, a business of the same nature as that which Kitson's had carried on, it would have been quite impossible to say that the A substratum of the company had gone. It might have been a good or a bad transaction for the company to enter into from a business point of view; but that is the last sort of thing that this court is concerned with in winding up cases. I think that the well known observations of LORD CAIRNS, L.J., in *Re Suburban Hotel Co* (2) (2 Ch. App. 737, at p. 750) might usefully be cited in reference to a great deal of the argument which has been presented to us on behalf of the respondents:

B

> But what I am prepared to hold is this, that this court, and the winding up process of the court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation. This company may become successful, or may continue to be unprofitable, as I believe it has hitherto been; and it may, therefore, hereafter re-appear in this court under different circumstances, but it is not for this court now to pronounce, and above all, not for this court to pronounce on opinion-evidence, that this is likely C to be an unprofitable speculation; and that, therefore, at the wish of a minority of shareholders, against the will of a large majority, the company should be wound up and put an end to.

It is not for us to say whether this venture is one which would be successful or would not be successful. That is a business matter for the shareholders to decide whether or not they would engage in it. It so happens that the share- D holders never had an opportunity of pronouncing their wishes with regard to the carrying out of that arrangement, and the reason was, that the winding up order was made.

The judge, subject to one matter which I am about to mention, as I read his judgment, would quite clearly have refused to make a winding up order. Down to this point he did not comment adversely, and it seems to me he had no material for commenting adversely on the question whether there was a real and *bona* E *fide* intention to re-embark in the engineering business at the time the matter was before him. Subject again to what I mentioned a moment ago, it is quite clear he was not prepared to question that. I myself would go further than that, because this question of intention on which counsel for the respondents laid very great stress is, I must confess, on the facts in this case, one which does not impress me. To say that the question whether substratum has gone F or has not gone can be affected by the intention that happens to exist in the minds of the board at a given moment appears to me to be going into irrelevant considerations. First of all, the board is not the company. Let it be supposed that at the time of the sale of the Kitson business, so far as the board was concerned they thought that there was no chance and that it was not desirable for the company ever to start again into engineering. It certainly is not proved nor was it proved that the shareholders had any such intention; but assume G that it was. A little time afterwards something might happen to make them change their minds. They might see a profitable opportunity of using the company's money again in the engineering business. What has intention to do with it? We are dealing with the question of substratum, and to say that the substratum can exist at one moment and cease to exist a moment later, or *vice versa* simply through a change of intention of the board or of the shareholders (I know not which) seems to me to lead into a morass.

H The situation as it appeared, without going into more detail, at the date when the hearing first began was put in general terms by one of the directors, in para. 18 of the affidavit which says this:

> Although at the date of the circular of July 20, 1945, and of the general meeting on July 30, 1945 [the circular and the general meeting related to obtaining the approval of the shareholders to the sale agreement of Kitson's business] the possibility of the company being wound up was contemplated, the unexpected conclusion of the Japanese war and the prospect of the early de-requisitioning of the Luton works [that was the Balmforth works] has completely altered the company's prospects. The company

> proposes to continue its engineering and manufacturing business and it is now considered to be in an advantageous position to do so. Broadly speaking, it is the intention of the board to re-open the Luton works upon their being de-requisitioned, to instal there the company's plant and machinery removed from the Airedale Foundry, to continue the business of the company and its subsidiary, the Balmforth Co., on this site and, if found convenient, to liquidate the Balmforth Co., and transfer its assets and undertaking to the company.

If that was the intention at the time, and it was made more concrete as the result of what happened during the trial, namely, by making the provisional agreement for the taking over of the Balmforth business it seems to me quite impossible to say that in the circumstances stated in that paragraph the substratum of the company had gone. I should add this by way of supplement: It is not really argued nor is there any fact to justify the proposition that this proposal for carrying on the Balmforth business was a wild cat scheme which had no prospect at all of financial success. If you have such a case as that, for instance, of the bank which has only £250 left, it is not a question of expressing an opinion on a question of business, for the court to say that you cannot carry on a bank with £250, nor would it be expressing an opinion on a matter of business if the court should say you cannot carry on an engineering business unless you have got at any rate a little working capital. That is quite a different thing altogether. Financial disability might be relevant. That is not the question here; there is no financial disability which would prevent the company carrying out those proposals. In my opinion the question of intention in this case has no real bearing on what we have to determine; but, assuming that it has, here is the intention of the directors set out and they would have been able to test the wishes of the shareholders if the proposal for taking over the Balmforth Co. had been allowed to go to a general meeting. As I have said, the winding up order intervened.

The judge, down to this point and on those facts which I have shortly stated, would quite clearly have refused to make the order, but something happened on the last day of the hearing, namely, Dec. 17. On that date an affidavit was produced which had been sworn in some proceedings in the Chancery Division brought by a shareholder in the company against the company and its then directors, who, with one exception, are not, we are told, the directors now. The affidavit referred to the draft minutes of a resolution of the board which, it was said, had been passed, under which the money of the company, including the money it acquired from the sale of the Kitson business, was to be used in purchasing a number of shares in a variety of companies. It was stated in the affidavit that those companies were all more or less insolvent, indeed some of them were said to be in or about to go into liquidation, and that the prices to be paid for those shares were a gross overpayment. Indeed, if you took that affidavit at its face value, it raised a very serious case against the then directors. I do not wish in any way to discount that, but the use that was made of it, and junior counsel, who was then appearing alone for the present respondents, quite properly told us, that he introduced that affidavit, feeling it was his duty to do so as soon as he discovered it, for the purpose and the purpose only of showing that at the time when this proposed share purchase was resolved upon by the directors, as appeared from the draft minute, namely in July, 1945, the directors had no intention of carrying on an engineering business. What the relevance and weight of that argument as bearing on the question of substratum may have been I do not propose to go into. I have already indicated my views as to the real bearing of these questions of intention; but that was the sole purpose for which he introduced it. The judge, we are told, as soon as this was introduced expressed the opinion that the company had not treated the court with frankness. That would appear to mean this, that the company ought to have informed the court that in July the board had had this intention of buying these shares. With all respect, I am not sure whether I can quite appreciate what is meant by a lack of frankness, because the matter on the company's argument was entirely irrelevant to any question before the court. The company was saying, as they have said here, that on the question of substratum at the date of the petition the intention of the board, whether it may have been good or bad, honest or fraudulent, in July, six months before, was entirely irrelevant; their intention now is what is stated. The judge may very well have thought: This is a matter of some suspicion and I do not like it. What he failed to observe, I think, was this, that the board now—I do not know whether he was so informed—is quite different, with one exception, to what it then was, and, what is more important, he did not have before him the affidavit sworn in those Chancery proceedings in answer to the one which I have mentioned. That affidavit deposed to two matters. First of all, it said that the draft minute on which the accusing affidavit had been based was a draft only and was inaccurate in that the proposed purchase of these blocks of shares was to be subject to the consent of the shareholders. This was a matter of considerable importance, because it was referring the transaction to the proper tribunal to consider it. The other matter was that the directors, in view of the affidavit, had decided not to go on with the proposal. All that comes to is this, that in July the then directors had an intention to carry out a particular purchase with the company's money. That intention they abandoned, and indeed an undertaking was given on motion in the action that it would not be carried out. Subsequently to that, in the present proceedings a proposal to acquire the Balmforth Co.'s business was made and reached the stage of the provisional contract I have mentioned. The judge did not have before him that second affidavit, and, indeed, he even declined to allow an adjournment to enable counsel for the appellants to produce evidence. Counsel for the appellants tells us he did not at that time know of the existence of that second affidavit; it was not before UTHWATT, J., and is not read accordingly in the order which he made. It is perfectly clear to my mind that, if UTHWATT, J., had had before him that second affidavit he could not possibly have formed the view of the circumstances which he did, because in effect what he said was that the affidavit in the Chancery action, what I have called the accusing affidavit, made him think that the real intention of the company was not to carry out the suggested purchase of Balmforth, but was directed to something quite different. But what was before him was at the highest the intention in July of the then directors. He did not know that even that intention was to be submitted to the shareholders and he did not know it had been abandoned. It seems to me, therefore, that it would have been quite impossible for him to have said that the substratum of this company had gone—in spite of all the considerations which he mentioned in the earlier part of his judgment, all of which pointed the other way—on the ground that six months ago the then board of the company decided to apply the assets of the company in a way which did not involve the carrying on of the business and which indeed, as is quite clear from reading the judgment, the judge thought was very suspicious. It is to be remembered that the winding up procedure does not exist for the purpose of keeping boards of directors in order, or indeed of preventing them from misapplying the funds of the company. It may very well be (I express no opinion) that in cases where directors have complete control of the company and are impossible to control, those circumstances, coupled perhaps with others, may make it just and equitable for a company to be wound up, although in these days of minority actions it would not seem that winding up proceedings in order to prevent that kind of thing are likely to be so necessary as before minority actions became common. But, apart from that, it seems to me that the winding up procedure ought not to be used for regulating the internal affairs of the company. If directors are misbehaving themselves, there lies a remedy to the shareholders to stop it, and it would be quite wrong to my mind that the partnership between shareholders, so to speak, should be dissolved merely because the persons carrying on the business on behalf of the company, namely the directors, are misbehaving themselves. It is for the shareholders to stop them. They can get rid of the directors or stop them by means of an injunction if they are doing anything improper, and, therefore, I do not think it is putting it too high to say that in the ordinary way of things winding up is not the proper procedure for dealing with that type of situation.

We have, therefore, this position: a winding up petition based on alleged disappearance of substratum, supported by a minority of votes but a majority in money, based on the allegation primarily, with which I have disagreed, that the paramount object of the company was the carrying on of a business called Kitson & Co., or, alternatively, based on the proposition that the intention of the company was not to carry on a business. The paramount object is much more general and is not confined to Kitson & Co.'s business. I have said on this question of intention that it is not, in my opinion, relevant, and, secondly, that whatever the intention of the board was some months before, it was always competent for the directors or the shareholders, whoever were expressing the wishes of the company, to change their minds if a suitable opportunity offered, and that we are told they did.

Having regard to that, the case for dismissing this petition seems to me to be clear; I cannot find that the judge was justified in declining to take the course, which it is quite clear he would have taken because of the introduction into the proceedings of the Chancery litigation and the affidavit. He placed upon that a reliance and gave to it a weight and effect which he never would have given it if he had had before him the affidavit in reply, and he therefore came to the conclusion on the subject without having before him the proper material. in my opinion, the Chancery matter must not be allowed to affect our minds in this case, because I cannot see in it anything relevant to this issue. In my opinion the appeal must be allowed.

Morton, L.J.: I agree that this appeal must be allowed and have very little to add. Although counsel for the respondents gave us an admirable survey of the facts and argument, I think he found himself in rather a difficult position. A great deal of the case which he would have liked to present to us really depends on alleged bad faith on the part of one or more of the directors. In this petition there is no allegation at all of bad faith or improper conduct on the part of the directors. In the course of the proceedings before Uthwatt, J., certain matters came to light which, so long as they were unexplained, bore a somewhat serious aspect; but they may be capable of a perfectly convincing explanation, and the directors have never had a chance of giving that explanation. Not only was no charge made against them in the petition, but, when at the last hearing before the judge application was made for an adjournment to enable the affidavit accusing the directors to be answered, he refused such an adjournment. It was, therefore, clear that, unless and until the petition was amended, counsel for the respondents could not invite us to deal with the matter upon the footing that the directors' conduct was improper, and thereupon he asked leave to amend the petition. We did not think it right to give such leave at this stage. The matters desired to be raised would clearly be matters on which further evidence would have to be filed; I think it would have been almost inevitable that there should be cross-examination of the deponents, and this court would have had to determine an issue of fact which had never been before the judge at all. In these circumstances, we refused the application of counsel for the respondents. There is, of course, nothing to prevent the petitioner from presenting another petition tomorrow based upon other allegations and relying upon other facts. I do not wish to be taken as encouraging him to do so, or as expressing any view as to the prospects of success or failure of that petition.

On this petition we have to deal with an allegation of loss of substratum, based upon the matters to which Lord Greene, M.R., has already referred. I do not propose to go through them again. It is said, and it may be quite true, that this idea of taking over the Balmforth Co.'s works represented a last minute change of mind on the part of the directors. Be it so; what was the position of the company immediately before that last minute change of mind? The company was perfectly solvent; it had a large sum of cash in hand; it had a certain amount of plant and machinery, and it was in a position to take over other works if it thought fit and to continue the business which, in my view, was within the primary object defined in its memorandum of association. I entirely and respectfully agree with the construction placed by Lord Greene, M.R., on the memorandum of association in this case. As has been said by Lord Parker of Waddington in *Cotman* v. *Brougham* (3) ([1918] A.C. 514, at p. 520):

> The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place, it gives protection to subscribers, who learn from it the purposes to which their money can be applied.

Lord Wrenbury said (*ibid.*, at p. 522):

> The purpose, I apprehend, is twofold. The first is that the intending corporator

who contemplates the investment of his capital shall know within what field it is to be put at risk.

Supposing the company affirms this scheme for taking over the Balmforth works, it seems to me that the business carried on by the Balmforth Co., so far as it is revealed by that company's memorandum of association and by the evidence before us, comes within the field in which these corporators have put their money at risk. According to para. 8 of the first affidavit of one of the directors, sworn on Nov. 30, 1945, the Balmforth Co. are " a well known firm of engineers specialising in the manufacture of industrial boilers, calorifiers and mechanical stoking equipment," and again in the memorandum of association of the Balmforth Co. I find these words, " To acquire and take over as a going concern the business of boiler makers, engineers . . . heretofore carried on by T. Balmforth & Co., at Luton, and to carry on the said business." Under these circumstances, it does not seem to me that the allegation that the substratum of this company has gone has been borne out by the evidence on this petition. I do not think that the case comes within the Companies Act, 1929, s. 168 (6).

I only want to refer to one other matter. At the conclusion of his judgment the judge said this :

> It is sheer nonsense for this company to say it has any present intention to try to carry on any object for which the company was formed, and you may read your objects as widely as you like, but included among them is not the spending of its money in the way of finding part of the purchase price payable for a lot of shares in what looks to me, as referred to here, a group of companies.

It is clear, I think, that the judge has been influenced in his decision by the proposal which the directors had in mind in July, 1945, to expend the moneys of the company in purchasing a number of shares in other companies. If he had gone on to read, as apparently he did not, the affidavit of the directors on the motion for injunction in a shareholders' action, he would have seen that these deponents first of all say that the proposed arrangement was subject to the sanction of the company, and, secondly, that the directors had decided not to proceed with the purchase of these shares. If UTHWATT, J., had considered only the facts alleged in the petition and the evidence in support of those facts and in the light of all the facts had exercised his discretion in the way of making a winding up order, it may be I should have felt great hesitation in differing from him ; but I think it is quite plain from his judgment that he has taken into account matters which were past history, and which should not, in my view have influenced his decision of this petition, founded as it was simply upon the allegation that by reason of the sale of the company's existing business the substratum had gone.

I agree that this appeal must be allowed and that there should be no winding up order.

TUCKER, L.J. : Counsel for the respondents in the course of his argument laid considerable stress on the question of the intention of the company or its directors. I only desire to say a word or two with regard to that aspect of the case. LORD GREENE, M.R., has read para. 18 of the affidavit of one of the directors, in which it is stated that :

> The company proposes to continue its engineering and manufacturing business and it is now considered to be in an advantageous position to do so. Broadly speaking it is the intention of the board to reopen the Luton works upon their being de-requisitioned, to instal there the company's plant and machinery removed from the Airedale Foundry, to continue the business of the company and its subsidiary, the Balmforth Co., on this site and, if found convenient, to liquidate the Balmforth Co., and transfer its assets and undertaking to the company.

Counsel for the respondents concedes that he is not in a position to deny that at the date of the winding up order and the date when this affidavit was sworn those statements are correct, that it was then the intention of the company so to act ; but he argues that, because at some prior date there was a contrary intention on the part of the then directors of the company, he is entitled to rely upon that in support of his submission that the substratum of this company has gone. It was in regard to that argument of his that I listened with all the attention and care I could to the authorities he cited ; but I am unable to find anything in those authorities in support of that proposition. It seems to me that, whatever may be the relevance of the intention, if at the time of the making of the winding up order it is beyond dispute that it is the intention of the company to carry on a business which is within the principal object of its memorandum of association, it is impossible to say that the substratum of that company has gone.

Appeal allowed with costs.

Solicitors: *Capel Cure, Glynn Barton & Co.* (for the appellants); *Hicks, Arnold & Co.* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

POWELL *v.* MAY.

[King's Bench Division (Lord Goddard, L.C.J., Humphreys and Henn Collins, JJ., January 29, 30, February 15, 1946.]

Corporations—Bye-laws—Validity—Repugnancy to general law—Bye-law prohibiting betting in public places—Street Betting Act, 1906 (*c.* 43), *ss.* 1 (1), (4), 2 —*Betting and Lotteries Act,* 1934 (*c.* 58), *ss.* 2 (1), 20.

Gaming and Wagering—Betting in public place—Bye-law repugnant to general law—Street Betting Act, 1906 (*c.* 43), *ss.* 1 (1) (4), 2—*Betting and Lotteries Act,* 1934 (*c.* 58), *ss.* 2 (1), 20.

A race meeting, confined to horse racing, was held in a field which was neither an approved racecourse nor a licensed track. The notice required by the Betting and Lotteries Act, 1934, s. 2, had been given to the chief constable of the county and bookmaking had been carried on in the field on 1 day only during the previous 12 months. The field was part of a farm adjacent to the highway and was enclosed on all sides by a hedge, but there was one gateway opening on to the highway through which the public obtained access to the field on payment of a fee. A number of bookmakers were present, including the appellant, who there carried on the business of bookmaking. The appellant was convicted by a court of summary jurisdiction under a bye-law made by the local county council and on appeal to quarter sessions the conviction was confirmed subject to the opinion of the court as to whether the decision was right in point of law. The bye-law, which was made under the Municipal Corporations Act, 1882, s. 23, was, for all essential purposes, in the same terms as those in the Street Betting Act, 1906, s. 1 (1). It did not, however, provide, as does the Street Betting Act, 1906, s. 1 (4), that, in the case of an enclosed space, betting was only unlawful if at or near every public entrance there was conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein. No such notice was exhibited on this occasion:—

Held: the bye-law was repugnant to both the Street Betting Act, 1906, and the Betting and Lotteries Act, 1934, which, in effect, permit bookmakers to bet at race meetings provided they observe certain conditions; and it was beyond the powers of the county council to enact a bye-law which prohibited them from doing that which the general statutes enabled them to do. The conviction should, therefore, be quashed.

[**EDITORIAL NOTE.** A statute seldom expressly enacts that something shall be lawful, but it is frequently provided that something which would otherwise be unlawful shall be lawful if certain conditions are observed. A bye-law making unlawful that which is expressly provided to be lawful would be void for repugnancy, and it is decided in this case that this repugnancy extends to bye-laws contrary to statutory provisions giving implied authority to act on fulfilment of conditions. As Channell, J., said in *Gentel* v. *Rapps* (4), a bye-law is repugnant "if it expressly or by necessary implication professes to alter the general law of the land."

As to Effect of Repugnancy to General Law on Validity of Byelaws, see HALSBURY, Hailsham Edn., Vol. 8, p. 47, para. 81; and for Cases, see DIGEST, Vol. 13, pp. 328, 329, Nos. 651-655.]

Cases referred to:

*(1) *Thomas* v. *Sutters*, [1900] 1 Ch. 10; 25 Digest 435, *327*; 69 L.J.Ch. 27; 81 L.T. 469.

*(2) *Strickland* v. *Hayes*, [1896] 1 Q.B. 290; 38 Digest 164, *97*; 65 L.J.M.C. 55; 74 L.T. 137.

*(3) *White* v. *Morley*, [1899] 2 Q.B. 34; 25 Digest 436, *330*; 68 L.J.Q.B. 702; 80 L.T. 761.

*(4) *Gentel* v. *Rapps*, [1902] 1 K.B. 160; 13 Digest 328, *653*; 71 L.J.K.B. 105; 85 L.T. 683.

APPEAL by a bookmaker from a decision of quarter sessions dismissing his appeal against a conviction by a court of summary jurisdiction for an offence under a county council bye-law. The facts are sufficiently set out in the judgment.

Gilbert Beyfus, K.C., and *Roger Willis* for the appellant.

Ralph Sutton, K.C., and *Carey Evans* for the respondents.

Cur. adv. vult.

LORD GODDARD, L.C.J. [delivering the judgment of the court]: In this case the appellant was convicted by a court of summary jurisdiction in the county of Glamorgan for an offence under bye-law No. 7, made by the Glamorgan County Council. On appeal to the quarter sessions the conviction was affirmed subject to the opinion of the court as to whether the decision was right in point of law. The bye-law in question is in these terms:

> No person shall frequent and use any street or other public place either on behalf of himself or any other person for the purpose of bookmaking or betting or wagering or agreeing to bet or wager or paying or receiving or settling bets. "Public place" includes "any common, public park, pleasure ground, roadside waste, foreshore, churchyard or chapelyard and any open space to which the public have access for the time being.

The facts found by quarter sessions are that on July 22, 1944, a race meeting was held in a certain field at Laleston which was neither an approved racecourse nor a licensed track. The racing was confined to horse racing and the notice required by the Betting and Lotteries Act, 1934, s. 2, had been given to the chief constable of the county and bookmaking had been carried on in the said field on 1 day only during the previous 12 months. A number of bookmakers were present at the meeting, among them the appellant, who there carried on the business of bookmaking. The field is part of a farm which is adjacent to the highway and is 16 acres in area. It is enclosed on all sides by a hedge, but there is one gateway opening on to the highway through which the public obtained access to the field on the payment of 2*s.* 6*d.*

Those are the only facts material for the purpose of the present case. There is no finding when the bye-law was made, but it was found that it was made under the Municipal Corporations Act, 1882, s. 23, and the same power of making bye-laws as is thereby given to municipal corporations is conferred on county councils by the Local Government Act, 1888, s. 16, now replaced by the Local Government Act, 1933, s. 232. The objection taken by the appellant to this bye-law is that it is *ultra vires* the county council because it is repugnant to the general law of the land. Bye-laws in form indistinguishable from the present have been before the courts on more than one occasion and upheld, but all those cases were before the Street Betting Act, 1906, and therefore also before the Betting and Lotteries Act, 1934, and the question that has to be decided in the present case is whether this bye-law can be regarded as valid although it goes beyond the provisions of those general Acts, and makes something unlawful which is expressly exempted from the provisions of those Acts and which, it is accordingly argued, is at least inferentially permitted by them. There is no question but that a bye-law which is repugnant to the general law is invalid, but it is not so easy to determine what is covered by the word "repugnant" and under what circumstances a bye-law is to be held invalid on that ground. Obviously it cannot permit that which a statute expressly forbids, nor forbid that which a statute expressly permits, though it can, of course, forbid that which otherwise would be lawful at common law, otherwise no prohibitory bye-law could be valid. It is but seldom that a statute expressly enacts that something shall be lawful, unless indeed it is dealing with the conferment of powers upon some body or person, but it is by no means unusual to find a statute which, while making some particular thing unlawful, goes on to provide that the thing prohibited may be done, or at least not be prohibited, if certain conditions are observed. If Parliament prohibits a certain thing from being done and imposes a penalty for doing it, and in the same Act says the prohibition is not to apply, or that no penalty is to be incurred, if the very same thing is done in a certain way or under certain conditions, it seems almost pedantic to say that Parliament has not at least impliedly authorised the doing of that thing subject to the conditions laid down.

Turning to authority, in *Thomas* v. *Sutters* (1), LINDLEY, M.R., gave what seems to be a most useful and helpful test for deciding whether a bye-law is invalid on the ground of repugnancy. Explaining his earlier decision in *Strickland* v. *Hayes* (2), he said that the bye-law in the earlier case was hopelessly bad because it dealt precisely with a matter with which Parliament had already dealt in an Act addressed to the very same thing. Before we consider the bye-law in relation to the two statutes we have already mentioned, we will refer to two judgments of CHANNELL, J., whose opinions are always treated with the utmost respect in matters relating to local government. In *White* v. *Morley* (3) the judge said ([1899] 2 Q.B. 34, at p. 39) :

> . . . bye-law . . . is not bad because it deals with something that is not dealt with by the general law. But it must not alter the general law by making that lawful which the general law makes unlawful ; or that unlawful which the general law makes lawful.

In that case a bye-law in the same terms as the present was in question in days before the Street Betting Act was passed. It was argued that the subject-matter had already been dealt with by the Metropolitan Streets Act, 1867, s. 23, which made it an offence to obstruct a street by three or more persons assembling for the purpose of betting, but the court held that the section was a provision relating to traffic in streets and dealing with obstruction, while the bye-law aimed at frequenting a street for the purpose of betting, which was a different thing and a different mischief. Then in *Gentel* v. *Rapps* (4) the same judge said ([1902] 1 K.B. 160, at p. 166) :

> A bye-law is not repugnant to the general law merely because it creates a new offence and says that something shall be unlawful which the law does not say is unlawful It is repugnant if it makes unlawful that which the general law says is lawful. It i repugnant if it expressly or by necessary implication [we emphasise those words professes to alter the general law of the land . . . Again, a bye-law is repugnant if i adds something inconsistent with the provisions of a statute creating the same offence but if it adds something not inconsistent, that is not sufficient to make the bye-law bad as repugnant.

The bye-law in that case was made under the Tramways Act, 1870, which enabled the promoters of a tramway to make bye-laws preventing nuisance in any carriage belonging to them. The bye-law provided that :

> No person shall swear or use offensive or obscene language whilst in or upon an carriage.

It did not contain any such words as " so as to be a nuisance or annoyanc to others," although the Towns Police Clauses Act, 1847, which was in forc in the district, and a local Act, both prohibited the use of obscene languag " so as to be a nuisance or annoyance to others." So there one had the cas of a general prohibition in the Town Police Clauses Act and also in a local Ac in force in the district and a bye-law applicable to a limited class of case, namely swearing in tramcars. There is nothing in the general Act saying that person may swear anywhere but in the public street, so a bye-law dealing with swearin in a particular place, though in one sense an extension of the statutory prohib tion, is in no way in conflict with it. That is just the sort of case with whic we think JEUNE, P., was dealing in that passage in his judgment in *Thomas* *Sutters* (1) on which counsel for the respondents so strongly relied, where h said ([1900] 1 Ch. 10, at p. 16) :

> When an Act of Parliament has forbidden certain things to be done in certain place it seems to me perfectly consistent with that that a municipality, with regard to the particular locality, should go somewhat beyond the Act, not contravening its spiri but carrying it out, and making regulations somewhat wider than those to be four in the Act.

The spirit of the Act was in no way contravened by the bye-law in questio The Act forbids swearing or obscene language in public so as to be a nuisan or annoyance to others, and a bye-law forbidding altogether swearing in tram cars where it must of necessity be a nuisance is not inconsistent with the general provisions of the Act.

We turn now to the Street Betting Act, 1906, and the Betting and Lotteries Act, 1934. Sect. 1 (1) of the former Act makes it an offence for any person to frequent or loiter in streets or public places for the purpose of bookmaking or betting or wagering or agreeing to bet or wager or paying or receiving or settling bets and the words are for all essential purposes the same as those contained in the bye-law. Sect. 1 (4), after providing what shall be included in the word "street," provides that the words "public place" shall include any public park, garden, or seabeach, and any unenclosed ground to which the public for the time being have unrestricted access, and shall also include every enclosed place (not being a public park or garden) to which the public have a restricted right of access. Pausing there for a moment, it seems to deal with exactly the same places as does the bye-law. The only distinction is that the Act distinguishes between enclosed and unenclosed places, while the bye-law deals with any open space to which the public have access for the time being and therefore includes both unenclosed and enclosed spaces. The Act, however, provides that for the purpose of the section, in the case of an enclosed space betting is only unlawful if at or near every public entrance there is conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein. If, therefore, under that Act a person were summoned it would be a good defence to show that the place where he was betting was an enclosed place to which the public had a restricted right of access and that there was no notice exhibited prohibiting betting.

Sect. 2 of the Street Betting Act, 1906, provides that nothing contained in this Act shall apply to any ground used for the purpose of a racecourse for racing with horses or adjacent thereto on the days on which races take place. There is no finding in the case that this field was a racecourse but it was undoubtedly a track as defined by sect. 20 of the 1934 Act, and so was within cl. (*b*) of the proviso to sect. 2 of the 1934 Act. Sect. 2 (1) provides that bookmaking shall not be carried on on any track unless the occupier of the track is the holder of a licence in force under this Act authorising the provision of betting facilities on that track. But then it goes on to provide that the foregoing provisions of the subsection shall not apply in relation to anything done on any track on any day if during the year in which that day falls bookmaking has not been carried on on that track on more than 7 previous days, and notice of the intention to permit bookmaking on that track on that day has been given beforehand to the chief officer of police. Both these provisions were satisfied in this case. Now it seems to us that if these statutes had provided in terms that it should be a good defence to a prosecution to prove those matters to which we have referred, a bye-law which says that those facts should provide no defence would be repugnant to the general law, and this is precisely what this bye-law effects. It deprives a bookmaker of the defence which he would have had under sect. 1 (4) of the Street Betting Act, 1906, that there was no notice prohibiting betting exhibited. It would deprive him of showing that the ground on which he was betting was a racecourse and that racing was taking place on the day on which he was betting and it would also deprive him of relying upon the provisions of sect. 2 (1) of the Act of 1934. That is the effect of the bye-law and it is by its effect and not by its mere form that it must be judged.

In our opinion this bye-law is repugnant to both these Acts. In effect those Acts do permit bookmakers to bet at race meetings provided they observe certain conditions. In our opinion it is beyond the powers of a county council to enact a bye-law which prohibits them from doing that which the general statutes enable them to do. We think, therefore, that the appeal should be allowed and the decision of the quarter sessions reversed and the conviction before the magistrates quashed.

Appeal allowed with costs. Case remitted to quarter sessions with direction to quash conviction.

Solicitors: *Field, Roscoe & Co.*, agents for *A. Frank Hill & Co.*, Cardiff (for the appellant); *Torr & Co.*, agents for *Richard John*, Cardiff (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILLIAM DICKINSON & CO., LTD. *v.* W. BRISTOW (H.M. INSPECTOR OF TAXES).

[Court of Appeal (Lord Greene, M.R., Somervell and Cohen, L.JJ.), February 18, 19, 1946.]

Income Tax—Profits from trade and trade receipts—Part recovery of debts previously written off as bad—Amounts so received to be included in computation of profits—Amounts taxable in year of receipt—Income Tax Act, 1918 (c. 40), *Sched. D, Cases I and II, r.* 3 (*i*).

The appellant company was engaged in export trade and had, for many years, made deliveries of coal and coke to customers in Spain. Between Dec. 1935, and June, 1936, the Spanish customers became indebted to the appellant company in sums amounting to £10,710. These debts were included at their full value as trade receipts in the computation of the appellant company's profits for the purposes of income tax. Owing to the outbreak of the Spanish revolution the debts were considered irrecoverable and written off as bad, and, in accordance with the practice of the Board of Inland Revenue, the sums so written off were allowed as trading losses for the years ended Apr. 5, 1938, and Apr. 5, 1939. In 1940 the British Government advanced a loan to the Spanish Government to facilitate the payment of debts owing by Spanish nationals to traders in this country, and a clearing house for Spanish debts was set up. In the appellant company's years ending Mar. 31, 1941, and Mar. 31, 1942, the appellant company recovered the sums of £5,115 9*s.* 6*d.* and £333 3*s.* 11*d.* respectively through the clearing house in respect of Spanish debts due to them. On appeal, the question for the determination of the court was whether those sums ought to be treated as trading receipts in the years in which they were paid by the clearing house to the appellant company, assessments having been made upon the appellant company on the footing that the sums should be so included as trading receipts :—

Held : in the assessments made upon the appellant company the amounts received from the clearing house must be included as trading receipts in the years in which they were received.

Judgment of Macnaghten, J., ([1945] 2 All E.R. 678), *affirmed.*

Dicta of Lord Simon, L.C., Lord Atkin and Lord Porter, *in Absalom* v. *Talbot* (2) *followed.*

[**EDITORIAL NOTE.** The Court of Appeal affirm the court below, following the opinions of Lord Simon, Lord Atkin and Lord Porter, expressed in *Absalom* v. *Talbot* (2). Lord Greene, M.R., examines the language of rule 3 (*i*) of the Rules applicable to Sched. D, Cases I and II, and finds full justification for the practice of the Revenue of allowing bad debts to be deducted as trading losses in the year in which they are written off. According to the opinion of Lord Porter in *Absalom* v. *Talbot* (2) it follows from this practice that if a debt which has been written off is subsequently paid it may be charged to tax in the year in which it is paid. This was the position in the case under consideration, and the decision of the Court of Appeal is in accordance with this opinion.

As to Trade Receipts and Expenses : Period of Account to which Referable and as to Bad Debts, see HALSBURY, Hailsham Edn., Vol. 17, pp. 118-120, 161, 162, paras. 223-225, 328 ; and for Cases, see DIGEST, Vol. 28, pp. 49, 50, Nos. 253, 254.]

Cases referred to :

*(1) *Gleaner Co., Ltd.* v. *Assessment Committee,* [1922] 2 A.C. 169 ; 28 Digest 49, n.

*(2) *Absalom* v. *Talbot,* [1944] 1 All E.R. 642 ; [1944] A.C. 204 ; 113 L.J.K.B. 369 ; 171 L.T. 53.

*(3) *Anderton & Halstead, Ltd.* v. *Birrell,* [1932] 1 K.B. 271 ; Digest Supp. ; 101 L.J.K.B. 219 ; 146 L.T. 139.

Appeal by the taxpayer from an order of Macnaghten, J., dated Oct. 18, 1945, and reported ([1945] 2 All E.R. 678). The facts are fully set out in the judgment of Macnaghten, J., in the court below.

F. Grant, K.C., and *J. Charlesworth* for the appellants.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *Reginald P. Hills* for the respondent.

Lord Greene, M.R. : The point raised by this appeal is one which might fairly be described as singularly devoid of merit. We have to decide a bare question of law. Put in diagrammatic form, so to speak, the question may be thus formulated. A trading company in the year 1 sells goods on credit. The amount so owing to it is brought into account in the computation of its profits and gains for the year 1. In the years 2 and 3 events happen which, first of all, depreciate the value of that debt, and later on destroy its value altogether. In the accounts for the years 2 and 3, the Revenue accept the view that the depreciation and final devaluation of the debt should be made the subject of an allowance in those respective years. In the year 4 further events happen of a quite unusual and, indeed, unexpected nature, which have the effect of converting the debt, which has been treated as bad, into a perfectly good debt which is paid in the year 4. The Revenue then says : " In taking the account of your profits and gains for the year 4, you must bring in that sum as a receipt. You have received it in the year 4, and you must accordingly bring it into account." It is not a question of revising or amending, by additional assessment or otherwise, any of the assessments for the years 1, 2 or 3. The claim of the Revenue is to treat that receipt as a receipt of income for the year 4.

The only statutory provision which bears on this question to which I need refer is the Income Tax Act, 1918, Sched. D, cases I and II, r. 3 (*i*). That sub-rule is as follows :

> In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . . (*i*) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad.

Then there is a provision as to bankruptcy or insolvency :

> In the case of the bankruptcy or insolvency of a debtor, the amount which may reasonably be expected to be received on any such debt shall be deemed to be the value thereof.

There is one curious point about that provision which I only note in passing. It finds its place in a series of sub-rules, all of which appear to deal with deductions, such as disbursements, expenses or losses, whereas this particular sub-rule prohibits the deduction of any debts. A debt would obviously only be the subject of deduction if the taxpayer was entitled to say to the Revenue : " Although I keep my profit and loss account on the basis of treating debts as being equivalent to receipts, yet as between me and the Revenue I am entitled to deduct debts because I have not yet been paid." The effect of the rule is to treat the account, which has to be taken for income tax purposes, on the same basis as a commercial account, and to prohibit the deduction of debts on the ground that they still remain to be paid and consequently ought to be brought into account in the year in which they are paid. The practice always has been, and rightly, having regard to that language, to treat debts in the ordinary commercial way, as though they were receipts of the year, and bring them into the account accordingly.

The first question which falls to be decided in examining this matter is one on the true construction of that sub-rule. In *Gleaner Co.* v. *Assessment Committee* (1), a case in the Privy Council on appeal from Jamaica arising out of the Jamaica income tax law, it is said that a provision similar in terms to this one did not justify the giving of an allowance in respect of a doubtful or bad debt save on the occasion when the debt was first brought into the account. For instance, the reasoning of that decision, if it applied to the present case, would have produced this result, that the allowances granted by the Revenue in years 2 and 3 would not have been authorised by the language of this sub-rule. The allowances could only have been made in respect of the debt in the year 1. In the year 1 there was no ground at all for writing it down, much less for treating it as altogether bad, and, therefore, nothing fell to be done about it. The consequence would have been, if that view applied, that the allowances granted by the Revenue in the years 2 and 3 would have been merely voluntary allowances not made pursuant to any provision of the statute. It was further said in that case ([1922] 2 A.C. 169, at p. 175) :

> If, therefore, debts decided to be doubtful in one year were found to be good at a later date, apart from the provisions of sect. 30 [that is of the Jamaica Act] there are no means whatever of obtaining further income tax upon the amount, nor, if their value further diminish, could they be the subject of reassessment.

That language, if it were applicable to the present case, would preclude the Crown from maintaining the claim it now makes, namely, to have the receipt in the year 4 brought into account in respect of that year. But in the recent case of *Absalom* v. *Talbot* (2) in the House of Lords, the effect of sub-rule (*i*) was considered in that connection. It is right to say that the observations to which I am about to refer were by way of *dicta* only. But of the five Lords who were sitting on that appeal, three, namely, Lord Simon, L.C., Lord Atkin and Lord Porter, emphatically and clearly dissented from the view which had been expressed by the Privy Council in the *Gleaner* case (1), and held—I repeat by way of *dictum* only—that it was legitimate for the Revenue to make allowance in a subsequent year in respect of a debt which, in the earlier year, had been treated as a perfectly good debt. The other two Lords, Lord Thankerton and Lord Russell of Killowen, appear to have been inclined to take the opposite view, although they did not express any concluded opinion. We have, therefore, 3 clearly expressed statements in that case as to the true construction of this sub-rule. We are not bound, of course, to follow them. I think it falls to us to decide whether, in our opinion, those expressed opinions are in accordance with the true meaning of the sub-rule. If we came to the conclusion that they were not, and that the view of the Privy Council in the *Gleaner* case (1) was preferable, the result of this case might well have been different to what I consider it should be, because then the allowances would have been purely *ex gratia* allowances. But, in my opinion, the views expressed by those three members of the House in *Absalom* v. *Talbot* (2) are correct.

I think I am right in saying that no one of the three Lords thought it necessary to examine carefully the language of the sub-rule, in order to show how and why the construction of it admitted the making of such allowances as we have to consider in this case. But it seems to me that that task is not really a difficult one, for this reason. When one looks at the language, it starts, first of all, by prohibiting a deduction in respect of a debt. That would appear to mean, as I have said, that a taxpayer cannot come and say : "Exclude this debt from the computation because it has not yet been paid." But in this case, in the years 2 and 3 the company was in effect saying to the Revenue : "We claim a deduction in those two years in respect of this debt ; the reason being that in those years 2 and 3 something has happened to it which has had the result, first, of reducing it in value, and subsequently destroying the value altogether, on the ground that it was bad." The company claiming to make that deduction in respect of the debt in the years 2 and 3 is entitled to the relief which the sub-rule allows, namely, that, if it is a bad or doubtful debt proved to be such to the satisfaction of the Commissioners, a deduction may be made. That is exactly what happened.

The contrary view, of course, is that the only occasion when the question of badness or doubtfulness of debts falls to be considered is the occasion when the debtor is bringing his debt into the account. But I cannot see that the language of this sub-rule necessarily leads to that result. It applies to any deduction claimed in respect of any debt, at any time in any year it seems to me, and such a claim was precisely the claim that was made by the company in this case. I am accordingly of opinion that we ought to follow the *dicta* of the majority of the House in *Absalom* v. *Talbot* (2). That is the first question to be considered.

The next question is : what is to be done where, in a subsequent year, the debt having, in the meanwhile, become a good debt, is paid ? In the *Gleaner* case (1) as I have said, it was regarded as a consequence of the early part of the decision, that a receipt in a subsequent year of a debt previously treated as bad could not be treated as something to be brought into account in that year, or as a ground for revising or reopening the earlier assessments. In the *Absalom* case (2) that consequence was not referred to, save by Lord Porter. He said this ([1944] 1 All E.R. 642 at p. 652) :

> Your Lordships' attention, however, has been drawn to the practice in the past of the Inland Revenue authorities of making an allowance in respect of losses for bad or doubtful debts as and when they occur, though the debt itself was originally treated as being of its face value in a previous year's accounts. Such a practice necessitates, I think, the corresponding obligation on the part of the taxpayer to submit in a later year to an increase in the sum at which a debt previously treated as bad or doubtful should be brought into account if in fact a payment greater than the assumed value had been obtained or seems likely to be obtained, on a later occasion.

That appears to mean that, in LORD PORTER's view, a subsequent improvement in the debt in a later year could be given effect to, notwithstanding that the debt had not in fact been paid, because he uses the phrase "seems likely to be obtained." I am not sure that I would accept that view; but we have not to consider it here because we are now dealing with a case where the debt has in fact been paid. Then he refers to *Anderton & Halstead Ltd.* v. *Birrell* (3). He says:

> The decision in that case turned upon a different point, namely, whether the debt could be treated as having been mistakenly valued at too low a figure in the years in which the value had been written down, so that the profits of those years could be recalculated, the value written up, and the sum, upon which tax was payable, increased.

That was a demand by the Crown to get what it wanted by a different method, namely, by re-opening the earlier assessment. LORD PORTER goes on:

> The argument that it could be so treated was held to be unsound, but nothing was said to throw doubt upon the right of the subject to have the value of a debt reduced at any time as and when it was discovered to be bad or doubtful, or of the Crown to have it increased in some future year, if it proved to be of greater value than had been assumed in an earlier year when it was brought into account or valued.

LORD PORTER took the view that, if the debt was paid in the subsequent year in whole or in part, that payment was a matter to be brought into account; but he also seems to have taken the rather more extreme view that, even if it were not paid, a mere change of its value would justify giving effect to that change in the account of the year in which it took place. As I have said, I am not prepared, without further consideration, to accept that.

If one looks at the position when the company in the year 4 received this sum, the first question that occurs to one to ask is this: as between the Revenue and the taxpayer, has the sum so received in any shape or form been brought into account for tax purposes? Leading counsel for the appellants says: "Yes, it has. It was brought into account in the form of a debt in the year 1, according to the ordinary practice, and, having been brought into account in the form of a debt in the year 1, it is not possible to strike it with tax in the year 4 when it is received." The reason why a receipt is not taxed in the year of receipt, I apprehend, is that it has already been taxed in the form of a debt in the year to which the debt is referable. But, in the present case, it seems to me impossible to disregard what has happened in the years 2 and 3 as affecting the position of the taxpayer, on the one hand, and the Crown on the other, in respect of this particular receipt. It seems to me, looking at the whole of what has happened, it is quite impossible to say that this receipt ought to be treated as having been previously brought into account for tax at all. It is perfectly true that it was originally brought into account in its then shape of a debt; but the effect of what happened in years 2 and 3 appears to me to have reversed that position altogether. The net result is that, at the end of the year 3, it is untrue to say that this particular item has been brought into account for tax purposes because, although it was brought in in calculating the profits in the year 1, it was taken out again in calculating the profits of the years 2 and 3. Here is a receipt in year 4. Why should not it be struck with tax when it has not so far been brought into effective computation? It is not like an ordinary trading debt which, when it is received, would not be taxed a second time. This is a peculiar debt, having regard to its history, of which it is impossible to say that, at the time when it was received, it had been brought into account for tax purposes while it was still only a debt. You cannot put what happened in the year 1 into a sort of watertight compartment and disregard what happened in the years 2 and 3. In my opinion, you must look to the result of all the transactions, and ask yourself in the year 4: what is the status of this receipt as between the taxpayer and the Revenue? Is it a receipt which must be excluded from computation on the ground that it has already come in in another form, namely, the form of a debt, or is it to be treated as something which has never been brought into account at all owing to the particular provisions of sub-rule 3 (*i*), and to what, in fact, was done under those provisions? In my opinion, the Crown's contention is right in this matter.

Junior counsel for the appellants pointed out that the receipt in the year 4 had its origin, from the commercial point of view, in the coal contract made in the year 1. No doubt that is perfectly true, but the question we have to decide is: what is the status of this receipt as between the taxpayer and the Revenue having regard to the events which have happened? Clearly, as counsel points out, if in year 1 there had been a debt which, for some reason, had been omitted, and then in year 4 the amount of that debt was paid, the proper course, according to the ordinary practice, would be not to treat that as a trading receipt of year 4, but as a trading receipt of year 1, when it ought to have appeared in the accounts in its then form of a debt. That is perfectly true, but the proper remedy in that case is to re-open, by proper procedure, the account of year 1. But that is not this case at all. That is a case of mere omission. This is a case where the whole position of the debt has been completely revolutionised by what happened in years 2 and 3. I can see no reason for saying that, as between the taxpayer and the Revenue, this receipt must be attributed to the year 1.

In my opinion, the judge, who took that view contrary to the view of the Commissioners, was perfectly right and the appeal must be dismissed with costs.

SOMERVELL, and COHEN, L.JJ., agreed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Hyde, Mahon & Pascall*, agents for *Wilkinson & Marshall*, Newcastle-upon-Tyne (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CROWN BEDDING CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Cohen, L.JJ.), March 6, 7, 8, 1946.]

Revenue—Excess profits tax—Acquisition of shares by a company in another company already controlled indirectly—Uncertainty as to liability to excess profits tax—Whether main benefit expected to accrue from the transaction was avoidance or reduction of liability to tax—Finance Act, 1941 (*c.* 30), *s.* 35—*Finance Act*, 1944 (*c.* 23), *s.* 33.

The appellant company, C.B., acquired certain shares in another company in which a large number of shares were already held by a subsidiary wholly owned by the appellants. By acquiring these shares the appellant company put itself in the position of a group of companies for the purposes of excess profits tax. The company, though aware at the time that in a certain event an excess profits tax benefit would accrue to the group, did not expect that the benefit would ever materialise owing to the improbability of the group remaining liable to excess profits tax. The Commissioners of Inland Revenue made a direction on the ground, *inter alia*, that, under the Finance Act, 1944, s. 33 (3), the "avoidance or reduction of liability" was to be deemed to have been the main purpose or one of the main purposes of the transaction. The company appealed under the Finance Act, 1941, s. 35 (3), to the Special Commissioners, who found as a fact that a tax benefit was to be expected and, comparing that benefit with any alleged commercial benefit, took the view that the tax benefit was the main benefit. On appeal, it was contended for the appellant company that, on a proper construction of sect. 33 (3) of the 1944 Act, a benefit could not be expected to accrue when the avoidance or reduction of tax was not a probability but a possibility:—

HELD: (i) on a proper construction of sect. 33 (3), the "main benefit" meant that which, in the opinion of the tribunal ultimately deciding the question, might have been expected by a person surveying all the facts and knowing all the law on the subject at the time the shares were acquired.

(ii) the word "expected" could not be construed in the sense that a hypothetical observer must have had that degree of confidence in the future as to expect that the benefit would materialise.

(iii) there was ample evidence on which it could be found that the tax benefit was the main benefit which might have been expected to accrue.

[**EDITORIAL NOTE.** This is the first decision on sect. 33 of the Finance Act, 1944, which amended the Finance Act, 1941, s. 35. Under sect. 33 (3) it is sufficient to prove that the main benefit which might have been expected to accrue from, *inter alia*, the transfer or acquisition of shares in a company, was avoidance or reduction of liability to tax. It is no longer necessary to prove the element of purpose. It is now held that "might have been expected" does not refer to the expectation in fact entertained by those carrying out the transaction, but the benefit which might have been expected by some third party in possession of all the relevant facts and law at the time. This would appear to be in accordance with the spirit of the section, which substitutes a statutory presumption for the former proof as to the main purpose of the transaction intended by the parties.

FOR THE FINANCE ACT, 1941, s. 35, AND FOR THE FINANCE ACT, 1944, s. 33, see HALSBURY'S STATUTES, Vol. 34, p. 131, and Vol. 37, p. 329.]

APPEAL by the taxpayer from a decision of MACNAGHTEN, J., dated Nov. 16, 1945. The facts are fully set out in the judgment of LORD GREENE, M.R.

J. Millard Tucker, K.C., and *J. W. P. Clements* for the appellants.

Terence Donovan, K.C., and *Reginald P. Hills* for the respondents.

LORD GREENE, M.R.: The Finance Act, 1941, s. 35, gave power to the Commissioners of Inland Revenue to give directions in certain cases with a view to counteracting the effect of transactions designed to avoid liability to excess profits tax. The direction could only be given where the Commissioners were of opinion that the main purpose for which the transaction was effected was "the avoidance or reduction of liability to excess profits tax." If they formed such an opinion, they could, if they thought fit, give a direction to make appropriate adjustments so as to counteract the effect of the attempted avoidance. By sect. 35 (3):

> Any person aggrieved by a direction of the Commissioners under this section may appeal to the Special Commissioners, whether on the ground that the main purpose of the transaction or transactions was not the avoidance or reduction of liability to tax or on the ground that no direction ought to have been given or that the adjustments directed to be made are inappropriate.

In the Finance Act, 1944, certain amendments to those provisions were enacted. Sect. 33 (1) and (2), introduced these amendments. It included as one of the grounds on which the Commissioners could form an opinion the case where the purpose was not merely the main purpose of the transaction but "one of the main purposes" of the transaction. Subsect. (3) contains a further and very stringent amendment and it is upon that subsection that the present question arises. It reads, so far as material, as follows:

> If it appears in the case of any transaction or transactions being a transaction which involves, or transactions one or more of which involve: (*a*) the transfer or acquisition of shares in a company . . . that, having regard to the provisions of the law relating to excess profits tax, other than the said section thirty-five, and this section, which were in force at the time when the transaction or transactions was or were effected, the main benefit which might have been expected to accrue from the transaction or transactions during the currency of excess profits tax was avoidance or reduction of liability to the tax, the avoidance or reduction of liability to excess profits tax shall be deemed for the purposes of the said section thirty-five to have been the main purpose or one of the main purposes of the transaction or transactions.

The effect of that is this. Whereas under the original sect. 35 of the 1941 Act, even with the amendments introduced by subsect. (2) of sect. 33 of the 1944 Act, it would have been necessary in such a case as this to prove to the satisfaction of the Commissioners of Inland Revenue or, on appeal, to the satisfaction of the Special Commissioners, that the main purpose, or one of the main purposes, of the transaction, was in fact the avoidance or reduction of tax liability, under subsect. (3) in the cases there mentioned the necessity of proving the subjective element of purpose in the minds of the actors is removed. It is sufficient to prove that the main benefit which might have been expected to accrue was "avoidance or reduction of liability to tax." Directly that is proved, the matter of purpose is deemed to have been satisfied.

The transaction in the present case was one under which the appellant company, the Crown Bedding Co., Ltd., acquired certain shares in the South Wales Flock Co., Ltd., from three gentlemen of the name of Seccombe and their mother, who held a small number. Those three gentlemen were three out of four of the directors of Crown Bedding Co., Ltd. That company had a wholly owned subsidiary called the Midland Flock Co., Ltd., which in its turn held a large number of shares in the South Wales Flock Co., Ltd. For the purposes of the Acts, the Crown Bedding Co., controlled both the Midland Co., and the South

Wales Co. Accordingly, the Seccombes, as directors of the Crown Bedding Co., were in the position indirectly to control the actions of the South Wales Co. By acquiring those shares from the directors and Mrs. Seccombe, the Crown Bedding Co., with its associated companies—there were others besides the Midland Co., and the South Wales Co.—put itself in the position to be treated as a group of companies for the purposes of excess profits duty.

Broadly speaking, without going into details, the effect of that grouping is that the profits of the group are taken together. One of the benefits to the taxpayer of such a grouping consists in the fact that an unsuccessful company in the group can claim to have its deficiency set against the profits of the more successful members of the group. It was therefore the case that, if the Crown Bedding Co., Ltd., could secure these shares but only if they could secure these shares, they would be in a position to claim and set against the profits of the group as a whole any deficiencies which the South Wales Co., suffered in the course of its business. It was also extremely probable at the time that the South Wales Co. would in fact suffer deficiencies, but it was uncertain (and indeed regarded apparently as improbable), whether the remaining members of the group would, in the circumstances at the time, be likely to earn profits the amount of which would make it advantageous to them to have the deficiency of the South Wales Co., to fall back upon so as to diminish their liability to tax.

The Commissioners of Inland Revenue made a direction based upon the view, first of all, that avoidance or reduction of liability to excess profits tax was the main purpose or one of the main purposes of the transaction. That particular branch of their opinion dropped out of the case when the matter came on appeal before the Special Commissioners, because the Crown did not apparently attempt to rest its case on the ground of purpose in fact. The other ground given by the Commissioners of Inland Revenue in their direction was that " the avoidance or reduction of liability " under subsect. (3) of sect. 33 was to be deemed to have been the main purpose or one of the main purposes. That is the question which was considered by the Special Commissioners.

I should have added one other matter of fact. There was evidence in the case that the directors thought, or were advised, that it would be advantageous to the Crown Bedding Co., and to the South Wales Flock Co., I suppose, or at any rate to one or other of them—it does not matter which—to get rid of the minority shareholding of the Seccombes and their mother. That is the only commercial benefit which could have accrued from this transaction other than the avoidance of excess profits duty. I can find nowhere in the case, nor do the Commissioners find anything to suggest, that any benefit of any kind other than excess profits duty and the alleged benefit arising from the acquisition of these minority shares came into the picture at all. With regard to the benefit to be obtained by getting rid of these minority shareholders, it is important to observe that, with the exception of Mrs. Seccombe, who held a small number of shares, the holders of the majority of the shares, the three Seccombes, were in fact the people controlling the Crown Bedding Co., and its subsidiaries. They were the directors. The Special Commissioners took the view that the benefit, if any, to be expected from getting rid of these minority shareholders, was of a very trivial and hypothetical nature. I must confess that nothing that counsel for the appellants has said has persuaded me that there was any real appreciable benefit in getting rid of these minority shareholders.

The finding of the Commissioners was expressed in this way :

> In May, 1941, three directors of a controlling company sold to that company their shares in a subsidiary company and the question to which we have to find the answer is which benefit could at that time be reasonably regarded as the greater, the tax benefit or the commercial benefit. The special difficulty in this case is that, after hearing the evidence, and especially the evidence of Mr. Cooke, it is not the comparative greatness of the benefits which we must consider but their comparative smallness. We hold that this appeal fails because while we accept Mr. Cooke's evidence that the prospect of a tax benefit was small the prospect of a commercial benefit was still smaller, so small indeed as to be practically negligible.

The commercial benefit to which the Special Commissioners referred in that finding is quite clearly the commercial benefit to be expected from the elimination of the minority shareholders, and they find as a fact—and there is no possible ground for differing from them in this court—that that benefit was so small as to be practically negligible. There is ample evidence on which they could come to that finding and we could not possibly disturb it.

The appeal, however, is based on other considerations. Before I come to consider the arguments put before us by counsel for the appellants, I would like to refer to one or two passages in the case. Para. 8 refers to the evidence of two of the Seccombes to this effect :

> The directors knew at the time of this transaction that the South Wales Flock Co. had a standard for excess profits tax purposes of £3,000 approximately. They also knew that by reason of this transaction this standard would be added to that of the Crown Bedding Co., and its other subsidiaries.

That is not quite accurate, but the inaccuracy does not really affect the substance of the point. The paragraph goes on :

> . . . and that as the South Wales Flock Co. had ceased to trade and substantial excess profits tax deficiencies would result an excess profits tax benefit would arise if the group of companies remained liable to excess profits tax, but for the reasons stated in paras. 9 and 10 hereof, it was not then expected that the group would remain liable to excess profits tax, and the question of excess profits tax was not considered.

That paragraph, notwithstanding an unimportant mis-statement, makes it quite clear also that the directors were fully conscious at the time of the fact that in a certain event an excess profits tax benefit would accrue to the group. That event was if the group of companies remained liable to excess profits tax. It is quite clear from that paragraph that they had that knowledge in their minds, but they also had something else in their minds and that was an expectation, namely, that the group would not remain liable to excess profits tax. The effect of the evidence appears to be that, with full knowledge of the advantage that would accrue, they put that out of their minds as a purpose of the transaction, because they did not expect that that benefit would ever materialise owing to the improbability of the group remaining liable to excess profits tax. Accordingly, they say : " The question of excess profits tax was not considered."

I might pause there to deal with one point. Taking that evidence at its face value, it goes no further than this, that the directors did not expect that they would obtain a tax benefit from this transaction. But counsel for the appellants did not argue that the opinion of the directors was to be treated in any way as conclusive for the purposes of the subsection. In other words, when the subsection speaks of the main benefit which might have been expected it does not mean the main benefit which was in fact expected by those carrying out the transaction but means the main benefit, in the opinion of the tribunal which ultimately has to decide, which might have been expected by a person surveying all the facts and knowing all the law on the subject at the time. I do not mean that the views of directors who are familiar with the facts would be inadmissible in evidence. All I am saying is that the fact that the directors expected or did not expect a particular result can by no means be conclusive of the question, although it may be evidence which the Commissioners should take into account in forming their opinion.

The next paragraph of the case I wish to refer to is para. 9. It sets out the difficulties of the group of companies with the possibility that they would not be able to retain their factories or sell their products as well as they had sold them before. It also refers to certain war damage and sums up by saying :

> The outlook was very disturbing . . . Later, however, [I think that must mean later than May, 1941, but nevertheless in 1941] the outlook changed as the result of engineering contracts of which there had been no expectation at the time of the transactions in dispute. In the result, there was excess profits tax liability for 1941 amounting to over £12,000.

That means this. The reduction of excess profits tax which the directors knew would take place in a particular event, but did not consider would take place because they thought that particular event was improbable, had in fact been realised, because the event which they considered to be improbable had in fact taken place.

Para. 10 sets out the evidence given by the auditor to the Crown Bedding Co. He says :

> . . . that he knew before June, 1941, [that was the date of the acquisition of the shares] that it was proposed to close down South Wales Flock Co., and to sell the shares of Mr. Pinchin and the Seccombe family to Crown Bedding Co. When told of

this proposal he advised in favour of transferring the family shares at the same time as the Pinchin shares for the reason that there was a moral obligation to treat all shareholders alike.

I must confess that is a reason which seems to me to be just nonsense, and the Commissioners obviously paid not the slightest attention to it. But that enables me to say this in passing. The point was suggested by counsel for the appellants as to whether the benefits which have to be considered and compared under the subsection should include benefits other than pure commercial benefits and extend, for instance, to some moral benefit or the satisfaction of some moral obligation. I do not find it necessary, on the facts of this case, to express any opinion whatever on that question, because the only peg on which it could have been hung in the present case was that statement of the auditor to the Crown Bedding Co., about the moral obligation, and that is a matter to which I can attach not the slightest importance.

The evidence of the auditor to the Crown Bedding Co., then goes on as follows:

> It would, in his view, be a benefit to the Crown Bedding Co., to have 100 per cent. control and thus avoid having a minority of shareholders whose interests might conflict with those of the parent company.

That is the commercial benefit which the Commissioners, quite naturally, in my opinion, found to be negligible. The evidence continues:

> At the time of the transaction in dispute the group standard was known to be between £60,000 and £70,000, though the precise figure was not finally agreed until 1942 owing to changes in legislation; that if an excess profits tax benefit was to be derived from the transactions it would be necessary for the group to have made a profit in excess of that figure . . . Almost the whole of the standard profits of the group were derived from the Crown Bedding Co. In Apr. and May, 1941, he could not have stated the trading position of the Crown Bedding Co., and its connected companies. He knew that there was a decrease in sales and had the fall in sales continued there might well have been no profit at all.

In view of that, the auditor might have had some difficulty, if he had been asked, in answering the question whether he thought that some sort of benefit would probably occur in the matter of excess profits tax.

I think the case must be considered on the footing that those concerned did not expect that excess profits tax benefit would accrue. They realised that, on the probabilities of the case, any excess profits tax benefit was unlikely to accrue and was not worth their consideration. The Special Commissioners quite clearly found as a fact that, in their opinion, a tax benefit was to be expected and, comparing that benefit with the alleged commercial benefit, they took the view that the tax benefit was the main benefit.

Counsel for the appellants attacks that finding by going straight to the construction of the section, and he says that under the section it is not open to the Special Commissioners to find that the main benefit which might be expected to accrue was avoidance or reduction of tax where avoidance or reduction of tax was not a probability but only a possibility. He says in this case the directors thought that it was so remote as to be negligible and they did not take it into account. He says, on the facts as found, a reasonable man, knowing all the facts and putting himself in the position in which things were at the relevant date, would have come to the conclusion that he could not expect any benefit in the way of avoidance or reduction of tax to accrue: the ground being that in order to bring the section into operation there must be expectation of a benefit by way of avoidance or reduction of tax in the sense that a reasonable man would expect such avoidance or reduction to accrue, not that he would think that it might, in certain unlikely events, accrue but that it would, in fact, in his opinion, be likely to accrue.

In my opinion, that is much too narrow a construction to put upon these words. After all, the question of probability or possibility is a matter really which can be considered as resembling a scale. At the top of the scale is certainty. At the bottom of the scale is improbability so extreme that no sensible person would ever take it into account. But, subject to that, the precise point on the scale at which you can say that a thing is probable rather than possible and the precise point at which you say that a probability falls to the level of a mere possibility depends on the view taken by a hypothetical observer. It seems to me that it is quite impossible to put on the word "expected" the sense that a hypothetical observer must have had that degree of confidence in the future as to expect that the benefit would materialise.

In the present case the company, by this transaction, acquired shares the possession of which in its portfolio was a partial safeguard against excess profits tax. It seems to me that the Commissioners must have taken the view that no reasonable person, looking at the position as it then stood, would have disregarded that benefit as a benefit arising from the transaction. It is perfectly true that the possession of these shares in its portfolio did not at the moment give any tax benefit to the company. But it was an effective protection and would prove an effective protection in the matter of tax if a certain event happened, namely, if the profits of the group exceeded a certain amount so that the benefit of the deficiency of the South Wales Co., would be effective.

The Commissioners had to decide whether that was a benefit in the first place which might have been expected to accrue, and they clearly came to the opinion that it was. In my view, on the evidence and on the true construction of these words, they were perfectly entitled to do so. I cannot find that they in any way misdirected themselves as to what this language means. They found that there was a benefit and that that benefit would result, in certain events, in the avoidance or reduction of liability to excess profits tax. Whether those events were probable or whether they were possible does not seem to me to decide the case at all. If the Commissioners in considering the possibility of benefit came to the conclusion that to the mind of a reasonable man that benefit was so remote and so unlikely as not to be worth considering, they would naturally put it out of consideration. On the other hand, once the possibility moves up the scale and advances in the direction of a probability, it seems to me there is a wide area within which they, as judges of fact and of matters of degree, are entitled to form a conclusive opinion. That is what they did in the present case.

That that view is right, I think is confirmed when one considers the other benefit which counsel for the appellants said was the real benefit to be expected, namely, the commercial benefit of getting rid of these minority shareholders. But that benefit, again, was a contingent benefit. It would only be a benefit if the minority shareholders disagreed with some policy proposed or were obstructive in some way. The benefit would only materialise in some such event as that. That benefit, therefore, was a benefit which could only be expected to accrue on the hypothesis that certain events took place.

If the argument of counsel for the appellants be right, it would appear that for the purposes of this section no benefit was to be expected to accrue from the transaction at all. The tax benefit was not to be expected to accrue because the obtaining of that benefit depended on certain unlikely contingencies. A commercial benefit would not be likely to accrue because that again depended on certain contingencies as to which nobody could say whether they would be likely to happen or not. Each of the benefits under discussion was in the nature of a safeguard against possible future events.

In my opinion, it was for the Commissioners to say which was the main benefit which might have been expected to accrue. I cannot find that they in any way misdirected themselves. They had ample evidence on which they could find that of the two benefits the tax benefit was the main benefit. Their opinion and the opinion of the judge who upheld them appear to me to be unassailable. Curiously enough, the judge went further (it is not necessary for us to go anything like so far) because he appears to have taken the view, not that there was no evidence on which the Commissioners could find as they did, but that there was no evidence on which they could have found otherwise. That extreme view was not put before us by counsel on behalf of the Crown, and I do not find it necessary to go as far as that the Commissioners' ground was the right ground. The judge certainly confirmed it, and perhaps confirmed it with certain over-emphasis, but, nevertheless, he came to the right conclusion.

In my opinion, the appeal must be dismissed with costs.

SOMERVELL, L.J.: I agree with the judgment that has just been delivered and with the reasons which LORD GREENE, M.R., has given. I only desire to add a sentence or two on the question of construction which was pressed upon us by Counsel for the appellants, in amplification of that part of the judgment of LORD GREENE, M.R., in which he demonstrated that, if counsel was right, where there were only possibilities of benefit then no benefit " might have been expected " within the natural meaning of these words and their meaning in this section. If that argument were right—and I agree fully with the reasons which have been given against it—it would introduce into this section a dividing line between probabilities and possibilities which would be extremely difficult to apply and which there are no words in the section to suggest exists. I simply put that forward as one possible added reason for rejecting the construction which was pressed upon us.

I agree that the appeal should be dismissed with costs.

Cohen, L.J. : I agree and I have nothing to add.

Appeal dismissed with costs.

Leave to appeal to the House of Lords.

Solicitors : *Ward, Bowie & Co.*, Agents for *Duggan, Elton & James*, Birmingham (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister at Law.*]

GILBERT *v.* McKAY.

[King's Bench Division (Lord Goddard, L.C.J., Humphreys and Henn Collins, JJ.), January 28, 1946.]

Street Traffic—Hackney carriages—Motor cars—Plying for hire without being licensed—Vehicles standing in public street—Hire and payment made in adjacent street—No contract with, and no payment to, driver of vehicle—Metropolitan Public Carriage Act, 1869 (*c.* 115), *s.* 7.

The appellant had an office in London with a sign, " Cars for hire," displayed on the outside. Several motor cars belonging to the appellant were standing in the street adjacent to the office, and, on Oct. 11, 1944, several persons were seen to enter the office for the purpose of paying for the hire of any one of the cars in which later they were driven away. On a charge of being the owner of unlicensed hackney carriages plying for hire, contrary to the Metropolitan Public Carriage Act, 1869, s. 7, the appellant was convicted and fined by the metropolitan police magistrate. The appellant appealed and a case was stated for the opinion of the High Court :—

Held : although in each case no contract was entered into with the driver of the car and no payment made to him, there was a plying for hire of the cars standing in the public street.

[**EDITORIAL NOTE.** It is difficult to lay down any test of what is " plying for hire " on which there are many decisions under the Town Police Clauses Act, 1847. It was held in *Cavill* v. *Amos* (1) that there was no plying for hire where the vehicle started from private premises, but in the case under consideration the vehicle stood outside the premises and the exhibition of the vehicle, while not conclusive, is a very important factor in deciding whether there was a plying.

As to the Metropolitan Public Carriage Act, 1869, s. 7, see HALSBURY'S STATUTES, Vol. 19, p. 165.]

Case referred to :

*(1) *Cavill* v. *Amos* (1900), 64 J.P. 309 ; 42 Digest 855, *89*.

Appeal by way of case stated by the defendant from a decision of a metropolitan police magistrate. The facts are sufficiently set out in the judgment of Lord Goddard, L.C.J.

Geoffrey Howard for the appellant.

Vernon Gattie for the respondent.

Lord Goddard, L.C.J. : This is a case stated by one of the metropolitan magistrates, in which the appellant was convicted of " being the owner of a hackney carriage . . . [which] was on Oct. 11, 1944 found plying for hire within the limits of the metropolitan police district, namely, at 6, Rupert Street, W.1., such carriage not being licensed to ply for hire," and there were two subsidiary charges to which it is unnecessary to refer, because it is clear that if he was properly convicted on the first charge, he was properly convicted on the others.

The facts found by the magistrate are as follows. The appellant keeps an office in Rupert Street, with a sign on the outside : " Cars for hire." On the night in question there were several cars belonging to him standing outside the office in the street. Various people came up, and as each got into a car and was driven away, the rank of cars moved forward. In each case the hirer had gone into the office and apparently paid his fare in the office to the proprietor or the manager of the business, that is to say, he did not make a contract with the driver. The magistrate has found that that amounted to a plying for hire, and it is said that he was wrong.

A certain number of cases were referred to before the magistrate, which he sets out in the case, and some of those cases have been referred to before us. Whether a car is plying for hire or not it is essentially a question of fact which has to be decided by the application to a great extent of the rules of commonsense, and nobody is more able to do that than the magistrate who stated this case, and in this particular case there is no doubt there was a plying for hire. What was being maintained was a stand, if I may use the word, for cars in the street. These cars were being used and left outside this office to be hired in exactly the same way as taxicabs drive up and stand on an ordinary hackney carriage stand in the street.

Various tests have at one time and another been laid down to decide whether or not a vehicle is plying for hire. CHANNELL, J., said in *Cavill* v. *Amos* (1) (64 J.P. 309, at p. 310) :

> In ordinary cases, in order that there should be a plying for hire the carriage itself should be exhibited.

It is quite possible that there can be a plying for hire where it is not exhibited, but where it is being exhibited it is a most important fact.

The only reason why I think it is necessary to say very little more than that we agree with the magistrate is that I think he has gone further in giving his reasons both in the case and the considered reasons than is necessary for the purpose of deciding the particular case. He has said in his reasons :

> I was further of the opinion that, if the cars had been concealed in a private yard or garage, the result would be the same provided that the cars were ready to be appropriated to an immediate hiring.

I express no opinion whatever as to whether that is a necessary conclusion or not ; in fact I am not going to say any more than that I do not necessarily agree with that remark of the magistrate. There may be cases in which, although the cars were standing in some yard and not actually seen by the public, it might be possible to find that there was a hiring. In any case, that part of the magistrate's finding is not necessary for this case, and I prefer to say no more about it. In my opinion there was abundant evidence in this case on which the magistrate could come to the conclusion that these cars were plying for hire ; I would say that there was no other conclusion to which he could come, and therefore this appeal must be dismissed.

HUMPHREYS, J. : I agree with every word of the judgment of LORD GODDARD, L.C.J.

HENN COLLINS, J. : I agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors : *H. R. Hodder & Son* (for the appellant) ; *The Solicitor for the Metropolitan Police* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

JOHNSON *v.* HUMPHREY.

[Chancery Division (Roxburgh, J.), February 18, 19, 1946.]

Sale of Land—Memorandum of contract—Terms—Balance of purchase money "to be paid immediately on possession"—When possession to be given not stated—Verbal agreement that possession should be given only when vendor had found other accommodation—Insufficiency of memorandum—No enforceable contract—Law of Property Act, 1925 (c. 20), *s.* 40.

On Nov. 9, 1944, H. entered into an oral agreement with J. to sell her house to him for £750, on the understanding that she would not give vacant possession until she had made some other suitable arrangement for herself. On Nov. 10, J. gave £20 to H. as a deposit on account of the purchase money, and made her sign a document stating that she thereby agreed to sell her house to J. for the sum of £750, for which he had paid a deposit of £20, "the balance to be paid immediately on possession." On Nov. 25 H. wrote to J., saying that she was unable to proceed with the sale and was therefore returning the £20. In an action brought by J. for specific performance of the contract of sale, it was contended on his behalf that the document of Nov. 10 was a sufficient memorandum within the meaning of the Law of Property Act, 1925, s. 40. It was further contended that there was an implied term in the agreement that possession was to be given and completion was to take place within a reasonable time of the making of the agreement :—

Held : (i) since the document signed by H., on Nov. 10, did not say when possession was to be given, which was a term of the contract made on Nov. 9, it omitted a material term of the contract and therefore it was not a memorandum sufficient to comply with the Law of Property Act, 1925, s. 40.

(ii) the ordinary principle of construction that, where no date was fixed for completion, completion was to take place in a reasonable time, and that vacant possession should be given on completion, could not be applied, because the document contained an express term that completion was to be determined by reference to possession. Moreover, where completion was made referable to possession, and nothing was said as to when possession was to be given, the court would not imply any term as to when possession should be given. Therefore, even assuming that the memorandum contained all the material terms of the contract, the contract was nevertheless unenforceable because it contained no provision as to the date for completion.

[**EDITORIAL NOTE.** It is argued as a subsidiary point in this case that where an agreement for the sale of land provides for the payment of the balance of the purchase money on completion, completion being made referable to possession at a time unstated, then completion must take place and possession be given in a reasonable time. This argument the court rejects, because in fact the document expressly provided that completion was to take place on possession being given and the document was silent on that point.

As to Sufficiency of Memorandum, see HALSBURY, Hailsham Edn., Vol. 7, pp. 120, 121, paras. 170, 171 ; and for Cases, see DIGEST, Vol. 12, pp. 148, 149, Nos. 1015, 1024.]

Action for specific performance of a contract for the sale of land. The facts are fully set out in the judgment.

Alan S. Orr for the plaintiff. The defendant appeared in person.

Roxburgh, J. : The statement of claim as amended reads as follows :

By an oral agreement on or about Nov. 9, 1944, the defendant agreed to sell to the plaintiff certain freehold premises being a bungalow known as "Seabys," Croft Way, Selsey, in the county of Sussex, for the sum of £750. On Nov. 10, 1944, the plaintiff paid to the defendant the sum of £20 by way of deposit and in part payment of the said purchase price and on the said date the defendant signed a written record of the said agreement which constitutes a note or memorandum of the said agreement to satisfy the Law of Property Act, 1925, s. 40. By the said memorandum it was agreed that the balance of the said purchase price should be paid immediately on possession of the said hereditament being given by the defendant. It was an implied term of the said agreement that the said sale should be completed within a reasonable time of the making of the said agreement. By a letter dated Nov. 25, 1944, the defendant repudiated the said agreement and refused to proceed with the said sale and the defendant has returned to the plaintiff the said sum of £20. The plaintiff claims specific performance [and certain other relief].

There is no doubt that by letter dated Nov. 25, 1944, the defendant did repudiate the agreement, if any, and did refuse to proceed with the said sale and did return the said sum of £20. Therefore, the issues which I have to determine are as follows : (i) whether there was an oral agreement on or about Nov. 9, 1944, and, if so, what were the terms of that oral agreement ; (ii) whether those terms were embodied in the document which was undoubtedly signed by the defendant, which is alleged to constitute the note or memorandum ; A and (iii) if the oral agreement is truly recorded in the memorandum, what the memorandum itself means.

On Nov. 9, 1944, the plaintiff, having heard that the defendant might be prepared to sell her bungalow, called upon her and inquired whether she would sell it to him. She said something to the effect that she would be prepared to sell it if she could find somewhere else to go to, and it was against that background that the negotiations took place. There was a discussion about the B price. The plaintiff offered her £750 and she accepted that offer. There was a discussion as to when she could give vacant possession, and she said—I have this from the plaintiff himself—that she would give vacant possession as soon as she could find somewhere to go, and if she could not find the place she wanted, she was prepared to store her furniture and go into either a hotel or a boarding house. Then the plaintiff offered her a deposit. She showed some reluctance, C whereupon he said it was a matter of business, and he then left. Shortly afterwards he returned with his wife. In the course of that visit the defendant told Mrs. Johnson that she would do her best to get out by Christmas, and if she could not find a place she would try to go to a hotel and store her furniture. At the close of that interview the plaintiff said that he would bring the deposit and an agreement on the following morning.

On the next day, the plaintiff returned accompanied by his son. The plaintiff D had in his own home prepared a document which he took with him together with a sum of £20. It was a very small deposit for a purchase at £750, but the plaintiff explained to me, quite frankly, that he was anxious to have something binding upon the defendant. He took this document, together with the £20, and he placed both of them in front of the defendant. The defendant having read the document, signed it. It is in these terms :

> Nov. 10, 1944. I hereby agree to sell my bungalow, "Seabys," Croft Way, Selsey, E to Mr. E. G. Johnson, Jeweller, High Street, Selsey, for the agreed sum of £750 [the amount is then written out in words] and for which he has paid a deposit of £20, the balance to be paid immediately on possession.

It is signed "C. B. Humphrey."

There was no suggestion by the plaintiff, and there is no suggestion in the pleadings, that the contract was made on Nov. 10. Both in the evidence and F in the pleadings it was said that the contract was made on Nov. 9, and this document, according to the plaintiff's case, was intended to be a record of the contract which should bind the defendant.

On Nov. 16, 1944, the plaintiff's solicitors wrote the following letter to the defendant :

> *Re* "Seabys," Croft Way, Selsey. We are acting for Mr. E. G. Johnson in his purchase from you of the above property for the sum of £750 of which he has paid to G you a deposit of £20 on account of such purchase money, and we undertsand vacant possession of the property is to be given on completion of the sale. We shall be glad if you will put us in touch with your solicitors in order that we may obtain the draft contract from them. If you have no regular solicitor, and would like us to act for you in the matter as well, we shall be happy to do so.

It will be observed that the letter is far from suggesting that the defendant had already bound herself by a contract ; on the contrary, the purchaser's H solicitors are offering their services to her for the preparation of a contract. I accept the evidence that the memorandum was not in the possession of the plaintiff's solicitors when the letter of Nov. 16 was written. It, therefore, comes to this, that the solicitors wrote that letter without any inquiry as to what the true position was.

It is very noticeable how quick the defendant was to take up the statement in the letter :

> We understand vacant possession of the property is to be given on completion of the sale.

She replied :

> I thank you for yours received this morning, and in reply beg first to correct the statement to the effect that vacant possession of the property, as address above, on completion of the sale was the arrangement I made with Mr. E. G. Johnson. I was not anxious to sell just now with the scarcity of houses vacant or available, and my condition of selling was that I would do so when I could make other suitable arrangements for myself and furniture. I did not ask for a deposit, and declined it, but Mr. Johnson came the next day with £20 deposit, and I signed his written statement that the balance of the purchase money would be received by me from him on the complete possession being given. If this does not suit Mr. Johnson's requirements I will immediately return the deposit money to him, more especially as in answer to all my inquiries I have had no glimmer of success for suitable accommodation . . . I thank you also for your offer of legal assistance . . .

On Nov. 20 the plaintiff's solicitors wrote :

> We thank you for your letter of Nov. 17. We will see Mr. Johnson upon it and take his instructions and write you again.

On Nov. 25 Miss Humphrey wrote to Johnson the letter to which I have already referred as being the letter of repudiation. She said :

> Owing to the present very difficult circumstances and to a sudden breakdown in my health, I am unable to proceed with the sale of the above property. I am, therefore, inclosing my cheque for £20, the amount deposited on account by you on Nov. 10 . . .

The letter was clearly a repudiation, if there was a contract.

The answer is this :

> Mr. E. G. Johnson has handed to us your letter of Nov. 25, with accompanying cheque . . . It is clear to us that the memorandum signed by you under date Nov. 10, 1944, evidences a binding contract between you and Mr. Johnson for the sale of the property for £750 and to this agreement Mr. Johnson is compelled to hold you. He asks us to point out that in consequence of your agreement to sell him this present property, his son has sold the house in which he now lives and is required to give possession. In any case there is a binding contract and our client is entitled to require you to perform the same and he does so require you to do. Will you therefore please instruct your solicitors to furnish us with abstract of title in order that the matter may proceed. We return your cheque for £20.

The money was ultimately sent back.

I am quite satisfied that one of the terms to which the plaintiff and the defendant agreed on Nov. 9 was that vacant possession should not be given until the defendant could make other suitable arrangements for herself and her furniture. Undoubtedly there was some discussion by way of modification of that agreed term. There is no doubt that the defendant said that she would try to get out by Christmas and that if she did not succeed in finding what she wanted she would try to go into apartments and store her furniture. Upon the whole, I think that the modifications of the stipulation never reached any degree of finality or certainty, *i.e.*, I do not think it was ever agreed for how long the defendant was to look for suitable accommodation before she was to move into apartments and store her furniture ; nor do I think exactly what she was to do was ever finally determined. But that the stipulation was made, and insisted upon, that she was not to give vacant possession until she had made some suitable arrangements for herself and her furniture, is to my mind established beyond all doubt. I do not think there is any conflict of evidence on the point.

If there was a term agreed to by both parties on Nov. 9 that the lady should give vacant possession when she could make other suitable arrangements for herself and her furniture, the memorandum does not contain all the terms of the bargain because it does not contain that term. It leaves the matter as a big query. It says :

> . . . the balance [*i.e.*, the balance of the purchase money] to be paid immediately on possession.

But it does not say when possession is to be given : therefore, plainly it does not include all the terms of the bargain, if I am right in holding, as I do hold, that one of the terms related to the giving of vacant possession. Nor do I think it matters precisely what that term was and whether or not it was too vague to be enforceable. If the term was too vague to be enforceable in a court of law, it would only mean that there was no contract, and, therefore, there could be no memorandum of it. Therefore, in my judgment, once I reach the conclusion, which I do, that there was a term about vacant possession agreed to on Nov. 9, the memorandum signed by the defendant on Nov. 10 cannot be a memorandum sufficient to comply with the Law of Property Act, 1925, s. 40, because it omits a material term of the bargain.

But, even if I am wrong in this conclusion and if, contrary to my judgment, all the material terms are embodied in the memorandum, then in my judgment the contract is unenforceable because it omits to deal with the vital question as to when possession is to be given. It is pleaded in this way:

> It was an implied term of the said agreement that the said sale should be completed within a reasonable time of the making of the said agreement.

Plainly it was not, because there was an express term about completion and, therefore, there cannot be any implied term about completion. There is an express term about completion because it is said:

> . . . the balance to be paid immediately on possession.

I would not wish to dispose of that point on that very narrow ground because, if that had been all, I should have given leave to amend. What counsel for the plaintiff really says is that there is an implied term that possession is to be given within a reasonable time of the making of the said agreement.

As regards that proposition, I desire to say this. It is, of course, well understood that, if a contract fixes no date for completion, the law implies that completion is to take place within a reasonable time. What is a reasonable time has to be measured by the legal business which has to be performed in connection with the investigation of the title and the preparation of the necessary conveyancing documents. It is also an implied term of a contract of the sale of land that vacant possession shall be given on completion, but here possession cannot be fixed by reference to completion because, by the express terms of the document itself, completion is to be determined by reference to possession. Therefore, the ordinary principles of construction clearly are inapplicable to the present case. Counsel for the plaintiff argued that in a case such as this, the direction that the balance is to be paid immediately on possession ought to be construed as meaning that possession is to be given, and completion is to take place, within a reasonable time. I do not know any case in which the court has construed a stipulation about possession in that manner, and counsel for the plaintiff has not referred me to any. If the reasonableness of the time is to be measured by such considerations as the difficulty of obtaining accommodation in the post-war world, I doubt whether the court would proceed to any such investigation. I should not be prepared to hold that in a contract of this sort, where completion is made referable to possession and nothing is said as to when possession is to be given, the court will imply any term whatever as to when possession should be given.

Accordingly, in my judgment the plaintiff has failed to prove an enforceable contract, and the action must be dismissed with costs.

Judgment for the defendant with costs.

Solicitors: *Kenneth Brown, Baker, Baker,* agents for *Wannop & Falconer,* Chichester (for the plaintiff).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

SHAYLER *v.* WOOLF.

[Chancery Division (Roxburgh, J.), January 29, 30, 31, February 1, 5, 6, 1946.]

Waters and Watercourses—Sale of land—Contemporaneous agreement for supply of water—Vendor owner of adjacent land—Covenants by vendor to supply water from pump on vendor's land for use of purchaser in connection with house on conveyed land and to keep pump in repair—Whether benefit of agreement assignable to subsequent purchaser—Whether covenants relating to land—Law of Property Act, 1925 (*c.* 20), *s.* 78.

By a contract dated July 4, 1938, Mrs. W. agreed to sell a piece of land adjacent to her own premises to Mrs. P., who covenanted to build thereon a bungalow for which she required a water supply. The contract contained a clause that on completion the vendor should enter into a contract to supply water on certain terms. The property was conveyed on July 30, 1938, and on the same day an agreement was entered into between Mrs. W. and Mrs. P., whereby Mrs. W. agreed to supply from a pump on her premises water for the use of Mrs. P. in connection with the bungalow to be erected on Mrs. P.'s premises. Cl. 1 of this agreement provided: "[Mrs. W.] will henceforth supply to [Mrs. P.] from the aforesaid pump situate on the premises of [Mrs. W.] and so long as such pump shall continue to produce the same a regular and continuous supply of water for use in respect of all domestic purposes in connection with the said bungalow." By cl. 2, Mrs. P. was to pay 10*s*. a year to Mrs. W. for the water supply. Cl. 4 provided: "[Mrs. W.] hereby covenants with [Mrs. P.] for and with intent to bind so far as may be herself and her successors in title that she and they will henceforth maintain and keep the said pump and the pipes taps and apparatus thereto in good and proper working order and repair and so long as such pump shall continue to produce the same do all such things as may be necessary to insure a constant supply of water." The agreement contained an arbitration clause and was determinable at the option of either party on 3 months' notice in writing at any time after the expiration of 10 years from the date of the agreement. After the outbreak of the war, the bungalow was unoccupied and Mrs. W. turned off the water supply. When the agreement was made, in 1938, the pump was producing water but was not in a good state of repair. In 1942, owing to the need for repairs, the rising main of the installation got out of order. Since the necessary repairs would have been expensive at the time, it was considered more economical to construct a new pump. The old pump was, therefore, dismantled, a new bore-hole was sunk and a new pumping apparatus was installed. There would have been no difficulty in connecting the bungalow to the new installation, but this was not done. On Aug. 17, 1944, Mrs. P. conveyed the property and the bungalow, together with the benefit so far as assignable of the water supply agreement, to S. S. requested Mrs. W. to continue the supply of water to the bungalow, but she refused to do so. S. thereupon brought an action for specific performance of the agreement. It was contended by Mrs. W. that the benefit of the covenants contained in the water supply agreement had not passed to S. because (*a*) the covenants did not relate to land and therefore the Law of Property Act, 1925, s. 78, did not apply to them; and (*b*) the agreement was one the benefit of which could not be assigned. It was further contended that, even if cl. 1 related to land, no action lay because, on the facts of the case, there had been no breach thereof; and cl. 4 related not to land but to an incorporeal hereditament (*i.e.*, the bundle of rights created by cl. 1) and the benefit of a covenant could not run with an incorporeal hereditament:—

Held: (i) the covenant contained in cl. 1 of the water supply agreement related to the land of the covenantee and the benefit of the covenant had passed to S. under the Law of Property Act, 1925, s. 78.

(ii) the covenant to keep the pump in repair (cl. 4 of the agreement) did not relate to an incorporeal hereditament; it was also for the benefit of the land, and ran with the land under sect. 78.

(iii) properly construed, the words in cl. 1, "so long as such pump shall continue to produce the same," meant "so long as such pump shall continue to produce the same if kept in such repair as is required by cl. 4."

(iv) because of Mrs. W.'s failure to keep the pump in repair, there had been a breach of cl. 4 of the agreement, and, upon the true construction of cl. 1, there had also been a breach of cl. 1.

(v) the burden of the agreement was not to supply the needs of Mrs. P. and her household but to supply the water required in the bungalow for domestic purposes; moreover, it was limited not with reference to Mrs. P.'s occupation of the bungalow but to a fixed term of years. It was, therefore, immaterial to Mrs. W. as to who was in occupation of the bungalow and the fact that the agreement contained an arbitration clause did not alter the position. Accordingly, the agreement was one the benefit of which could be assigned and which had been assigned.

[**EDITORIAL NOTE.** It is held that a covenant to pump water on to land of an adjoining owner, and a covenant to keep the pump in repair, are covenants running with the land enjoying the benefit, within the meaning of the Law of Property Act, 1925, s. 78. This is in accordance with the decision in *Cooke* v. *Chilcott* (2) where it was held that the benefit of a covenant to erect a pump and supply water ran with the land.

On the question of assignability at common law it is argued that if assignment of the contract, which contained an arbitration clause, is permitted it would throw an additional burden on the covenantor, since the arbitration clause would not be enforceable against the assignee. Roxburgh, J., however, holds that an assignee claiming the benefit of the covenant could not refuse to comply with an arbitration clause, since to hold the contrary would mean that no contract containing an arbitration clause would ever be assignable.

As to Right to Enforce Covenants, see HALSBURY, Hailsham Edn., Vol. 29, pp. 440-454, paras. 646-660; and for Cases, see DIGEST, Vol. 40, pp. 302-306, Nos. 2600-2626, and Vol. 44, pp. 9-11, Nos. 24-32.]

Cases referred to:

*(1) *Austerberry* v. *Oldham Corpn.* (1885), 29 Ch.D. 750; 40 Digest 305, *2618*; 55 L.J.Ch. 633; 53 L.T. 543.

(2) *Cooke* v. *Chilcott* (1876), 3 Ch.D. 694; 40 Digest 304, *2614*; 34 L.T. 207.

*(3) *Grant* v. *Edmondson,* [1931] 1 Ch. 1; Digest Supp.; 100 L.J.Ch. 1; 143 L.T. 749.

*(4) *Cottage Club Estates* v. *Woodside Estates Co.* (*Amersham*), [1928] 2 K.B. 463; Digest Supp.; 97 L.J.K.B. 72; 139 L.T. 353.

(5) *Aspell* v. *Seymour,* [1929] W.N. 152; Digest Supp.

*(6) *Bonnin* v. *Neame,* [1910] 1 Ch. 732; 2 Digest 365, *336*; 79 L.J.Ch. 388; 102 L.T. 708.

*(7) *Lurcott* v. *Wakely & Wheeler,* [1911] 1 K.B. 905; 31 Digest 332, *4757*; 80 L.J.K.B. 713; 104 L.T. 290.

(8) *Lister* v. *Lane & Nesham,* [1893] 2 Q.B. 212; 31 Digest 328, *4700*; 62 L.J.Q.B. 583; 69 L.T. 176.

Action for specific performance of an agreement for the supply of water. The facts and the provisions of the agreement are fully set out in the judgment.

C. L. Fawell for the plaintiff.

M. G. Hewins for the defendant.

Roxburgh, J.: In May, 1938, Arthur Peacock, who was a builder, took a fancy to a piece of land with a derelict building upon it, which belonged to the defendant, Mrs. Dorothy Gladys Irene Woolf, of Shottenden Lodge, Herne Bay. After some negotiation, a contract was made on July 4, 1938, between the defendant of the one part and the wife of Peacock, namely, Iris Ethel Peacock, of the other part, for the sale to her of the said piece of land for £175. She covenanted to demolish the old building and to build a new bungalow, for which she required a water supply. Accordingly, cl. 7 of that contract provided that on completion the vendor should enter into a contract to supply water on certain terms, which were subsequently embodied in an agreement which was then in contemplation.

On July 30, 1938, the property in question was conveyed to Mrs. Peacock and was mortgaged by her to the vendor to secure the purchase money in manner stipulated for, and on the same date the contemplated water supply agreement was entered into. This is the document upon which this action is founded, and it is as follows:

> An agreement made on July 30, 1938, between [the defendant] of Shottenden Lodge . . . of the one part and Iris Ethel Peacock . . . of the other part Whereas the said [defendant] is the owner of the property known as Shottenden Lodge West End Herne Bay aforesaid and the said Iris Ethel Peacock is the owner of property adjacent thereto

and the said [defendant] has agreed to supply from the pump on her said premises water for the use of the said Iris Ethel Peacock in connection with the bungalow now in course of erection upon her said premises which are known or intended to be known as [blank] subject to the terms and conditions of these presents [then it was agreed—and this agreement is under seal]: 1. The [defendant] will henceforth supply to the said Iris Ethel Peacock from the aforesaid pump situate on the premises of the [defendant] and so long as such pump shall continue to produce the same a regular and continuous supply of water of wholesome quality for use in respect of all domestic purposes in connection with the said bungalow known as [blank] now in course of erection upon the land of the said Iris Ethel Peacock such water to be conveyed from the said pump through mains or pipes to be constructed by the said Iris Ethel Peacock as hereinafter provided. 2. The said Iris Ethel Peacock shall pay to the said [defendant] a yearly sum of 10s. payable yearly in advance the first of such payments to be made on July 3, 1938, for such water supply as aforesaid. 3. The said Iris Ethel Peacock shall have full right and liberty to lay mains and pipes so far as may be necessary for carrying and conducting the said water supply . . . in or under the adjoining property of the said [defendant] with the liberty and right of entering thereon from time to time for the sole purpose of inspecting maintaining cleansing and repairing renewing and enlarging such mains pipes valves manholes and surface boxes so far as aforesaid the said Iris Ethel Peacock doing as little damage as possible to the surface of the said adjoining property and the crops (if any) for the time being growing thereon and making good any damage done. 4. The said [defendant] hereby covenants with the said Iris Ethel Peacock for and with intent to bind so far as may be herself and her successors in title that she and they will henceforth maintain and keep the said pump and the pipes taps and apparatus thereto (but except the mains pipes or apparatus layed or fixed or to be layed or fixed for carrying and conducting the said water supply from the said pump to the property of the said Iris Ethel Peacock as aforesaid) in good and proper working order and repair and so long as such pump shall continue to produce the same do all such things as may be necessary to insure a constant supply of water of a quantity and quality hereinbefore mentioned and will from time to time comply with or enforce all statutory provisions for the time being in force for guarding against fouling of water and will not at any time during the continuance of this agreement do or suffer to be done upon the said adjoining land any act or thing which may in any way diminish interfere with or damage the purity or flow of water to or carried by the mains or pipes hereinbefore mentioned. 5. This agreement may be determined (without prejudice to the rights of either party for any antecedent breach thereof), at the option of either party (*a*) In the event of a main water supply being brought within such a distance of the said property of the said Iris Ethel Peacock as will enable her to connect up with the same at a reasonable cost or (*b*) At the expiration of a period of 10 years from July 30, 1938. Such option shall be exercised by the party desiring so to do giving to the other three months' notice in writing at any time after the happening of either of the said events and at the expiration of three months from the date of such notice this agreement shall save as aforesaid determine and cease in all respects. 6. On the determination of the said agreement the said Iris Ethel Peacock shall (if so required by the said [defendant] remove the said mains pipes valves manholes surface boxes and apparatus at her own cost doing as little damage as possible and making good any damage done. 7. Any dispute arising under or out of this agreement shall be referred to a single arbitrator to be appointed in default of agreement by the president for the time being of the Surveyors' Institute.

I have read the whole of that agreement because some argument has been addressed to me on, I think, every single clause which it contains. It is to be observed that nobody suggests that at the expiration of ten years from July 30, 1938, the agreement cannot be determined.

On Aug. 17, 1944, Mrs. Peacock, who by this time had become Mrs. Lawton, conveyed the property and the new bungalow which by this time had been completed and was known as Peartree Cottage, together with the benefit so far as assignable of the said agreement dated July 30, 1938, to the plaintiff. It has been contended before me most strenuously that the benefit of this water supply agreement was incapable of assignment to the plaintiff. I have heard arguments both upon the general principles of assignability and upon the Law of Property Act, 1925, s. 78. I will deal first with the Law of Property Act, 1925, s. 78, which is as follows:

> (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

Now which, if any, of the covenants in the water supply agreement relate to land of the covenantee? The land, of course, is the land upon which the bungalow is built. In my judgment, both the first covenant and the fourth covenant so relate, and it is unnecessary to consider whether any other covenants do.

I have very considerable guidance here from what COTTON, L.J., said (29 Ch.D. 750, at p. 778), in the Court of Appeal in *Austerberry* v. *Oldham Corpn.* (1) :

> Then there is the case of *Cooke* v. *Chilcott* (2), which was before MALINS, V.-C., where he likewise expressed an opinion that the covenant ran with the land. He did not base his opinion on the cases I have mentioned, but the case was one in which there was very little, if any, difficulty as regards the benefit of the covenant touching and relating to land of the plaintiff, because it was to erect a pump and pump water from the land of the defendant's predecessor in title to the land of the plaintiff's predecessor in title, and there was reference to the benefit of the land, which showed that that was the object of the covenant.

I think counsel for the defendant was almost prepared to concede that, in the light of that statement, cl. 1 of this water supply agreement must be one relating to the land of the plaintiff ; but whether he conceded it or not, I so hold. As regards cl. 4, counsel for the defendant has strenuously contended that it is not. His argument, as I understand it, is that cl. 4 does not relate to the land of the plaintiff, but to the bundle of rights created by cl. 1, which he says is an incorporeal hereditament. Having put forward that proposition, he proceeded to cite *Grant* v. *Edmondson* (3), to which I will refer in a moment, and concluded his submission by saying that I am thereby precluded from holding that cl. 4 of this agreement is one which relates to the land of the plaintiff.

Grant v. *Edmondson* (3) is a decision of the Court of Appeal and, if I thought that it in any way governed the present case, I should follow it at once. But the only materiality of that decision, in my judgment, in the present case is that it held that the benefit of a covenant to pay a rent charge did not run with the rent charge, which is, of course, an incorporeal hereditament, and I have no intention of holding that this covenant runs with an incorporeal hereditament. What I propose to hold and do hold is that, just as the covenant to erect the pump and the covenant to pump water [in *Cooke* v. *Chilcott* (2)] was said in *Austerberry* v. *Oldham Corpn.* (1) to be for the benefit of the land and to run with the land, so the benefit of the covenant to keep the said pump in repair runs with the land, *i.e.*, the land upon which the bungalow is built, and the bungalow on the said land.

If that conclusion is well founded, it becomes unnecessary to consider whether the benefit of the contract (*i.e.*, of the water supply agreement) was assignable according to the general principles of the law of contract governing assignability, but as that point has been very fully argued before me I propose to express my view upon it.

The water supply agreement was one under which the owner of Shottenden Lodge agreed to supply water for the use of Mrs. Peacock, in connection with the particular premises upon the land then being purchased by her from the owner of Shottenden Lodge. It seems to me that the very subject-matter of the agreement points to the possibility of assigning the benefit of it, more especially when the conveyance of the land to Mrs. Peacock and the making of the water supply agreement were contemporaneous transactions. There was not anything which the assignee had to do in performance of the agreement during its subsistence beyond paying a small annual sum. Therefore there can be no question whether the assignee could substitute his personal service for somebody else's personal service. Moreover, the parties in this case did consider the period for which the right was to continue, and they did not limit it by reference to the personal occupation or the ownership of Mrs. Peacock, but by a fixed term of years which plainly might have elapsed before Mrs. Peacock ceased personally to occupy the bungalow or ceased to own the bungalow. Nor do I think that it can be said that the assignment of the benefit can place any additional burden on the other party to the contract, namely, the defendant. The burden, as I understand it, is not to supply the needs of Mrs. Peacock and her household at Peartree Cottage, but to supply the water required there for domestic purposes, and, if that is the burden of the contract, it is immaterial to the vendor who is actually in occupation of the premises. Nor can I accept the argument which has been submitted to me by counsel for the defendant by reference to the arbitration clause. This was that the assignment of the contract would place an additional burden on the defendant, because, whereas she could enforce the provision for arbitration against Mrs. Peacock, she could not enforce that provision against an assignee of Mrs. Peacock, and that, therefore, she might be compelled to litigate in these courts instead of going to arbitration; but, in my judgment, Mrs. Woolf could have compelled Mrs. Peacock's assignee to go to arbitration had she so desired.

In support of his argument, counsel for the defendant very naturally and properly referred me to *Cottage Club Estates* v. *Woodside Estates Co.* (*Amersham*) (4), and also to *Aspell* v. *Seymour* (5). In the *Cottage Club* case (4) WRIGHT, J., said ([1929] 2 K.B.D. 463, at p. 466), that the arbitration clause was a personal covenant and could not be transferred; but the facts of that case show, I think, that he meant that the rights under the arbitration clause could not be transferred from the assignor to the assignee without the concurrence of the other party to the contract, and he did not suggest that, if an assignee claimed to take the benefit of a contract under an assignment, he could escape the burden of an arbitration clause if that other party desired an arbitration. In my judgment, he could not. In *Bonnin* v. *Neame* (6) the question arose whether mortgagees of a share of a dissolved partnership were bound by an arbitration clause. The contention was advanced by Mr. Micklem that the mortgagees of the share could not have any better right than their mortgagor. Counsel for the mortgagees countered that the mortgagees were not claiming an account under any right given to them by the partnership deed, but were claiming under the Partnership Act, 1890, s. 31 (2); and it was on that ground, as I understand it, and on that ground only, that they were held not to be bound by the arbitration clause. I cannot claim *Bonnin* v. *Neame* (6) as an authority decisive in favour of the view which I am expressing, but I derive comfort from that case because, in my judgment, if the mortgagees had been claiming under the partnership deed and had not been claiming by virtue of some independent statutory right, the decision would almost certainly have been the other way.

Counsel for the defendant referred me to *Aspell* v. *Seymour* (5), which is a decision of the Court of Appeal, but I cannot find anything in that case which throws any light at all on the point which I am now deciding, and I am not prepared to hold, in the absence of any authority to that effect—and certainly none has been cited to me—that an assignee claiming the benefit of a contract could refuse to comply with an arbitration clause contained in the contract if the other party to the contract required him to do so. If the argument of counsel for the defendant is sound, I cannot see how any contract containing an arbitration clause, and not expressed in its very terms to be assignable, could ever be assignable, and counsel for the defendant did not point to any way of escape from this far-reaching conclusion. I accordingly reject that argument, and I hold that the benefit of this contract was assignable and was assigned.

I will now describe the pump and the pipes, taps and apparatus thereof, or such of them as appear to me to be material. A rising main had been inserted in a brick-lined well, and a complete sail-driven pump had been installed, part of which was below ground level and the remainder of which (which I will call the working head) was above ground level. At a subsequent date, a bore-hole had been driven downwards from the bottom of the well, no doubt to increase the accessibility of the water; this bore-hole had been lined and down the bore-hole had been passed a suction pipe. But the bore-hole was not driven immediately below the bottom of the rising main, and, accordingly, there was a piece of angular pipe connecting the top of the suction pipe with the bottom of the rising main. Such a method of construction necessarily involved the maintenance of the sides of the well, because otherwise there was no possible means of access to the suction pipe. It is quite true that access to the rising main could have been preserved if a lining to the rising main had been inserted in the well, but this would not have given access to the suction pipe, and there was at the bottom of the well this very sharp bend. Subsequently the brick lining of the well collapsed, and the well was filled up with earth. To anybody who thought about it, it must have been obvious that at some time or another it might be necessary to have access to the rising main or the suction pipe, or both of them, in order to effect repairs, and it must have been equally obvious that this would involve the removal of some, if not all, of the earth which had been put in the well. This was the position at the date of the water supply agreement in 1938. The pump was producing water, but, if at any time it became necessary to repair the rising main or the suction pipe, this could only be done by removing a very considerable quantity of earth and in some way sustaining the sides of the excavation made. Then came the war; Peartree Cottage became empty, and Mrs. Woolf turned off the supply of water, which was controlled by a stopcock near by. Then, in 1942, the rising main got out of order.

Mr. Hayden, a director of M. Mullins, Ltd., water engineers, made it clear, in his evidence, that if labour had been available there would have been no technical difficulty in clearing the old well and relining it, so far as might be necessary, with concrete cylinders, and then withdrawing the rising main and repairing or renewing the defective part. But it would, undoubtedly, have been a most expensive course, and Mr. Hayden advised the defendant that it would be much better and cheaper to drill a new bore-hole altogether. Accordingly, a new bore-hole, 100ft. deep, was sunk some 30 yards away from the well that I have described, it was lined with a lining tube, and then a pumping apparatus was installed. The pumping apparatus consisted of the old working head, which was dismantled and removed to the site of the new bore, and a new rising main, plunger rod, suction pipe, and such other parts of the apparatus as functioned below ground level. The value of the old materials thus re-used was greater than the value of the new materials supplied. There would have been no difficulty in connecting Peartree Cottage to the new installation.

When the plaintiff bought Peartree Cottage, which was on Aug. 17, 1944, he naturally wanted some water, but the defendant was not minded to let him have any, not even for the short period which remained before the water supply agreement would have expired according to its terms, if she had exercised her option to give notice thereunder. Accordingly, on Dec. 4, 1944, the plaintiff's solicitors wrote to the defendant's solicitors in the following terms:

> In May last, on behalf of our client, Mr. Shayler, who was then negotiating for the purchase of the above premises from Mrs. Peacock, we wrote you inquiring whether your client Mrs. Woolf was prepared to enter into an agreement with our client for the supply of water, in similar terms to an agreement between your client and Mrs. Peacock dated July 30, 1938. We are instructed that our client has been in correspondence with your client and yourselves in an endeavour to arrive at an amicable arrangement for the supply of water to our client's premises, but your client has refused to either enter into a fresh agreement or to continue the supply provided for under the agreement of July 30, 1938. Since our letter of May 26, 1944, our client has completed the purchase of the above premises, and in the conveyance to him Mrs. Peacock has assigned the benefit (so far assignable) of the said agreement. We have now in our possession the counterpart agreement of July 30, 1938, and we are satisfied that quite apart from the benefit of the assignment, the supply of water to our client's premises is an easement which pursuant to the Law of Property Act, 1925, s. 187, enures for the benefit of our client's land. We have to give you notice that unless we hear from you by Dec. 15 that your client is prepared to continue the supply of water to our client's premises, our client will take such steps as he may be advised, to enforce his rights.

On Jan. 13, 1945, the plaintiff's solicitors again wrote to the defendant's solicitors:

> Not having received any reply to our letter to you of Dec. 4, we have, on behalf of Mr. Shayler, taken counsel's advice, and are proceeding to issue a writ for specific performance of the agreement or damages in lieu thereof. We shall be glad to hear whether you will accept service on behalf of your client.

On Jan. 17, the defendant's solicitors replied:

> We are receipt of your letter of Jan. 13, upon which we are taking our client's instructions; we will write you further as soon as we have done so.

On Jan. 20, the defendant's solicitors wrote:

> Further to our letter of Jan. 17, we have now seen our client and are instructed to accept service of proceedings on her behalf.

Accordingly the writ was issued on Feb. 1, 1945.

The allegation in para. 6 of the statement of claim is as follows:

> The supply to the said pump of water of wholesome quality has not failed but the defendant has refused or neglected to supply to the plaintiff from the said pump any water for use in respect of domestic purposes in connection with the said bungalow

> and to keep the said pump in good and proper working order and repair and to do all such things as may be necessary to ensure a constant supply of water and by reason of such refusal or neglect the plaintiff has suffered damage.

And then the plaintiff claims (i) specific performance of the said agreement dated July 30, 1938; (ii) a mandatory injunction to compel the defendant to supply water to the plaintiff in accordance with the terms of the said agreement; (iii) damages in substitution for or in addition to the above relief; and (iv) costs.

Turning for a moment to the construction of the water supply agreement, and in particular to cl. 1, in my judgment, the words "so long as such pump shall continue to produce the same" must be construed as meaning "shall continue to produce the same if kept in such repair as is required by cl. 4"; otherwise the defendant could have relieved herself of that obligation by cutting the rising main, which obviously was not the intention of either party. Those words must, in my judgment, be inserted by necessary implication. This point is only material if I am wrong in holding that the Law of Property Act, 1925, s. 78, applies to cl. 4, and if I am wrong in holding that the benefit of the water supply agreement is assignable according to the general law of contract; otherwise it is immaterial whether those words are read into cl. 1 or not, because, in my judgment, there has been a breach of cl. 4, and therefore, except in the event that I have just indicated, it is immaterial whether there has been a breach of cl. 1 or not, the measure of damage being the same in either case. In my judgment, however, there has, in fact, been a breach of both cl. 1 and cl. 4.

Now in treading further along my path, I take as my lantern a portion of the judgment of COZENS-HARDY, M.R., in *Lurcott* v. *Wakely & Wheeler* (7). After referring to *Lister* v. *Lane* (8) COZENS-HARDY, M.R., said ([1911] 1 K.B.D. 905, at pp. 913, 914):

> It was there held by the Court of Appeal, and I see no reason to quarrel with their decision, that the change of circumstances which had arisen could not have been in the contemplation of the parties and that it would not be reasonable to construe the covenant to repair as applicable to that change of circumstances . . . That being so, it seems to me that we are driven to ask in this particular case, and in every case of this kind, Is what has happened of such a nature that it can fairly be said that the character of the subject-matter of the demise, or part of the demise, in question has been changed? Is it something which goes to the whole, or substantially the whole, or is it simply an injury to a portion, a subsidiary portion, to use BUCKLEY, L.J.'s phrase, of the demised property? In this case the view taken by the official referee and the Divisional Court is the view which commends itself to me, that this portion of the wall, 24ft. in front, is merely a subsidiary portion of the demised premises, the restoration of this wall leaving the rest of the building, which goes back more than 100ft., untouched. The restoration of this wall will not change the character or nature of the building, and I am unable to say that the question differs in any way from that which we should have had to consider if by reason of the elements and lapse of time, say, some rafters in the roof had become rotten, and a corner of the roof gave way so that the water came in. It seems to me that we should be narrowing in a most dangerous way the limit and extent of these covenants if we did not hold that the defendants were liable under covenants framed as these are to make good the cost of repairing this wall in the only sense in which it can be repaired, namely, by rebuilding it according to the requirements of the county council.

In my judgment, it must have been in the contemplation of the parties, if they thought about it at all, that at some time or another it would be necessary to have access to the rising main, and possibly also to the suction pipe, in order to repair it, and, if so, that the necessary excavations would have to be made. The whole difficulty in 1942 was to get access. Nobody knows what repair would have been needed. It might have been something quite trivial. There is no reason to suppose that the repairs needed would have been very expensive. The bulk of the labour and expense would have been due to excavating in order to get access and to supporting the sides of the excavation, which Mr. Hayden thought should be done by inserting concrete cylinders. Therefore it seems to me that it could not be said in this case, as COZENS-HARDY, M.R., said of *Lister* v. *Lane* (8), that the change of circumstances which had arisen could not have been in the contemplation of the parties, and that it would not be reasonable to construe the covenant to repair as applicable to the change of circumstances. Again, there is no reason to suppose that the apparatus, after repair, would have been substantially different. The insertion of a concrete cylinder in the well, in lieu of the brick lining which had existed at some stage, though it had apparently collapsed before the date of the grant, would not enable me to say that the repair had changed the character or nature of the apparatus. The whole trouble was that it was plainly much more prudent and much more economical to bore a new hole, using for the new hole the greater part of the old apparatus, rather than to repair the old apparatus, because, and only because, of the difficulty of getting access to that portion of the old apparatus which was below ground level; and, in my judgment, it would be a novel doctrine to hold that such considerations as these should be accepted as a ground for excusing the defendant from performance of her covenant to repair, especially when it was quite simple for her to connect Peartree Cottage to the new bore-hole and the new installation but she declined to do so.

Looking at the facts of this case in the light of the passage which I have read, I hold that there was a breach of the covenant to repair, and if so, there was also a breach of cl. 1, because if there are inserted in cl. 1, the words which I have held must be inserted, the limitation "so long as such pump shall continue to produce the same" does not protect the defendant, because it only failed to produce the same by reason of her failure to comply with her obligations under cl. 4.

Very many questions of law, some of them difficult, have been canvassed in this case, and in view of the small financial value of the subject-matter, these must, I fear, fall very heavily upon the party which is ultimately adjudged to be wrong; I hold that the defendant was wrong, and accordingly I award the plaintiff an inquiry as to damages, which in the result was all that he asked me for, and I order the defendant to pay the plaintiff's costs.

Judgment for the plaintiff.

Solicitors: *Bentley, Taylor & Co.* (for the plaintiff); *Kingsford, Dorman & Co.*, agents for *Girling, Wilson & Bailey*, Herne Bay (for the defendant).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

HALLIDAY *v.* BARBER, WALKER & CO., LTD.

[COURT OF APPEAL (Scott, du Parcq and Tucker, L.JJ.), December 14, 1945, January 17, 1946.]

Workmen's Compensation—Costs—Travelling expenses of workman attending for examination by medical referee—No arbitration actual or pending—Jurisdiction of county court judge—Workmen's Compensation Act, 1925 (c. 42), *s.* 19 (2), *Sched.* 1 (7)—*Workmen's Compensation Rules,* 1926 (*S.R. & O.,* 1926, *No.* 448), *rr.* 57 (9), 76 (4).

County Courts—Jurisdiction—Travelling expenses of workman attending for examination by medical referee—No arbitration actual or pending.

The respondent, a miner, was seriously injured in 1940. Total incapacity resulted for a time and the appellants, his employers, paid compensation, without arbitration, on that basis. Subsequently the compensation was, by agreement, reduced to partial payment. In 1944 the respondent was certified by the medical referee as fit only for the lightest work and as suffering from 75 per cent. physical disability. The appellants were not able to provide light work and paid compensation on the basis of total incapacity. After the certificate was issued the respondent asked for his expenses of travelling to the medical referee, but the appellant's insurance company on their behalf refused. In 1945 the appellants again took the necessary steps under the Workmen's Compensation Act, 1925, to obtain a diminution of the weekly payment, but without success, and a certificate in the same terms as in 1944 was issued by the medical referee. The appellants continued to pay compensation on the basis of total incapacity. The county court judge to whom the matter was referred by the registrar ordered the appellants to pay the expenses incurred by the respondent in attending upon the medical referee:—

HELD (SCOTT, L.J., dissenting): as no arbitration had taken place and none was pending the county court judge had no jurisdiction to make such an order.

[**EDITORIAL NOTE.** The right of a workman to travelling expenses on attending for medical examination in consequence of an order made under the Workmen's Compensation Act, 1925, s. 19, depends upon the existence of a specific rule giving that right. The county court judge apparently regarded the power to award the expenses as existing either under rr. 57 (9) or 76 (4). Rule 57 (9), however, does not appear to be applicable in the absence of some such words as " incidental to " or " occasioned by " the order, and it is difficult to regard these as " proceedings " taken for which no provision is made, within rule 76 (4). They appear rather to be proceedings within r. 57 (9), which is, as indicated above, inapplicable to the expenses in issue in this case. The court differs in its views upon the applicability of *Brown* v. *Sherwood Colliery Co.* (1) to proceedings where there has been no arbitration and no pending arbitration, DU PARCQ, L.J., holding that the case cannot be so widely construed as to include such proceedings within its ambit.

FOR THE WORKMEN'S COMPENSATION ACT, 1925, Sched. 1 (7), see HALSBURY'S STATUTES, Vol. 11, p. 594.]

Cases referred to:

*(1) *Brown* v. *Sherwood Colliery Co., Ltd.*, [1940] 2 All E.R. 25; [1940] 1 K.B. 726; Digest Supp.; 109 L.J.K.B. 761; 162 L.T. 316.

*(2) *Richards* v. *United National Collieries, Ltd.*, (1927) 96 L.J.K.B. 716; Digest Supp.; 137 L.T. 467; 20 B.W.C.C. 465.

APPEAL by the employers from an award of His Honour JUDGE CAPORN, made at Worksop County Court, and dated June 26, 1945.

Phineas Quass for the appellants.

F. W. Beney, K.C., and *G. C. Dare* for the respondent.

Cur. adv. vult.

SCOTT, L.J.: The question in this appeal is whether the county court judge acting under the Workmen's Compensation Act, 1925, had jurisdiction to order that the employer should pay the expense incurred by the workman in making two journeys to the consulting room of the medical referee acting in the case, which he was " required " to make by an order of the registrar made on Mar. 23, 1945, in the terms of Form 51 of the Appendix to the Workmen's Compensation Rules, 1926. The order provided that the workman should attend at such time and place as might be fixed by the medical referee. The workman, who had been a collier when injured, duly attended on the day fixed by the medical referee, but the medical referee was unable to see him that day, and fixed the next day when the workman again attended. A total expense of 14*s*. for travelling on the two days was incurred by the workman.

The workman had been seriously injured in 1940. Total incapacity resulted for a time and compensation was paid, without arbitration, on that basis. Subsequently it was by agreement reduced to partial payment; but on July 1, 1944, the workman was certified by the medical referee as fit only for lightest work, and as suffering from 75 per cent physical disability. The employer was not able to provide light work, and paid compensation on the basis of total incapacity. The workman asked, after the certificate was issued, for his expenses of travelling to the medical referee, but the employer's insurance company on behalf of the employer refused. In Mar., 1945, the employer again took the necessary steps to obtain a diminution of the weekly compensation under sects. 11, 12 (3) of the Act, proceeding under sects. 18, 19 (2). The result was again in the workman's favour, as the medical referee gave a certificate in the same terms as in June, 1944; and the employer duly continued to pay compensation on the basis of total incapacity. The " matter " was duly docketed in the county court records as " No. 23 of 1945 "; and all proceedings were carried out on the Forms 49 to 52 contained in the Appendix to the Workmen's Compensation Rules. The judge to whom the registrar referred the matter ordered repayment of the expenses, hence this appeal.

The employer's one and only point is that the county court judge had no jurisdiction to make that order. If he had jurisdiction, no question could be raised in this court as to the exercise by him of his discretion. Counsel for the employer argued the case clearly and forcibly, but he did not convince me. I agree with him that statutory power to make the order must be found, but I think it is to be found in the County Courts Act, 1934, and the Workmen's Compensation Rules made under the Workmen's Compensation Act, 1925. By the Workmen's Compensation Rules, 1926, r. 1, those rules are to have effect under the Workmen's Compensation Act, 1925, with reference to any matter or proceeding for the regulation of which rules of court may be made under the Act.

17 APR 1

The Workmen's Compensation Act, 1925, Sched. 1, contains various provisions as to procedure. Paras. 1 and 2 of that schedule give jurisdiction to the county court judge. Para. 7 enables him to exercise complete discretion over all costs of and incidental to the arbitration and proceedings connected therewith, subject to rules of court. That paragraph applies whether an "arbitration" under the Act has actually been started or not. An application and order for a reference to a medical referee has been held to be an interlocutory proceeding although no arbitration had taken place or was even contemplated: see *Brown* v. *Sherwood Colliery Co., Ltd.* (1). The judgment of GODDARD, L.J., in that case treats the question broadly and refers to the feature of all the Workmen's Compensation Acts, which I regard as fundamental, that the settlement of issues between employer and workman by agreement stands on the same footing as settlement by arbitration, and is a part of the machinery of the Act. I have no doubt that "matter No. 23 of 1945" was a "proceeding" in the general sense of the word. On the whole, though not without doubt, I think that the words "connected therewith" should be construed as covering any "proceeding" which is one which may be a step precedent to as well as a step towards an arbitration which in default of agreement is under the Act the only solution of a difference between employer and workman.

Our attention was called by counsel for the appellants to Sched. 1, of the Workmen's Compensation Act, 1925, para. 9, and the point was made that that paragraph is limited to the fee payable to the medical referee himself. That is so, but that paragraph does not cut down the wide provisions of the earlier paragraphs which I have quoted, and is therefore irrelevant to this appeal. Had the question of discretion been in issue, para. 12 would have been relevant, but as the appeal stands it is immaterial.

The only two Workmen's Compensation rules which may be directly relevant are rules 57 and 76. The former deals with and is headed "Application for Medical Referee under Section 19 of the Act." I have already pointed out that the forms required by rule 57 (2), (3), (4) were used in the present case. Rule 57 (5) reads as follows:

> Before making such order the registrar shall inquire whether the workman is in a fit condition to travel for the purpose of examination, and if satisfied that he is in a fit condition shall by the order direct him to attend at such time and place as the referee may fix, and if satisfied that he is not in a fit condition to travel shall so state in the order of reference; and it shall be the duty of the workman, on being served with the order, to submit himself for examination accordingly.

Rule 57 (9) contains three separate provisions of which the third only may concern us. It provides that the costs of any application to the registrar may be allowed as costs (*a*) in any subsequent arbitration for the settlement (*i.e.*, of the amount) of the weekly payment or (*b*) on a review (under sect. 11) or (*c*) by special order of the judge on application in that behalf, such application to be made by not less than 4 days' notice in writing and in accordance with the provisions of R.S.C., Ord. XII, r. II, so far as applicable.

In the present case the workman's application for payment of his travelling expenses was made to the registrar and by him referred to the judge; and I am inclined to think the judge's order, *vice* the registrar, that they should be paid, was a special order for costs under the third limit of rule 57 (9).

If it does not fall within that provision, I think it is covered by the general clearing up provision of rule 76 (4), because in that event "no provision" would have been "made by these rules."

The only objection to that interpretation of r. 76 (4) urged by counsel for the appellants is that there was in the present case no "proceeding." I am satisfied that that contention is erroneous. "Proceeding" is a very wide word, and includes any step authorised by the Workmen's Compensation Acts, or rules made thereunder, for enforcing any claim of right by either party. That must include a claim by the workman to have the medical issues as to his condition and fitness for employment referred to the medical referee in order that he may obtain the necessary evidence on which to base an application to the judge for an arbitration. That the certificate will be conclusive, when granted, does not make it any the less evidence on the issues. The certificate in the present case shows that the reference was by agreement of both parties. That the word "proceeding" has a very wide meaning (if there were any doubt about it, which in my opinion there is not) is shown by its use in rr. 96, 97, and under item No. 21 of r. 97 an application to refer a matter to a medical referee is one of the " proceedings " within the rule which have to be "recorded" in the county court.

Richards v. *United National Collieries, Ltd.* (2), to which we were referred, has no bearing on the present appeal. It was a decision that it was not a condition precedent to the employer's right to have the workman examined by a medical referee that the employer should provide the workman with conduct money to make his journey to the medical referee's consulting room, as was contended by the workman in that case. The judgments were carefully limited " to that stage " of the proceedings. It was a question of inferring a condition in statutory words conferring a right, when the words were clear and there was no room for such an implication. That decision does not touch the question of costs which alone is before us.

I would hold that the appeal be dismissed with costs, but my brethren disagree and the order of the court will be as they direct.

du Parcq, L.J. : In this difficult case I have come to the opposite conclusion from that arrived at by Scott, L.J. I am not myself prepared to treat the decision of this court in *Brown* v. *Sherwood Colliery Co., Ltd.* (1) as an authority which compels me to hold that the costs of a reference to a medical referee, where there has been no arbitration and there is no pending arbitration, may properly be described as " costs of and incidental to the arbitration and proceedings connected therewith." I say this because the attention of the court was not directed in that case to any question except that which alone was argued, namely, the question whether the order then under discussion was a final or interlocutory order. It must be supposed that the argument proceeded on the assumption that the order was one which there was jurisdiction to make, but that assumption, though it must be attributed to counsel, is certainly not shown to have been deliberately made by the court, and it was, I think, erroneous. A decision is an authority for what it decides, but not for propositions which were neither debated nor decided, and of which all that can be said is that, if the question at issue had been more thoroughly explored, it would have been manifest that their affirmation was a condition precedent to the decision. I have had the advantage of reading the judgment which Tucker, L.J., is about to deliver, and, except that, for the reasons I have stated, I am disposed to attach less weight than he does, for the present purpose, to *Brown* v. *Sherwood Colliery Co., Ltd.* (1), I am so completely in agreement with his judgment that I find it unnecessary to add any further words of my own.

In my opinion the appeal should be allowed with costs here and below, and the order of the judge set aside.

Tucker, L.J. : The question raised by this appeal is whether the county court judge had jurisdiction to order the employers, who are the appellants in this court, to pay reasonable travelling expenses incurred by the workman respondent in attending before the medical referee, pursuant to an order made by the registrar under the Workmen's Compensation Act, 1925, s. 19 (2), in a case where, at the date of the order, no arbitration had taken place or was pending in respect of the workman's claim to compensation.

The judge's jurisdiction with regard to costs and the power to make rules of court with regard thereto must be sought in the Workmen's Compensation Act, 1925, and are to be found in general terms in para. 7 of the First Schedule to the Act. So far as material the words of this paragraph are :

> (1) The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the . . . judge of the county court subject . . . to rules of court. (2) The costs . . . shall not exceed the limit prescribed by rules of court and shall be taxed in manner prescribed by those rules . . .

In addition there are to be found in the Act further express provisions with regard to the making of rules and regulations in connection with certain specified matters : see sects. 16 (2), 19 (6), 23 (7), 43 (1) (*f*) and Sched. 1, para. 11, to mention only those which relate to various kinds of references to medical referees. It is to be observed that sect. 19 confers no power to make any rule with regard to costs. The power in this case must, therefore, be found, if anywhere, in para. 7 of Sched. 1 and this raises the question whether the costs of a reference to a medical referee where there is no arbitration past or pending can be described as " costs of and incidental to the arbitration or proceedings connected therewith."

Apart from authority, I should have felt some doubt about this, but I think the decision of this court in *Brown* v. *Sherwood Colliery Co., Ltd.* (1) shows that the members of the court took the view that these words ought to receive a wide interpretation and that they cover applications under sect. 19 where there is no arbitration and that the costs of such applications are to be taxed as interlocutory. This does not, however, conclude the matter, because assuming the power to make rules with regard to costs in such cases, it is necessary for the workman to point to the specific rule or rules which he says confer the power on the judge or registrar to include in any order as to costs that he may make an order for the payment of these travelling expenses. In this case the matter came before the judge on two applications which were heard together. One was a reference to him by the registrar of an application made to the registrar under the Workmen's Compensation Rules, 1926, r. 76 (4), and the other was an application made direct to the judge under r. 57 (9). It is clear that the order cannot be justified under both rules, since r. 76 (4) in terms applies only to proceedings for which no provision is made in the rules or scales of costs. It is accordingly sought to uphold the order under one or other of these rules. The judge's note indicates that he held he had power under either r. 57 (9) or 76 (4), but he does not state under which he acted.

Dealing first with r. 57 (9), the relevant words are :

> The costs of any application to the registrar, including the fee mentioned in paragraph (3), . . . may be allowed by special order of the judge on application in that behalf, such application to be made or not less than four days' notice in writing and in accordance with the provisions of Order XII r. 11, so far as applicable.

The application referred to is an application to the registrar for reference to a medical referee under sect. 19, and the fee mentioned in para. (3) is the medical referee's fee authorised by para. 9 of Sched. 1 of the Act.

It seems to me that the costs of the application to the registrar cannot include travelling expenses incurred in carrying out the order in the absence of some such words as " incidental to " or " occasioned by " the order made on the application. I am confirmed in this view by the fact that when the draftsman comes to r. 76 (6) and (7) he shows that when he wishes to make provision for such travelling expenses in the circumstances there referred to, he uses clear language to express his intention. Furthermore, there would be no need for r. 76 (6) if the expenses in question could be included in the costs which may be allowed under r. 57 (9) in a subsequent arbitration.

I am, therefore, of opinion that the judge's order cannot be justified under r. 57 (9).

Before passing to r. 76 (4), I would observe that r. 57 appears to me to be framed as a code for the procedure and costs of proceedings under sect. 19. Rule 76 (4) is as follows :

> Where proceedings are taken for which no provision is made by these rules or by the scales of costs, reasonable costs may be allowed in respect of such proceedings by the registrar, subject to review by the judge, or by special order of the judge, not exceeding those which may under the scales be allowed in respect of proceedings of a like nature.

What were " the proceedings " in this case ? I think the proceedings began with the application to the registrar and were continued by the medical referee's examination of the workman and concluded when the medical referee forwarded his certificate to the registrar in accordance with reg. 13 of the regulations made by the Secretary of State with regard to references to medical referees. In my view the examination by the referee cannot be considered as a separate " proceeding " which was " taken " within the meaning of r. 76 (4). It was part and parcel of a proceeding which was " taken " when application was made to the registrar and for the costs of which express provision is made in r. 57 (9), but in language which is inapt to include the expenses of the workman in travelling to the medical referee, an item which was clearly envisaged both by the draftsman of the rules and the Secretary of State when he made the regulations : *vide* reg. 26.

For these reasons I am of opinion that the judge's order was not authorised by r. 76 (4), or by r. 57 (9), and was accordingly made without jurisdiction, and that this appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Johnson, Weatherall & Sturt*, agents for *Parker, Rhodes, Cockburn & Co.*, Rotherham (for the appellants); *Taylor, Jelf & Co.*, agents for *Hopkin & Son*, Mansfield, Notts (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

COMMISSIONERS OF INLAND REVENUE *v.* LEBUS.

[King's Bench Division (Macnaghten, J.), July 23, 1945.]

[Court of Appeal (Lord Greene, M.R., Somervell and Cohen, L.JJ.), February 19, 20, 21, 22, 1946.]

Income Tax—Sur-tax—Widow of deceased partner entitled under his will to share of profits—Continuing partners unable to pay share of profits during year of assessment—Widow not liable—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case III, r.* 1 (*a*), *All Schedules Rules, r.* 19.

A partner in a firm of cabinet manufacturers, by his will bequeathed to his trustees (his widow and the continuing partners) one-quarter share of the profits of the business on trust to pay what they received in respect of it to the widow. For the year ending Apr. 5, 1939, the widow's share of the profits amounted to a considerable sum, but the business, owing to financial stringency, was unable to pay that sum or any part of it. The widow was assessed to sur-tax for that year and the question for determination was whether the assessment ought to include the sum representing her share in the profits of the business:—

Held: the widow was not a partner in the business and none of its assets belonged to her, nor was there any ground for saying that the partners were trustees of the business or of any of its assets for her; she could, therefore, not be said to have received any income unless and until she had received her share of the profits, and consequently she was not liable to sur-tax in respect of the amount in question.

Dewar v. *Inland Revenue Comrs.* (2) *followed.*

Inland Revenue Comrs. v. *Hamilton-Russell's Exors.* (6) *distinguished.*

[**EDITORIAL NOTE.** Much of the difficulty of this case arose from the unusual sense in which the word "goodwill" was used by the testator. Goodwill has been defined many times, from the well known definition of Lord Eldon, in *Crutwell* v. *Lye* ((1810), 17 Ves. 335), as "nothing more than the probability that the old customers will resort to the old place," to the *dictum* of Lord Macnaghten, in *I.R. Comrs.* v. *Muller & Co.'s Margarine, Ltd.*, [1901] A.C. 217: "It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom." The testator in this case, however, uses it in the sense of profit-earning capacity, which is not an item of property. The widow, therefore, has no beneficial interest in the partnership business and assets: she has at most a right to call upon the partners to pay her a share of the profits. Since she is not a partner, there is not in her case, as there is in the case of partners, a liability to income tax on profits though not drawn. Such profits form an accretion to the value of the partnership assets, but in this accretion the widow does not realise a profit in the income tax sense. There is also no indication of a trust which she can enforce against the partners as a person beneficially interested in the partnership business and assets: her right, which she could enforce in equity, is merely to call for one quarter share of the profits and receive it. When she received a payment the widow would be receiving an "annual payment" charged under Case III, Sched. D, and within r. 19, in the sense of the *Shaftesbury Homes* case (3), on which she would not be directly assessable.

As to Taxation of Income Due but not Received, see HALSBURY, Hailsham Edn., Vol. 17, p. 249, para. 503; and for Cases, see DIGEST Supp.

As to Goodwill, see BUTTERWORTH'S WORDS AND PHRASES, Vol. 2, pp. 425-427 [1215].]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Muller & Co.'s Margarine, Ltd.*, [1901] A.C. 217; 39 Digest 278, *627*; 70 L.J.K.B. 677; 84 L.T. 729; *affg.*, S.C. *sub nom. Muller & Co.'s Margarine, Ltd.* v. *Inland Revenue Comrs.*, [1900] 1 Q.B. 310.

*(2) *Dewar* v. *Inland Revenue Comrs.*, [1935] 2 K.B. 351; Digest Supp.; 104 L.J.K.B. 645; 153 L.T. 357; 19 Tax Cas. 561.

*(3) *R.* v. *Income Tax Special Comrs., Ex p. Shaftesbury Homes & Arethusa Training Ship*, [1923] 1 K.B. 393; 28 Digest 84, *480*; 92 L.J.K.B. 152; 128 L.T. 463; 8 Tax Cas. 367.

(4) *Psalms and Hymns (Baptist) Trustees* v. *Whitwell* (1890), 3 Tax Cas. 7; 28 Digest 84, *479*.

(5) *Williams* v. *Singer, Pool* v. *Royal Exchange Assurance*, [1921] A.C. 65; 28 Digest 78, *425*; 89 L.J.K.B. 1151; 123 L.T. 632; 7 Tax Cas. 387.

*(6) *Inland Revenue Comrs.* v. *Hamilton-Russell's Exors.*, [1943] 1 All E.R. 474.

A APPEAL by the Crown, by way of case stated, from a decision of the Commissioners for the Special Purposes of the Income Tax Acts. The facts are fully set out in the judgment of MACNAGHTEN, J.

D. L. Jenkins, K.C., J. H. Stamp and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., H. Wynn-Parry, K.C., and *J. H. Bowe* for the respondents.

B MACNAGHTEN, J.: The respondents in this case are the executors of the late Mrs. Harris Lebus, who died on Mar. 17, 1942. She was assessed to surtax for the year ending Apr. 5, 1939, and the question at issue on this appeal is whether the assessment ought to include a sum for her share of the profits of a business carried on under the style of Harris Lebus. The Special Commissioners decided that it should be excluded from the assessment, and against that decision this appeal is brought.

C Mrs. Lebus was the widow of one Harris Lebus, who died on Sept. 27, 1907, leaving two sons and six daughters him surviving. For many years before his death Harris Lebus carried on business as a cabinet manufacturer in partnership with his brother, Solomon, under the style of Harris Lebus. Under the articles of partnership Harris Lebus was entitled to four-fifths of the profits of the business and Solomon was entitled to the remaining one-fifth. Their shares in the
D capital of the business were in about the same proportion. The articles of partnership between Harris Lebus and his brother provided that, in the event of his death during the continuance of the partnership, he, Harris Lebus, could by his will introduce his two sons into the partnership, and that the business should be continued for a period of 10 years from the date of his death and that his share of the capital should remain in the business for that period.

By his will, dated Apr. 18, 1905, Harris Lebus appointed his wife, Sarah,
E and his two sons, Louis and Herman, and his brother, Solomon, to be his executors and trustees. In cl. 5 of his will he recited the provisions contained in the articles of partnership between himself and his brother, Solomon, and that he was anxious to make the provisions set out in his will with respect to his capital in the business and his share of the profits and to introduce his two sons as partners, and that, so far as such provisions might not be in accordance with any powers under the articles of partnership, the same should take
F effect under the doctrine of election and should be binding on his brother Solomon and his personal representatives as well as on his sons and all other persons beneficially interested under the will. By cl. 6 he directed that an account should be taken of the amount of his capital in the business, and by cll. 7 and 8 he gave directions to his trustees with regard to the withdrawal of his capital from the business. By cl. 9 of the will he provided that on his
G death his brother Solomon should be considered as entitled to and he thereby bequeathed to him in addition to his capital and loan in the business and in lieu and in full discharge of the profits or share of profits in the articles of partnership one equal fourth part or share of the goodwill of the partnership, which Solomon was to accept in full discharge of such profits or shares of profits. By cl. 10 he introduced his sons, Louis and Herman, as partners in the said business as from his death, and he bequeathed to each of them one equal fourth part or share
H of the goodwill of the business. By cl. 11 he provided as follows:

> I bequeath the remaining one equal fourth part or share of the said goodwill of the said business to the trustees hereinbefore named during the life of my said wife upon trust that the trustees or trustee shall pay the one fourth part or share of profits representing or received in respect of the same to my said wife during her life for her separate use without power of anticipation.

The question in the case is as to the meaning and effect of the bequest of the one-fourth part or share of the goodwill of the said business to his trustees during the life of his wife.

The business was a large and prosperous business. During the first world war it was changed from making cabinets to making munitions and after the termination of that war it was entirely reorganised. It was converted into a mass production business and this involved the expenditure of very large sums of money in providing the necessary plant and machinery for that purpose; and there was the sum representing the amount of the capital of Harris Lebus in the business which was to be paid to his trustees. The result was that the partners were unable to pay to the trustees of Harris Lebus' will the one-fourth share of the profits to which Mrs. Harris Lebus was entitled under her husband's will. They paid 4 per cent. upon the arrears that were due to her, but the arrears mounted up year by year and at the close of 1938 a considerable sum was due to her in respect of the arrears. For the year in question her share of the profits amounted to £31,689, but the partners were unable to pay it. Mrs. Lebus pressed, and pressed severely, for payment of her share of the profits, but she was not willing to proceed to extremities. Considering that the interests of herself and her children depended upon the continuance of the business, she naturally was unwilling to wreck it.

Those are the facts which the Special Commissioners have found to be proved and it is in these circumstances, the business being unable, owing to its financial stringency, to pay this sum of £31,689, or any part of it, that the question arises whether she ought to be assessed to sur-tax in respect of it. The point was put by counsel for the respondents that, if the £31,689 was merely a debt payable by the partners to the executors of Harris Lebus, there could be no ground for saying that his widow should be assessed to sur-tax in respect of it since, in spite of her efforts, she had been unable to obtain payment; but if, on the other hand, the partners held the money as trustees for her, she must include it as part of her total income and would be assessable to sur-tax in respect of it. The case for the Crown, if I apprehend the argument rightly, is that the provisions of cl. 11 of the will of Harris Lebus did constitute the partners trustees for Mrs. Harris Lebus of one-fourth share of the annual profits of the business. It is, therefore, necessary to consider the precise meaning of the provisions contained in cl. 11 of the will of Harris Lebus. It is difficult to understand what was meant by the gift of a share of the goodwill of a business to a person who has no part or lot in the business, since the goodwill of a business cannot be separated from it (*Inland Revenue Comrs.* v. *Muller & Co.'s Margarine, Ltd.* (1)). If and when the business, which belonged to the three partners and belonged to them alone, was sold and part of the price paid for the business by the purchaser was properly attributable to goodwill, then, if that event did happen, the trustees of the will of Harris Lebus might perhaps claim one-fourth part of so much of the price that was paid by the purchaser of the business as was attributable to the item goodwill. That, however, was an event which Harris Lebus, it is plain, never contemplated; and, although Mrs. Lebus survived her husband for 35 years, it did not happen in her lifetime and has not in fact happened down to the present time.

I am unable to appreciate the argument that, because cl. 11 of the will uses the expression "one-fourth part or share of the goodwill of the business," it thereby makes the partners trustees for the widow. The parties concerned acted on the footing that they had a contractual obligation to pay one-fourth of the profits to Mrs. Lebus during her life. There is no doubt or dispute about that. Solomon and his two nephews entered into a deed of partnership dated July 29, 1909, extending the partnership as from the date of the death of Mr. Harris Lebus. The three partners entered into a bond to pay to Mrs. Harris Lebus the one-fourth share of the profits. Those documents treated the obligation as a contractual obligation, and I can see no reason for holding that the partners were in any sense trustees for Mrs. Lebus. I, therefore, come to the conclusion that the decision of the Special Commissioners was right and that the appeal must stand dismissed with costs.

Appeal dismissed with costs.

From this decision the appellants appealed.

D. L. Jenkins, K.C., *J. H. Stamp* and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., *Gerald Upjohn, K.C.*, and *J. H. Bowe* for the respondents.

Lord Greene, M.R.: When the rather intricate argument in this case is unravelled, the answer to the question which we have to decide does not appear to me to admit of doubt. I hope I may be forgiven if I say that much of the apparent difficulty has been due to a certain ambiguity and lack of definition in some of the phraseology employed on behalf of the Crown. That criticism, which is no criticism of counsel who advanced these arguments, will, I hope, be made good in the course of this judgment.

It is not necessary for me to recapitulate the facts set out in the case stated. I may, however, in order to get it out of the way, make one observation on the phraseology of the will of Harris Lebus which relates to the rather curious use which he makes of the word "goodwill." In one part of the will he appears to use the word in its proper sense; in other parts of the will he seems to be personifying under that expression what I may call the profit-earning capacity of the business, which he regards himself as able to dispose of by virtue partly of his interest in the business as a partner under the original partnership deed, and partly by virtue of the application of the doctrine of election. It will be found on a close examination (which I do not propose to make now in great detail) that in a great many cases he is using the phrase in that sense.

The paragraph of the will which deals with the interest of Mrs. Lebus now in question is para. 11. It is in the following terms:

> I bequeath the remaining one equal fourth part or share of the said goodwill of the said business to the trustees hereinbefore named during the life of my said wife upon trust that the trustees or trustee shall pay one fourth part or share of profits representing or received in respect of the same to my said wife during her life for her separate use without power of anticipation.

The words "share of profits" representing or received in respect of "one-fourth part of the goodwill" seem to me to show that, when here he is using the word "goodwill," he is really using it in the sense of profit-earning capacity; a thing which is not an item of property in the legal sense. However, the net effect of it is, I think, quite clear. He is bequeathing to his trustees one quarter share of the profits of the business upon trust to pay what they receive in respect of it to his wife. In the rest of that part of the will he is sharing out what he calls the "goodwill" equally among the three new partners, his two sons and Solomon Lebus, as the third partner, who was also to get his share.

One thing which may be noticed about this will is that never, from the beginning to the end of it, does he refer to the new partners as being in any sense of the word "trustees" for anybody. They are partners in the ordinary sense. They take over the assets of the old partnership and they are liable to pay out the testator's capital in accordance with the provisions there laid down. But that they are regarded by the testator as being partners in every relevant sense of the word, both as to ownership of the assets and the ownership of the real goodwill and everything else, to my mind is beyond question. However, that, as will appear, does not involve the view that there is not, in certain respects and for certain purposes, imposed on the partners a trust obligation. What I mean by that will appear later.

I think the most convenient way of approaching the question we have to decide is to examine briefly but, I hope, adequately, the arguments presented on behalf of the Crown who are the appellants here. Their first proposition is this. Mrs. Lebus is the beneficial owner of, or is beneficially entitled to, one-fourth of the profits of the business. That, as I may venture to point out without, I hope, any disrespect, is a question-begging phrase. If it means she is entitled to some specific existing identifiable fruit of the business in any given year, that is one thing; if, on the other hand, all it means is that she, through the medium of the will trustees, is entitled to call upon the partners to hand her one-fourth of the profits of any year, that is a totally different thing. Unless these two meanings are kept quite distinct, confusion is likely to arise. To say that a person is the owner of something is a phrase which is no doubt convenient but often vague. A man may be said to own the credit balance in his banking account, but, from the legal point of view, that is an entirely incorrect expression. Similarly, in the present case, if to say that Mrs. Lebus owns a share of profits means nothing more than that she is entitled to call upon the partners to pay her a share of the profits, that is a totally different conception from the implication which appears to me to be inherent in the argument of the Crown—that she, in some way, has a proprietary interest in something identifiable, of which it can be predicated that she has received it.

The argument proceeds somewhat in this way. It is said that, where partners carry on business and make profits, they are assessable to income tax in respect of those profits, whether they take them out of the business and divide them or whether they do not. For example, a partnership has had a very profitable year. The whole of its property may be so locked up in its assets that it is quite impossible in that year to get any money out to pay to the partners their shares or the whole of their shares of the profits. That is a thing which commonly happens. But, in assessing a partnership in respect of the profits of its business, what you do is to take the account as between the Revenue and the partners and say: "In this year the partners have made so much profit; it belongs to those partners, and the fact that they cannot pay themselves out in cash has nothing in the world to do with it, for the very simple reason that the partners own the entirety of the assets, and they have themselves realised those profits in the sense that the profits have resulted in an accretion to the value of their assets which belong to the partners. For income tax purposes it is their profit on taking the proper income tax account." In the case of partners that is perfectly clear. The fact that the profits are not released and paid over in cash to the partners has nothing to do with it from the income tax point of view. From the income tax point of view, they have made profits and are taxable.

Now, says the Crown: "That is really what has happened here. The three partners have made profits and they are taxable even though they did not draw those profits out of the business." Similarly, the Crown says: "Mrs. Lebus has made some profits and it makes no difference whether she draws the profits out of the business or does not." But there is all the difference in the world between the two cases, because Mrs. Lebus is not a partner, and the assets of the partnership do not belong to her. It is, therefore, impossible to say as against her what can be said as against the partners—that she has in the accretion to the value of the partnership assets realised a profit in the income tax sense. She has not realised a profit unless and until the profit is paid to her. It is a complete confusion, with great respect to the argument, to put her in the same position as if she had been a partner.

The Crown endeavoured to get out of the difficulty by saying that in some sense—I hope I am not putting it inaccurately—the partners carried on the business as trustees for her. It is said they are trustees for her of one-quarter share of the profits of the business. What does that mean? If it means that she is beneficially interested in the business and its assets, that is one thing; but, with all respect, it is quite untrue. She is not. If, on the other hand, all it means is that she is entitled to call for one-quarter share of the profits and receive it, it means something totally different. If it means only the latter, then I cannot myself see how she can be said to have received any income, unless and until she has received her share of the profits. The Crown puts her, in substance, in exactly the same position as if she had been a partner for these purposes. The argument failed to realise why it is that a partner who has not received his share of profits nevertheless is liable to taxation in respect of those profits. It is because he is a joint owner of the business and its assets. As soon as the accounts show a profit the partnership has made a profit for income tax purposes. On the other hand, a person who is only entitled to payment by the partners of a share of the profits has no proprietary interest in anything whatsoever unless and until it is paid over. That does not mean that there is no element of trust in the matter. I have said that, on the face of this will, the new partners are regarded as being partners in every sense, and there is no reference to any trust obligation upon them; but I am prepared to accept the view that there is a trust obligation which the court will raise against them, for this reason. The right to receive one-quarter share of the profits by the will trustees from the partners is not a common law right. It is not a contractual right. It can only be given effect to in equity. The machinery that equity would use for giving effect to those rights is to raise a trust. I myself am prepared to agree, without investigating the matter further, that these partners are trustees for Mrs. Lebus through the intermediary of the will trustees.

What exactly does that mean? What is the nature of the trust? As I see it, there is no ground whatever for saying that they are trustees of the business or of any of its assets for her. The only trust that one can extract from the provisions in this will, as it seems to me, is a trust to pay to the trustees for her one-quarter of the profits, if any. If partners are carrying on a business subject to a trust obligation to pay one-quarter of the profits to A, I ask myself: How can A be said to have received any income if the partners make default? That seems to me to be all that there is in this case. The Crown's argument breaks down by reason of the fact that it assimilates the position of Mrs. Lebus to the position of a partner, and there is no justification for that either on the language of the will or in any of the other documents or in any principle of law. In fact, it seems to me to fly in the teeth of the principles of law which distinguish the position of partners *vis-a-vis* the partnership assets and the position of outsiders.

I think it will be convenient now if I turn to the arguments put on behalf of the respondent, Mrs. Lebus. The argument there approached the matter from a different angle. The proposition of counsel for the respondent, shortly stated, I think is this. Mrs. Lebus is assessable to sur-tax in respect, and in respect only, of her income. In order, therefore, that you may bring into charge for sur-tax an element of income, you must show that it is her income in respect of which she would have been liable to direct assessment if it had not been for the fact that the tax had been paid by somebody else when the income was on its way to her.

Case III, r. 1, (a) provides:

> The tax shall extend to (*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods.

Counsel for the respondents said, in my opinion, rightly, that the other cases of Sched. D are excluded. If Case III is the right case, that operates to exclude Case VI. Under that, he says, Mrs. Lebus, if she had been liable to direct assessment would have been assessable; that is to say, in respect of her receipts, if and when she received the same in respect of her share of profits, she would have been directly assessable under that case. But what in fact would come to her would be a share in a fund which had been already taxed as partnership income. Under r. 10 of the rules applicable to Cases I and II, the partnership income is taxed by means of a joint assessment in the partnership name. That is exactly what happened here. The whole of the profits of this partnership were properly taxed under r. 10 in the partnership name. She becomes entitled to one-fourth. When she receives it she is not liable to direct assessment in that sum, as that sum in her hands has already borne tax, and, says counsel for the respondents, r. 19 of the All Schedules Rules would apply. I think it is correct that, unless it can be shown that income received in respect of this one-fourth share would have been her income liable to direct assessment, if tax had not already been paid by somebody else, she cannot be assessable to sur-tax in respect of it. Can she be made assessable to sur-tax in respect of income which she has never received? It is not disputed that, as a result of *Dewar* v. *Comrs. of Inland Revenue* (2) if it can be said of this piece of income, that she has never received it, actually or constructively, she cannot be assessed.

The Crown, of course, tries to get out of that difficulty by saying: "She has received her share of profits in precisely the same way that the partners have received their shares of profits in respect of which they are liable to tax, although they have not received their shares in cash, or drawn it out of the business." In the same way they say she has received her share of profits, and, therefore, *Dewar's* case (2) does not apply. I have already dealt with that aspect of the argument.

Counsel for the respondents places great reliance on *R.* v. *The Special Comrs. of Income Tax* (*Ex p. Shaftesbury Homes and Arethusa Training Ship*) (3). That is an authority which seems to me very powerfully to support his argument. Certain trustees of a will were carrying on the business of a testator. They were, of course, in the eye of the law, partners, and the profits of the business were assessable in the ordinary way under r. 10 as the profits of that partnership. The trusts were to the effect that, after the payment of certain annuities, the balance of the profits of the business should be paid over to the trustees of the charity. The question arose under sect. 105 of the Income Tax Act, 1842, and sect. 37 (1) (*b*) of the Act of 1918, which are in substantially the same terms. The provisions of sect. 105 enabled trustees for charitable purposes to claim a certain exemption from income tax, and to reclaim tax which had been paid. The actual language of the section, so far as relevant, was that they were entitled to exemption and to repayment of:

> . . . the amount of the duties which shall have been paid by [the charity] in respect of such interest or yearly payment either by deduction from the same or otherwise.

What had happened was this. The will trustees, who were carrying on the business, had been assessed to income tax and had paid it. The result of that was that, when they came to hand over to the charity trustees the balance in their hands, that balance had been diminished by reason of the tax which had been paid. The question before the court was: was the balance of profits of the business which was handed over by the will trustees to the charity trustees a yearly payment within the meaning of that section? It was held that these payments were quite clearly yearly payments. A distinction was drawn between certain earlier cases where the business had been carried on by the trustees of the charity themselves. That brings out a very important distinction. In those days—I fancy it has been changed now—if trustees of a charity were carrying on a business themselves and were assessed to tax and had paid the tax, they could not recover the tax because in those times the exemption from tax did not extend to trading profits of a charity. Therefore, in order to obtain their exemption from tax, the charity trustees had to show that what they received from the will trustees was a yearly payment. The distinction was drawn quite clearly in the judgments between the case where the charity trustees themselves are carrying on the business and the case where the business is being carried on by somebody else, who is under a trust obligation to pay over the balance of the profits to the charity trustees. The application of that case to the present is, I think, pretty clear. The distinction between charity trustees, who own and carry on a business, and charity trustees, whose only right is to call upon the will trustees who are carrying on the business to hand over the profits, is of great importance in the present case, because all that Mrs. Lebus is entitled to demand is that the will trustees, as trustees for her, shall call upon the partners to hand over her share of the profits. LORD STERNDALE, M.R., said this (8 Tax Cas. 367, at p. 376):

> Therefore, the only question we have to consider is: is this an annual payment to the charity? That seems to me to depend almost entirely upon one question, and that is this: were the charity (which means, I suppose, the committee of the charity) carrying on this business?

I pause there to say that the Crown's argument was in effect that Mrs. Lebus was carrying on this business, or the trustees of the will were carrying on this business, because they were interested in one-quarter of the profits. LORD STERNDALE, M.R., goes on:

> If they were then they were not getting an annual payment; they were merely getting the profits of the business that they were carrying on, and they would then come within the four corners of the decision, which seems to me to be quite right, in the *Trustees of Psalms & Hymns* v. *Whitwell* (4). Some cases have been cited, I am bound to say we have had a great many cases, which had very distant relevance, if any, to the point we are arguing; other cases have been cited, which no doubt are relevant, as to the relation of trustee and *cestui que trust* in regard to income tax, chiefly *Williams* v. *Singer* (5). The principle of that case and the principle of the other cases as to trustee and *cestui que trust* is said to establish this, that these trustees who are carrying on the business [that is to say, the will trustees] were carrying it on for the committee of the charity, and that, therefore, the committee of the charity were carrying it on themselves.

That has a very striking resemblance to a part of the argument in the present case. LORD STERNDALE, M.R., goes on:

> I can only say that those cases do not seem to me to establish anything of the kind, and, in my opinion, looking at the will under which the trustees are carrying on the business, and looking at what is happening with regard to the carrying on of the business, the committee of the charity are not carrying on this business themselves. That is at the root of the whole thing, I think. If they are not carrying on the business them-

selves then they are not receiving the profits of a business carried on by them, and, if they are not doing that, then they are receiving an annual sum that is paid to them by somebody else. In those circumstances it does not seem to me to matter whether the amount which they are receiving is fixed at so much per year, or whether it is fixed by reference to the profits of the business which the person who has to pay it to them is carrying on. It does not become a receipt by them of profits of business if it is not their own business, and if it be a payment, then it does not matter in the least that that payment arises out of the profits of a business that is carried on by somebody else.

Applying that to the present case, when Mrs. Lebus receives something in respect of her share of profits, she is receiving an annual sum from the persons who are carrying on the business.

Counsel for the respondents then links up the argument with r. 19 in this way, I think it is quite fair to say that the language of the All Schedules Rules, r. 19, was primarily directed to a different type of case, the common case, of course, where a person is liable under some contract, or some provision of a will, to pay what is in terms a gross sum, and is entitled to deduct tax when he pays it. But I can find nothing in the language of r. 19 which excludes such a case as this. Although the court in the *Shaftesbury Homes* case (3) was not dealing with r. 19. it quite clearly came to the conclusion that the phrase "annual payment" in sect. 105 included such a case, and that is the very expression used in r. 19. I can see no justification myself for attributing to the phrase in r. 19 a different meaning to that which the court attributed to it in sect. 105. R. 19 says this:

> Where any yearly interest of money, annuity, or any other annual payment [if I may read in what I have here just stated, the sum payable by the partners to the will trustees for Mrs. Lebus is "an annual payment"] . . . is payable wholly out of profits or gains brought into charge to tax [that sum will be paid out of the fund which has borne tax, to wit, the profits of the partnership which are assessed in the hands of the partners, and which paid the full quota of their tax] no assessment shall be made upon the person entitled to such interest, annuity, or annual payment [that is to say, although it is the income of Mrs. Lebus, no direct assessment is to be made on her] but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity or annual payment, without distinguishing the same . . .

That has this effect in such a case as this. When the partners are being assessed to tax, they are not entitled to say: "You must exclude from our taxable profits one-quarter because we are bound to pay that over to Mrs. Lebus." They cannot say that. They have got to submit to taxation on the whole of their profits. Then the rule goes on:

> . . . and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax [and now under the Act at present in force] in force during the period through which the said payment was accruing due.

In the present case those words may not be necessary, for the simple reason that what the partners are dividing up is a fund which has already been taxed. But, though not particularly appropriate, there is nothing there, so far as I can see, which would justify us in saying that r. 19 does not apply to the present case. The same observation applies to the concluding words which are directed obviously to the common case where a person is entitled to the gross income whether by way of interest, or something of that kind, and is bound to suffer deduction of tax. The rule continues:

> The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid.

In the present case that may be quite unnecessary, but, anyhow, it does show that Mrs. Lebus would not be entitled to go to the partners and say: "Why have you deducted something from my share of profits? My share of profits, according to your accounts, is £1,000, and you have only paid me £500. Where is the other £500?" The answer to her would be: "We have paid tax on that, and under r. 19 all we are bound to do is to pay you the net sum." It seems to me to fit in exactly with the *Shaftesbury Homes*' case (3). If, in the *Shaftesbury Homes*' case (3) the residue of the profits had belonged to an individual and the charity trustees had been trustees for that individual, it seems to me that that individual would have been a person who could say : " I have an annual payment within the meaning of r. 19. I am not liable to direct assessment, and I have only received a net sum."

There is one more passage that I must refer to in the Act, and that is the passage in Sched. 5, which sets out the contents of the necessary declarations and statements of total income. It is headed " XVII " in Sched. 5. The declarant has to make these declarations :

> First. Declaration of the amount of value of property or profits or gains returned, or for which the claimant has been, or is liable to be, assessed.

That applies to the case of direct assessment—income in respect of which the taxpayer is liable to direct assessment. Then :

> Second. Declaration of the amount of rents, interests, annuities, or other annual payments, in respect of which the claimant is liable to allow the tax, with the names of the respective persons by whom such payments are to be made, distinguishing the amount of each payment.

There again you have the phrase " annual payment," and, applying the *Shaftesbury Homes'* case (3) the receipt by Mrs. Lebus is an annual payment. If she has received an annual payment, it seems to me in her return of total income she would have to bring it in under that head. If she had not to bring it in under that head, there is no head in this form under which she would have to bring it in, and, therefore, it must fall under that head. The third head is :

> Declaration of the amount of interest, annuities, or other annual payments to be made out of the property or profits or gains assessed on the claimant, distinguishing each source.

That is a deduction for the purposes of total income because it is deducting from the income of the declarant something which is not his income but is the income of the person who is entitled to receive from him an annual payment. The fourth head is merely a statement of the figure which that sum would bring out. You add 1 and 2, and you deduct 3, and you state the result under head 4. It is a perfectly simple conception. That seems to me to make the whole thing hang together. Counsel for the respondents says : " You cannot, on the authority of *Dewar's* case (2), treat a person as having received an item of income when she has not received it, however much she may be entitled to call for it, and however much her right to call for it is due to a trust obligation."

Counsel for the appellants protests that this conclusion which I have come to is one which involves disagreeing with the decision of this court in *Comrs. of Inland Revenue* v. *Exors of Hamilton-Russell* (6). With all respect to him, it seems to me that it does nothing of the kind. That was a totally different case. There the trustees were trustees of a trust fund, and they were directed to accumulate the income of the trust fund during the settlor's life, and to hold the fund and income for the testator—he was the person concerned in that case—until he attained 21 years of age. When he attained 21, he was entitled, as a matter of law, to call upon the trustees to hand over the fund, and all the accumulations, but he did not do so. He left the accumulations in the hands of the trustees, and his executors were assessed to sur-tax on the income. Of course, they were. He was the beneficial owner of a definite, ascertained, concrete piece of property, to wit, the dividends and income of a trust fund which had been received by his trustees. The trustees had got it. Of course, the receipt of the trustees, as trustees for him, was for income tax purposes a receipt by him. It is totally different to the present case where the income never has been received by Mrs. Lebus, or by the will trustees. Therefore, it seems to me that that authority does not assist the Crown's argument, nor is it any reason at all for throwing doubt on the conclusion to which I have come in this case.

Somervell, L.J. : I agree. Although we are supporting the judge, the reasons which have influenced this court are rather different from those which influenced him. I would, therefore, like to state, shortly I hope, how I view the issues which arise. The judge based himself, I think, mainly on the existence of the subsequent, what has been called, profit bond, and regarded that as showing that this was a purely contractual or personal right. I think there may be a difficulty about using the bond in that way, because in the recital it is said to be entered into " for the purpose of securing one-fourth part or share of the profits bequeathed by the testator," and therefore it may be said that, if there were any other rights of an equitable character before the bond was entered into, they remain.

I will not repeat the facts, but I will read one sentence in the case to show how this matter arises. This is in para. 10. Mrs. Lebus

> . . . had frequently asked for the share of profits she was entitled to and had been told that the firm was not in a position to pay her. She pressed severely for payment, but did not proceed to extremes as she did not want to wreck the business. Louis Lebus told her that the firm would pay her as soon as they were in a position to do so. There was never any arrangement with the firm that she should leave some of the money with them on loan.

That last sentence is the reason why no suggestion was put forward, nor indeed, could it be put forward in this case, that the money being left in the business ought to be treated as a disposal by Mrs. Lebus of money to which she was entitled, and, therefore, she ought to be treated as having been paid constructively.

I agree with LORD GREENE, M.R., and it seems to me fundamental to the decision in this case, that in para. 11 of the will, the testator is using the expression " goodwill " as meaning the profit-earning assets of the business. That is a conception which is unknown to the law as a form of property. Therefore, in my view, one has to read para. 11 as giving, and only giving, a right to the trustees to receive a share of the profits. It may follow from that—and I am perfectly prepared to accept this—that the result of that is that partners who elected to come in and to carry on under this will were carrying on the business upon trust to pay to the trustees for Mrs. Lebus a quarter share of the profits. That phrase follows very closely the phrase which was considered by this court in the *Shaftesbury Homes'* case (3). To my mind it is quite clear that persons who have a share of profits, or an interest in a share of profits, or a right, indeed, to receive the whole of the profits, but are not themselves partners, or are not themselves carrying on a business, are altogether outside assessment under Case 1 of Sched. D.

I suppose it is possible to imagine an income tax code which had our Case 1 of Sched. D, namely, a provision for assessing the profits of a business, into which you put, not only those who carried on business, but those who had an interest in or a right to a share of the profits. But it seems to me quite clear that that is not our income tax code. I think that was so decided on very similar facts quite plainly in the *Shaftesbury Homes'* case (3). Therefore, the assessment which was made on the partners in respect of the profits of the business was something with which neither the widow, Mrs. Lebus, nor her trustees had anything to do. It was not in any way an assessment of her income or of anything she had a right to, or was entitled to, or might receive. It is quite clear she has to come in somewhere, because what she is going to get, if it is paid, as it was at any rate in part, is clearly income. If there were any difficulty about putting it under Case III, then it would come under Case VI.

But, speaking for myself, once it is established, as I believe it is, that these rights of hers are entirely outside the trading assessment under Case 1, I would be inclined to take the view that it is unnecessary to examine what her equitable rights against the partners would be. It might indeed be unnecessary to examine whether Case III and r. 19 precisely fitted this case. Whether it does, or whether one has to go to Case VI, it seems to me to be clearly a position of the same nature as that which has been dealt with in such cases as *Dewar's* case (2), namely, a position where you do not assess for sur-tax until payments are actually made. Counsel for the appellants said that was, or might be, inconvenient. I rather doubt that. After all, the partners here ought to pay punctually as the profits are earned. I think it might be much more inconvenient that Mrs. Lebus, or somebody else in a similar position, should have to pay sur-tax on a sum of money which she had tried to get but had been unable to get, than that there should be a re-adjustment of an earlier assessment when the sum is actually paid.

For these reasons, I agree that the appeal should be dismissed.

COHEN, L.J. : I agree with the conclusion to which my brethren have come, and with the reasons they have given for their conclusions ; but, out of respect to the interesting argument which counsel for the appellants addressed to us, I will state, I hope quite shortly, my reasons for thinking that that argument cannot be sustained.

In answer to LORD GREENE, M.R., I think I am right in saying that counsel for the appellants admitted that it went to the root of his argument to establish that the partners were trustees for the will trustees of such portion of the assets as might represent one-fourth of the profits. It seems to me that there is nothing in the will which justifies us in coming to the conclusion that the partners are in any sense trustees of any part of the assets at any time for the will trustees, or for Mrs. Lebus. Indeed, such a conclusion would lead to the strange result that the partners would be trustees or not according as to whether the business was for the moment being carried on at a profit or at a loss. I think that the true effect of the will, and of the exercise by the partners of the election to which they were put by the will, is to create, as LORD GREENE, M.R., said, an obligation enforceable in equity on the partners to pay to the trustees what is called one-fourth of the profits, which I think means a sum equal to one-fourth of the profits. If that be the true view, if the partners performed the obligation to pay the will trustees, no doubt Mrs. Lebus would be liable, whether or not the will trustees had paid it over to her. I think that is in accordance with the principle of *Williams* v. *Singer* (5), but I can see no justification for holding the share of profits, or the sum representing the same, to be her income before the partners pay it away either to her or to the will trustees. I agree with my brethren that the case seems to be covered by such decisions as *Dewar's* case (2).

I would add one observation on the application of r. 19, though it has perhaps no direct relevance. It is perhaps of interest that, when the partners try to give effect to what they conceive to be their obligations by executing a document of July 29, 1909, which was called, I think, the profit bond, what they covenanted to pay was "one equal fourth part or share of the net profits of the said business of Harry Lebus without any deduction except income tax." That seems to me to fit in with the idea that LORD GREENE, M.R., has suggested, that r. 19 can be applicable to such a case as this.

For the reasons I have stated, I agree with my brethren that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Robertson, Martin & Co.* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., and F. GUTTMAN, ESQ., *Barristers-at-Law.*]

NOTE.

LEVER BROS. AND UNILEVER LTD. *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Wright, Lord Porter and Lord Uthwatt), February 5, 7, 8, March 22, 1946.]

An appeal from the decision of the Court of Appeal (LORD GREENE, M.R., FINLAY and MORTON, L.JJ), dated Dec. 18, 1944, and reported [1945] 1 All E.R. 145, was dismissed.

J. Millard Tucker, K.C., and *F. Heyworth Talbot* for the appellants.

Sir Patrick Hastings, K.C., *J. H. Stamp* and *Reginald P. Hills* for the respondents.

Solicitors: *L. A. Ellwood* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

MADDOX PROPERTIES, LTD. *v.* KLASS.

[KING'S BENCH DIVISION (Denning, J.), March 1, 1946.]

Landlord and Tenant—Rent restriction—Furnished letting—Whether substantial portion of rent for use of furniture—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 2 (1), *proviso* (i)—*Rent and Mortgage Interest Restrictions Act,* 1923 (*c.* 32), *s.* 10 (1).

The plaintiffs let to the defendant for a period of just over a year, at a rent of £300 a year, a flat in Brighton, together with certain fixtures, furniture and effects which were specified in an inventory signed by both parties. At the expiration of the tenancy the tenant claimed to be protected by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), proviso (i), as amended by the Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1), and refused to vacate the flat. The flat consisted of a reception room, two bedrooms, a kitchen and a bathroom. At the date of the letting the reception room had in it pairs of curtains and two tables and little in the way of chairs or settees; one bedroom had a carpet, a double bed and all bedding, the other a single bed, curtains and all bedding; the kitchen had a number of kitchen utensils and some china, glass and plate. In addition there were some articles not specified in the inventory but which, having regard to *Gray* v. *Fidler* (1), had to be brought within the head of furniture, *viz.*, fixed cupboards, a refrigerator and a cooker. The estimated value of the furniture included in the inventory was £50 a year, and, including the articles omitted from it, £60 to £65 a year, approximately between 17 and 20 per cent. of the whole rent (including rates):—

HELD: having regard to the value and to the nature of the furniture, the amount of rent which was fairly attributable to its use formed a substantial portion of the whole rent; consequently, the flat was not protected by the Rent Restrictions Acts and the plaintiffs were entitled to possession.

[**EDITORIAL NOTE.** The court again considers what constitutes a furnished flat for the purposes of rent restriction. The letting included, in addition to the fixed cupboards, refrigerator and cooker brought in by the decision in *Gray* v. *Fidler* (1), furniture in the popular sense of the word, and this distinguishes the case from *Property Holding Co.* v. *Mischeff*, p. 406, *ante*. The value of all this furniture is found to be approximately 20 per cent. of the rent, and this is held to be a " substantial " portion of the rent, so as to make it a furnished letting.

AS TO FURNISHED LETTINGS, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 560, 561, Nos. 7078-7084.]

Case referred to:

*(1) *Gray* v. *Fidler*, [1943] 2 All E.R. 289; [1943] 1 K.B. 694; 169 L.T. 193.

ACTION by the landlord to recover possession of a furnished flat. The facts are fully set out in the judgment.

H. V. Lloyd-Jones for the plaintiff.

Phineas Quass for the defendant.

DENNING, J: By an agreement made Mar. 15, 1944, the plaintiffs let to the defendant a flat, No. 12, Embassy Court, King's Road, Brighton, together with certain fixtures, furniture and effects, which were specified in an inventory signed by the plaintiffs, on the one hand, and by the defendant, through his wife, on the other hand; and the period was for one year and thirteen days at a rent of £300 a year.

At the end of the tenancy the defendant did not vacate. He claimed that the premises were within the protection of the Rent Restrictions Acts, and whether they are so or not depends on whether they were *bona fide* let at a rent which includes payments in respect of the use of furniture, and for that purpose it is provided in sect. 10 (1) of the 1923 Act that:

> . . . a dwelling-house [which includes this flat] shall not be deemed to be *bona fide* let at a rent which includes payments in respect of . . . the use of furniture unless the amount of rent which is fairly attributable to . . . the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

In considering the value of the furniture to the tenant it is necessary to look at the nature of these articles which were specified in the inventory and let to the tenant. The flat consisted of a reception room, two bedrooms, a kitchen and a bathroom. The reception room contained pairs of curtains, a table and a tea-table, and not much in the way of chairs or settees, or anything of that kind. The south bedroom had a carpet, a double bed, all the bedding ; not much more. The back bedroom had a single bed, curtains, all bedding, and so forth ; not much more. The kitchen had quite a number of frying pans, brushes, and so on, a dinner service, a tea service, a coffee set, some glass and some plate in the way of knives, forks, spoons. That was the substance of the furniture in the flat as specified in the inventory. In addition, there were some articles not specified in the inventory, but owing to a decision of the Court of Appeal in *Gray* v. *Fidler* (1), to be brought within the head of furniture there were fixed cupboards, a refrigerator and a cooker.

The defendant when he went in soon found that he had to supplement the furniture that was there. He had to buy quite a fair amount ; a settee, and so on, chairs for the reception room, sideboards, and other things ; but it seems plain to me, having regard to the nature of the furniture which I have enumerated, that it was of some considerable value to the tenant, and I have to assess what is the amount of rent fairly attributable to the furniture. I have had estimates given to me of its value on each side, and I think, on the whole, that 20 per cent. of the value of the ordinary furniture is quite a fair basis to assess rent for furniture, 10 per cent. for the fixed cupboards, and 15 per cent for the refrigerator and cooker. Those percentages were common ground between the parties. Approaching the matter on that basis, out of the total rent of £300 a fair figure for this furniture, apart from what I may call the real fixtures, was £50 a year, and if I include the fixed cupboards, and so forth, was £60 to £65 a year.

The question is does that form a substantial portion of the whole rent ? I am going to take this whole rent of £300, and I am not going to deduct the rates for the moment of £43. I am going to see whether those figures which I have given form a substantial portion of the whole rent. It will be seen that the figures I have given, £50 to £60, are somewhere in the region of 17 to 20 per cent. of the whole rent. Having regard to the value of this furniture and to the nature of it, it forms a substantial portion of the whole rent, and therefore the case is one which is not within the Rent Restrictions Acts.

There will, accordingly, be judgment for the plaintiffs for possession and for mesne profits at the rate of £300 a year from Mar. 25, 1945, until delivery of possession.

Judgment for the plaintiffs.

Solicitors : *Judge, Hackman & Judge* (for the plaintiffs) ; *Goodwins* (for the defendant).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

NOTE.

TAYLOR *v.* INLAND REVENUE COMMISSIONERS

[Court of Appeal (Lord Greene, M.R., Somervell and Cohen, L.JJ.), March 5, 6, 8, 1946.]

An appeal by the taxpayer from the decision of Macnaghten, J., dated April 12, 1945, and reported [1945] 1 All E.R. 698, was dismissed.

G. G. Honeyman (with him *R. P. Colinvaux*) for the appellant.

Terence Donovan, K.C., *J. H. Stamp* and *Reginald P. Hills* for the respondents.

Solicitors : *Hyde, Mahon & Pascall*, agents for *Clayton & Gibson*, Newcastle-upon-Tyne (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

SPICER AND ANOTHER *v.* SMEE.

[KING'S BENCH DIVISION (Atkinson, J.), February 20, 21, 22, March 8, 1946.]

Nuisance—Adjoining premises—Fire caused by defective electric wiring—Live wire inadequately protected owing to negligence of contractor—Adjoining premises destroyed—House let with defect—Owner liable for repairs—Knowledge of want of repair—Liability—Fires Prevention (Metropolis) Act, 1774 (*c.* 78), *s.* 86.

The plaintiff and the defendant were the respective owners of two adjoining leasehold bungalows. Under the terms of her lease, the defendant was under an obligation to keep her bungalow in good repair and condition. In 1934, the defendant installed electric lighting in her bungalow. In Dec., 1942, she let the bungalow to T. Under the terms of the agreement with T., the defendant retained the right and power of repair. On Jan. 14, 1943, the plaintiff's bungalow was completely destroyed by a fire which originated in the defendant's bungalow owing to a defect in the electric wiring. The plaintiff brought an action against the defendant for damages for nuisance. On the evidence, the judge found that, owing to the negligence of the contractor who did the work, the wiring for the electric lighting had been installed in such a way that part of the live wire was inadequately protected, and that the bungalow had been let to T. with this defect. It was contended by the defendant (*a*) that she could not be held liable for the acts of the contractor; and (*b*) that under the Fires Prevention (Metropolis) Act, 1774, s. 86, no action was maintainable. It was further contended that liability for a private nuisance was less than that for a public nuisance:—

HELD: (i) the state of the electric wiring in the defendant's bungalow constituted a nuisance on her property for which she was liable. Since the fire which destroyed the plaintiff's bungalow was due to this nuisance, the defendant was liable to the plaintiff in damages.

(ii) the principle that a man is not liable for the acts of an independent contractor did not apply in the law of nuisance.

Bower v. *Peate* (9) *applied.*

Dictum of SCRUTTON, L.J., *in Job Edwards, Ltd.* v. *Birmingham Navigations* ([1924] 1 K.B. 341, at p. 355) *applied.*

(iii) although the defendant was not in occupation of the premises at the time, she was nevertheless liable; she had let the premises with a nuisance thereon created by her agents and was, therefore, liable for the continuation of the nuisance.

Dictum of SCRUTTON, L.J., *in Job Edwards, Ltd.* v. *Birmingham Navigations* ([1924] 1 K.B. 341, at p. 355) *applied.*

(iv) assuming that the nuisance had not been created by the defendant's agents, and that the electric wiring had become exposed by some other means, the defendant was nevertheless liable, because, on the facts of the case, the nuisance existed at the commencement of the tenancy and, since the defendant had retained the right to repair, she should have known that the nuisance existed.

(v) liability for a private nuisance was no less than that for a public nuisance.

Dictum of MAULE, J., *in Overton* v. *Freeman* (11 C.B. 867, at pp. 871, 872) *applied.*

(vi) since the fire was due to nuisance created by the landlord or those for whom he was responsible, the Fires Prevention (Metropolis) Act, 1774, s. 86, did not apply.

[**EDITORIAL NOTE.** This case should be compared with *Collingwood* v. *Home & Colonial Stores, Ltd.* (7), another case of fire caused by defective wiring. There, however, there was no evidence of negligence, while in the case now reported there was evidence of negligence by an electrical contractor, for whose acts the defendant is held liable, on the principle that a person authorising work from which mischief may result, is responsible for the consequences.

AS TO LIABILITY FOR INJURY TO NEIGHBOURING PROPERTY, see HALSBURY, Hailsham Edn., Vol. 24, pp. 42-50, paras. 74-86; and FOR CASES, see DIGEST, Vol. 36, pp. 187-189, Nos. 308-316, and Supplement.]

Cases referred to:

*(1) *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588; 36 Digest 175, *206*; 63 L.J.Ch. 36; 69 L.T. 361.

*(2) *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652; 36 Digest 89, *594*; 78 L.J.K.B. 1063; 101 L.T. 411.

*(3) *Barker* v. *Herbert*, [1911] 2 K.B. 633; 36 Digest 197, *374*; 80 L.J.K.B. 1329; 105 L.T. 349.

*(4) *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341; 36 Digest 215, *575*; 93 L.J.K.B. 261; 130 L.T. 522.

*(5) *Wringe* v. *Cohen*, [1939] 4 All E.R. 241; [1940] 1 K.B. 229; Digest Supp.; 109 L.J.K.B. 227; 161 L.T. 366.

*(6) *Noble* v. *Harrison*, [1926] 2 K.B. 332; 36 Digest 189, *316*; 95 L.J.K.B. 813; 135 L.T. 325.

*(7) *Collingwood* v. *Home & Colonial Stores, Ltd.*, [1936] 3 All E.R. 200; Digest Supp.; 155 L.T. 550; *affg.*, [1936] 1 All E.R. 74.

(8) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* S.C. *sub nom. Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265.

*(9) *Bower* v. *Peate* (1876), 1 Q.B.D. 321; 36 Digest 99, *658*; 45 L.J.Q.B. 446; 35 L.T. 321.

(10) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 19 Digest 7, *4*; *sub nom., Public Works Comrs.* v. *Angus & Co., Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844.

(11) *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q.B. 72; 26 Digest 410, *1308*; 68 L.J.Q.B. 704; 80 L.T. 615.

*(12) *Chauntler* v. *Robinson* (1849), 4 Exch. 163; 36 Digest 199, *389*; 19 L.J.Ex. 170; 14 L.T.O.S. 107;

*(13) *Overton* v. *Freeman* (1852), 11 C.B. 867; 26 Digest 410, *1309*; 21 L.J.C.P. 52; 18 L.T.O.S. 224.

*(14) *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K.B. 551; Digest Supp.; 103 L.J.K.B. 321; 148 L.T. 287.

Action for damages for negligence and for nuisance. The facts are fully set out in the judgment.

C. G. Armstrong Cowan for the plaintiffs.

Humfrey H. Edmunds for the defendant.

Cur. adv. vult.

Atkinson, J.: This is an action brought by Mr. and Mrs. Spicer against the late Mrs. Ethel Smee for damages for the destruction by fire of their house and furniture. The plaintiff Mrs. Spicer was the owner of a bungalow, No. 12, The Island, Thames Ditton, which she bought in 1941, and her husband was the owner of the furniture in it. Mrs. Smee, the original defendant, who has since died (and whose daughter has been joined as executrix) was the owner of the adjoining bungalow, No. 13. Both bungalows were leasehold, and the leases of both plots of land, then vacant, are dated Sept. 17, 1908, and were for 90 years. The defendant's lease has been produced, and I will refer to two of the covenants:

> 2. And also will within a period of 3 months from the date of these presents at his own expense erect a bungalow in and upon the said land in workmanlike and substantial manner in accordance with plans which have been previously approved by the lessor's surveyor and passed by the surveyor for the time being of the district council. 8. Will keep the bungalow and premises both internally and externally in good and tenantable repair and condition.

Smee bought lot No. 13, with the bungalow which had then been erected, in 1915. He died in 1931, and the bungalow then became the property of Mrs. Smee. The bungalow faced the river, looking north. Each bungalow was built within 3ft. of the boundary line dividing the leased plots, so that they were only 6ft. apart. They were built entirely of wood, and were raised some 3ft. from the ground to safeguard the buildings from floods. The outer skin consisted of weather boards, and the inner skin of matchboarding, with the usual cavity between the two skins or walls. During the night of Jan. 14, 1943, the plaintiffs' house and furniture were totally destroyed by fire. The fire originated in No. 13, Mrs. Smee's bungalow, and almost completely destroyed it and its contents. The plaintiffs claimed damages from Mrs. Smee, and now claim damages from the daughter, the executrix, for this loss.

The Smees had not lived in the bungalow for some years. They had let it furnished. The defendant and her mother attended to the lettings personally.

They have had no agent whose duty it was to inspect and attend to the necessary repairs. Some description of the defendant's bungalow is necessary. The north-west corner is occupied by the living room. The fireplace was at the far end, and was built in brick. Behind that wall (*i.e.*, behind the fireplace) was the kitchen. To the east of the living room were three bedrooms. The largest one faced the river, and behind it were two smaller ones. Between the main bedroom and the back bedroom nearest to the living room there was a passage, A which opened into the living room. The electric meters were in the lavatory at the far end of the bungalow.

In Mar., 1934, Mrs. Smee installed electric lighting. A man employed by one Lock did the work. His estimate has been produced; it is dated Mar. 26, 1934, and is in these terms:

> Wiring for eight lighting points in English best quality lead-covered cable, wires B to be fixed on the surface, and in roof where necessary, care being taken to conceal wires as much as possible. To supply and fix best quality semi-recessed bakelite switches, lampholders and flex, also the necessary main switch and fuses combined. The price includes for supplying and fixing one inclosed unit in bathroom, and to wire for lighting plug point in lounge controlled by switch at door. The work guaranteed for 3 years against defective material and workmanship. For the sum of £5 6*s.*

The point referred to was in the skirting board on the west side of the living C room. The only other point in the living room was in the ceiling, in front of the fireplace. The wiring for the plug came along the passage to the east of the kitchen, and was then carried through the floor, and ultimately along the side of a joist up to a point below the plug, when it turned upwards, passing into the cavity between the two walls to the back of the plug, and then through the inner wall and the skirting board. It was thus in contact with wood for some considerable distance from the plug.

D The plaintiffs' case is that the fire started in the woodwork behind and below the plug, in consequence of a leakage of current from a bare wire into wet wood. The claim is put in two ways. It is said that the installation near to the plug was always, or had become, a nuisance, and also that the original defendant, Mrs. Smee, had negligently failed in the duty to keep the bungalow and the electric installation in a safe and proper condition, whereby the fire was caused.

It is established beyond all question by the evidence that if an exposed electric E wire in circuit comes into contact with wet or damp wood, current will escape into the wood, char it and may (and, indeed, almost necessarily will) ultimately set it on fire. The lead covering of the cable is to protect the vulcanised rubber and the insulating tape around the wires from deterioration and from injury. Uncovered by the lead, especially if outside a building, the rubber and the tape are exposed to the weather and, in a place like this F island, are subject to attack by rats. The wood near the plug was exposed to damp. It could get wet there. Anyone who has had any experience of a bungalow on the river knows how damp even the inside can become during the winter. It is plain that, even with ordinary atmospheric conditions, the outside woodwork in a bungalow could easily, and indeed would necessarily, get damp and wet.

A great deal was made, during the trial, of the bad state of repair of the roof. G The relevance of this want of repair was that it added to the danger of the woodwork near to the plug getting wet. It was also relied on as showing a negligent indifference to the state of repair of the bungalow. I am satisfied that the roof had been in a very bad state of repair for a long time. There is no doubt that, if Mrs. Smee was under any duty to repair the roof, she was guilty of a breach of that duty.

On Dec. 5, 1942, Mrs. Smee let her bungalow furnished to one Terry, from H Dec. 7, for one year, at a rental of £143, which amounted to £2 15*s.* a week, and which was to be paid weekly in advance. The agreement contained the following terms:

> The tenant agrees with the landlord as follows: 1. To pay the rent at the times and in the manner aforesaid. 2. To keep the glass in the windows and all internal fixtures and fittings belonging to the said demised premises and all furniture in good and sufficient order and repair (fair wear and tear and damage by enemy action excepted) and to replace or make good any article furniture or fittings lost or damaged during the tenancy . . . During the continuance of the tenancy to permit the landlord

or her agents with or without workmen to view the interior of the premises and to carry out any necessary works of repair.

Mrs. Smee, therefore, retained the right and power of repair.

Terry gave evidence that, right from the beginning, a standard lamp which was part of the furniture of the house, and which was used in connection with this plug kept going out. In wet weather the light faded out quite often, so much so that they ceased to use the lamp, disconnected it from the plug and put it in the corner of the room. They also used this plug for a radio set, and they gave up attempting to plug the radio set into the plug, and fixed a double fitting in the hanging light in the front of the fireplace, and used that for supplying current for the radio set. Terry also said that when he came to the bungalow, on the very first day, not only was there water all about the kitchen, but there was a big damp place in the sitting room between the fireplace and the plug. His evidence is : that a day or two before Dec. 20 when paying his rent to Miss Smee he complained about the leaking roof quite generally, and about this plug. I am satisfied that Terry did complain about this plug ; I think anything else is highly improbable. A B

In his evidence, Terry said :

> When this fading out of the light in damp weather occurred, or perhaps when the lamp went wrong, I did go under the bungalow to see if I could see anything . . . I had a look round to see if I could find where the wires went to. I got underneath the bungalow and traced them along the side of the bungalow footings. Nearing the plug, where it goes through into the back of the plug, the wire was bare for some distance . . . C

Mr. Shipley, the defendant's expert witness, said that you would not see this wire until it was five inches away from the plug, and that if you saw two or three inches of bare wire it would mean that there were perhaps six or seven inches of bare wire between the point where you could see the end of the lead and the actual junction with the plug. But that is immaterial. There were, I am satisfied, several inches of bare wire behind the plug and in contact with the wood, which could, and which did, get wet. D

On the night in question, when the fire took place, Terry was asleep in the back room. Mrs. Terry, two daughters and a baby were in the main bedroom. The baby apparently was restless, and at about 1.0 a.m. Mrs. Terry got up to go to the kitchen to get something for the child. Through the door of the living room she saw the light of fire. She opened the door, shouted for her husband and called out "Fire." She says that what she saw was this : Right opposite her was the plug, and there was fire coming from the plug and from just behind it, and going up the wall. Her husband was there in a matter of seconds, and he swears the same thing. Mrs. Terry added something of which she did not understand the significance, that round the plug there was for a moment or two a blue ring of light. E F

I have thus direct evidence that the fire in fact started at the plug. I have direct evidence from Terry of a state of things which might easily cause a fire, and, indeed, would be expected to cause a fire, just where this fire started. I also have the evidence, the relevance and importance of which Terry would not understand, about light fading away in wet weather, which is exactly what would happen if the current were leaking into damp wood. You would get irregularity of supply of current to the plug, and you would get just the sort of thing which he spoke of. I am quite satisfied, and I find as a fact, that the fire did start at the plug or just below the plug, that it was caused by the bare wire coming into contact with wet wood, and that it came into contact with the wet wood because there was no lead covering and because the insulating rubber and tape had worn away, leaving the wires or a wire bare. G

The next question of fact to which I have to address my mind is this : Was the wire originally fixed without lead covering on the last few inches of it ? The man who fixed it was not called. His employer was called ; he would naturally say everything was perfect ; but I do not believe for a moment that an employer living some distance away would go and examine every bit of work that his man had done. I do not believe that he looked at the plug from underneath the bungalow. If this lead had been put on right up to the plug, as it ought to have been, it would have been there at the time of this fire. I myself cannot see—and nobody has been able to help me with any suggestion about it—how lead H of good quality (such as, on the evidence, this was) could have come off this wire of itself. No one has suggested any agency which could get it off. The inference I draw is that when the point was reached below the plug where the wire had to be turned up through some boards, it was perhaps easier to handle it without the lead, and the lead was brought up to a point below the plug, and, from that point up to the plug, the lead had been taken off by the man who fixed it. That is the inference I draw, that this was negligently fitted originally, without lead covering for the last few inches. Mr. Shipley said it would be very bad workmanship but that he was afraid it was at times done in that way. If that is right, I have this fact, that, owing to the negligence of the contractor, the wiring was installed in such a way, that there was inadequate protection of the insulating covering of the live wire, which, in course of time, would wear away and would come off, and would leave the wires exposed.

There is one other question of fact with which it is necessary to deal. Was the bungalow let to Terry in this condition ? I cannot think that there can be any real doubt about that. I am satisfied that when the bungalow was let to Terry on Dec. 5, 1942, the tenancy to start from Dec. 7, this dangerous state of things was already in existence. The lead had been off for years, and I am satisfied that this wire must have been in a dangerous state of bareness at the time when the bungalow was let to Terry. That is consistent with the fact that, right from the beginning, there was irregularity of current from the plug. I find as a fact it was let to him in that state.

On those facts, what is the law ? I have no doubt that there was a nuisance on this property, a nuisance which caused the damage, and it is one for which, as a matter of law, the defendant is answerable. Liability for a nuisance may exist quite independently of negligence. In negligence a plaintiff must prove a duty to take care, but not so in nuisance. In *Rapier* v. *London Tramways Co.* (1), LINDLEY, L.J., said ([1893] 2 Ch. 588, at p. 600) :

> . . if I am sued for a nuisance, and the nuisance is proved, it is no defence on my part to say, and to prove, that I have taken all reasonable care to prevent it.

Nuisance and negligence are different in their nature, and a private nuisance arises out of a state of things on one man's property whereby his neighbour's property is exposed to danger. I think that that is a fair summary of what was said by FLETCHER MOULTON, L.J., in *Wing* v. *London General Omnibus Co.* (2) and *Barker* v. *Herbert* (3). I am satisfied that the state of the defendant's bungalow around that plug, with a bare wire in contact with wet wood, did constitute a nuisance on the defendant's property and that it exposed the neighbouring property to danger and, in the end, caused the escape of a dangerous thing, to wit, fire.

Mrs. Smee was not the occupier. In general, the responsibility for nuisance is based on possession, but it is clear law that, if an owner lets his premises with a nuisance thereon created by himself or by his servants or agents, he assumes liability for the continuance of that nuisance. In *Job Edwards, Ltd.* v. *Birmingham Navigations* (4), SCRUTTON, L.J., was dealing with the question of nuisance, and damage done by fire. His judgment was a minority judgment, but there was no difference between the members of the court as to what was the law which they were applying. He said ([1924] 1 K.B. 341, at p. 355) :

> In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land : (i) if he or his servants or agents created the nuisance ; (ii) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment . . .

Accepting that, as I am bound to do, as a correct statement of the law, Miss Smee was clearly liable for the negligent way in which this installation had been carried out.

But, supposing that I am wrong in the inference that I draw that this lead had always been off, and that in some mysterious way it had come off in the process of time so that it could not be said that she had installed the nuisance, again it is clear that a landlord is liable for a nuisance although not of his creation, if it existed at the commencement of the tenancy and was known, or ought to have been known, by the landlord to exist. The words " ought to have known " can only mean " if it was his duty to have known," and therefore, if this nuisance was there at the time of the letting of this bungalow to Terry, the question arises ;

Was it one of which she knew, or if she did not know, was it one of which it was her duty to have known ?

In *Barker* v. *Herbert* (3) some trespassers had removed the iron railings of the defendant's house, leaving unprotected one of those sudden drops into the basement yard in front of the house, and somebody had tumbled down and been injured. FLETCHER MOULTON, L.J., said ([1911] 2 K.B. 633, at p. 642) :

> In my opinion the law in such a case as the present is that the possessor of land adjoining a highway may not cause his premises to be a nuisance to the highway, and he will be responsible in this respect for the acts of his agents or servants. It may be that, as indicated in certain cases, his responsibility may have a wider range than that, and he may sometimes be responsible for the acts of those whom he permits to be occupants of his premises, but no question arises here as to any such extension of his responsibility, and I only mention the possibility of his being so responsible in order to show that I have not forgotten it. In a case where the nuisance is created by the act of a trespasser, it is done without the permission of the owner and against his will, and he cannot in any sense be said to have caused the nuisance ; but the law recognises that there may be a continuance by him of the nuisance. In that case the gravamen is the continuance of the nuisance, and not the original causing of it. An owner of premises may have a duty to prevent the continuance of the nuisance, but it is obvious that, just as, where the allegation is that he has caused the nuisance, it must be proved that it was there by his act or that of some one for whose action he is responsible, so, where it is alleged that he is responsible for the continuance of the nuisance, it must be proved that it was continued by his permission. He cannot be said to have permitted the continuance of that which was not caused by him, and of which he had no knowledge ; and when I say of which he had no knowledge, of course I include the knowledge of the servants and agents for whom he is responsible. If they have knowledge of the nuisance, their knowledge must be attributed to him. I also realise that cases may arise in which his or their want of knowledge may be due to neglect of duty.

These last words are the important ones.

In *Wringe* v. *Cohen* (5) it was held that there is a duty on a landlord who has retained the right of repair to prevent his premises from getting into such disrepair as to constitute a danger to his neighbours. That case only dealt with nuisance arising from want of repair. A duty to prevent his house from becoming dangerous from want of repair connotes a duty to inspect and examine, and if a landlord fails to do either, it is right that he should not be allowed to rely upon want of knowledge. There is nothing latent in the premises becoming in such disrepair as to be in danger of collapse. That was the point in *Wringe* v. *Cohen* (5). The last words of the judgment of the Court of Appeal in that case are these ([1939] 4 All E.R. 241, at p. 254) :

> . . . if premises become dangerous, not by the occupier's act, nor neglect of duty, but as the result of the act of a third party, or of a latent defect, the occupier is not liable without proof of knowledge or means of knowledge and failure to abate it.

There is no hardship imposed on the landlord by that obligation. If the want of repair is due to something latent, it cannot be said that he ought to have known about it.

That difference is well illustrated by comparing *Wringe* v. *Cohen* (5) with *Noble* v. *Harrison* (6). In *Noble* v. *Harrison* (6) a tree which overhung the highway had suddenly fallen, and a heavy branch had come down on a man who was passing. He claimed damages from the owner. It was held that there was no liability, and the reason is instructive. WRIGHT, J., said ([1926] 2 K.B. 332, at p. 341) :

> Then it is contended that it became a nuisance when at some unknown time, some years ago, the latent defect began and gradually developed by natural causes and without any human agency or any indication to human eyes. In that case I think the defendant is not liable, because of the principles laid down in *Barker* v. *Herbert* (3) [*i.e.*, the passage that I have just read]. The nuisance in that case was caused by the act of a trespasser, but I think the same principle applies to a nuisance (in this case the latent crack in the branch with the resulting risk that some day it would fall) caused by a secret and unobservable operation of nature.

That is as much as to say : "If it is latent and unobservable, well and good. You cannot attribute knowledge." But it is obvious, I think, that, if that crack had been observable, the decision would have been the other way.

Therefore it seems to me that the defendant must be responsible for this nuisance. If it had always been there, this potential danger was there by the act of her contractors. If the lead in some unexplained way came off since installation, it was let to the tenant in that condition, it was a matter of observable disrepair which could be seen on inspection, and the late defendant, the owner, cannot be heard to say : " I did not know about it." It was her duty to know about it.

On those facts, the Fires Prevention (Metropolis) Act, 1774, sect. 86, which provides that no action shall be maintainable against anyone in whose building a fire shall accidentally begin, has no application. It has no application where the fire is due to negligence, or to nuisance created by the landlord or those for whom he is responsible. That was discussed in *Collingwood* v. *Home and Colonial Stores, Ltd.* (7). There, a fire had originated in a neighbour's basement and had damaged or destroyed the plaintiff's buildings, and an action was brought, based upon nuisance. GREAVES-LORD, J., who tried the case, had been unable to find what the cause of the fire was. He said ([1936] 1 All E.R. 74, at p. 76) :

> It may have been by a fusing of the wiring, but what caused the wire to fuse ? Was it a result of faulty wiring, or of some conditions that caused a leakage of current in the basement ? I am unable to say. It is said the wiring was defective and that a warning to that effect was given . . .

He then dealt with that, and, in the end, was quite unable to find that there had been in fact anything wrong with this installation. He said that the fire was unexplained ; it was, therefore, an accident within the meaning of the Act. That case was taken to the Court of Appeal, and it was sought to have the defendant held liable on the principle of *Fletcher* v. *Rylands* (8) that something dangerous had been brought on to the premises, viz., electric current, and if it had caused the fire it did not matter how it had caused it, because it had escaped and damaged the plaintiff's house. But the court held that the principle of *Fletcher* v. *Rylands* (8) did not apply, and, therefore, as there was no finding of fact that there was a nuisance, or that there was negligence on the part of the defendant, the defendant was entitled to judgment on the basis of the fire being an accident.

It was urged that Mrs. Smee could not be liable for the acts of the contractor. As to that, usually a man is not liable for the default of an independent contractor, but in the law of nuisance an exception exists. I have already referred to what was said by SCRUTTON, L.J., in *Job Edwards, Ltd.* v. *Birmingham Navigations* (4). WINFIELD ON TORTS also deals with this contention and states that it does not apply in the case of nuisance. The principle which governs these cases is that which was laid down in *Bower* v. *Peate* (9) by COCKBURN, C.J. Having explained that normally a man is not liable for the negligence of the contractor, COCKBURN, C.J., goes on to say (1 Q.B.D. 321, at pp. 325, 326) that " this reasoning cannot prevail " where :

> . . . he directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damage to the adjoining property. He is, therefore, not in the position of a man who has simply authorised and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is, therefore, not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants. The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. ?

I think that is the broad principle, which was approved by LORD BLACKBURN (6 App. Cas. 740, at p. 829) in *Dalton* v. *Angus* (10) and in *Penny* v. *Wimbledon Urban Council* (11) that, where danger is likely to arise unless work is properly done, there is a duty to see that it is properly done.

There was one other point which was urged. It is said that all this may be very true with regard to public nuisances, nuisances which affect the public generally, but that it does not apply to a private nuisance. I do not think there is anything in that point. In *Wringe* v. *Cohen* (5) the Court of Appeal refused to differentiate between the two, and in *Chauntler* v. *Robinson* (12), PARKE, B., said (4 Exch. 163, at p. 170):

> . . . but in any understanding of this term, there is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a lasting and substantial manner: the only duty is to keep it in such a state that his neighbour may not be injured by its fall; the house may, therefore, be in a ruinous state provided it be shored sufficiently, or the house may be demolished altogether.

The relevant words are that it is his duty

> . . . to keep it in such a state that his neighbour may not be injured . . .

In *Overton* v. *Freeman* (13) where this defence was being urged, MAULE, J., said (11 C.B. 867, at pp. 871, 872):

> It is urged by [counsel for the plaintiff] that the defendants are liable in respect of this being a public nuisance; and it is insisted that there is some greater degree of liability in respect of this being a public wrong, than would ordinarily attach in the case of a mere private injury. I do not, however, perceive that there is any distinction between the two which is at all favourable to the plaintiff's argument. I rather think the liability for a public wrong is less extensive than the civil liability.

In *Cunard* v. *Antifyre, Ltd.* (14), a Divisional Court consisting of ACTON and TALBOT, JJ., considered this point at some length, and refused to admit any distinction between the measure of obligation to the public and to a neighbour. The principle is the same in both cases. In HALSBURY, Hailsham Edn., Vol. 24, p. 49, para. 85, it is said:

> It is an unreasonable and unlawful use of property by the owners or occupiers to allow premises to become or remain in a ruinous or dangerous condition . . .

I am satisfied that the duty owed to a neighbour is not less than the duty owed to a member of the public using a highway. It would be indeed strange if a man standing in his own doorway had no remedy for the collapse upon him of his neighbour's house, while he would have had a remedy if he had taken one step into the highway. The owner is responsible for preventing his premises from getting into such a state of disrepair as to be a danger, and he ought to have in contemplation the danger to a neighbour, at least as much as the dangers to users of the highway.

Therefore, whether on the ground of nuisance or on the ground of negligence, I find that Mrs. Smee, and therefore her estate through Miss Smee, is liable for damages.

Judgment for the plaintiffs with costs.

Solicitors: *Godden, Holme & Co.* (for the plaintiffs); *Blyth, Dutton & Co.* (for the defendant).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

TRINIDAD PETROLEUM DEVELOPMENT CO., LTD. *v.* COMMISSIONERS OF INLAND REVENUE.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Wright, Lord Porter and Lord Uthwatt), February 4, 5, April 12, 1946.]

Revenue—Excess profits tax—Computation of capital—Deduction of debt—Companies interconnected in standard period but not in chargeable accounting period—Finance (*No.* 2) *Act,* 1939 (*c.* 109), *ss.* 13 (4), 14, 17.

The appellants had selected the years 1935 and 1937 as their standard period for the purposes of excess profits tax. Prior to Jan., 1937, they had for many years been a subsidiary of another company which, during that period, made them loans at interest, the balance of which outstanding at the beginning of 1937 amounted to £800,000. In Jan., 1937, these loans were discharged and on that date the subsidiary relationship between the companies ceased to exist and had not since recurred. The question to be decided was as to the applicability of the Finance Act, 1939, s. 17 (1) to the calculation of excess profits tax claimed from the appellants in respect of two chargeable accounting periods, Apr. 1, 1939 to July 31, 1939, and Aug. 1, 1939, to July 31, 1940. It was contended on behalf of the appellants that sect. 17 (1) of the Act did not apply in relation to either of their chargeable accounting periods under review by reason that in neither of them were they a subsidiary of another company; that unless that contention was correct results that could not have been intended would follow and that, as subsects. (2) to (5) of sect. 17 were limited to cases where the relationship of principal and subsidiary existed during the whole or part of the chargeable accounting period, a similar restriction should be implied in subsect. (1):—

HELD: (i) the language of sect. 17 (1) was general, clear and unambiguous, and there was nothing in the words used to confine the employment of the modified method of computation in that section to cases where the subsidiary relation existed both in the standard period and in the chargeable accounting period.

(ii) the argument that results that could not have been intended might follow, if sect. 17 (1) were held to apply, was relevant only where there was an ambiguity in the provision under consideration; it found no place where there was no ambiguity; the duty of the court was merely to interpret the words used, and not to improve upon the section in order to produce what might seem a more just result.

(iii) it would be wholly illegitimate as a matter of construction to extend the limitations of subsects. (2) to (5) to the previous subsection.

(iv) the appellants were, therefore, not entitled to deduct the £800,000 debt from their figure for capital in the year 1935 or to treat the interest they paid in that year as an expense of the company.

Decision of the Court of Appeal ([1944] 1 All E.R. 667) *affirmed.*

[**EDITORIAL NOTE.** The question considered in this case is as to the relationship between a subsidiary and a principal company when that relationship is not existing both in the standard and in the chargeable accounting periods. According to VISCOUNT SIMON, sect. 17 of the Finance (No. 2) Act, 1939, is to be construed as if it amounted to saying "Whether you are computing for the standard period or for a chargeable accounting period, employ the ordinary method of computation if there is no subsidiary relation during that period, but employ the modified method if and so far as there is."

For the Finance (No. 2) Act, 1939, s. 17, see HALSBURY'S STATUTES, Vol. 32, p. 1202.]

APPEAL by the taxpayer from a decision of the Court of Appeal, given on May 4, 1944, and reported ([1944] 1 All E.R. 667). The facts are fully set out in the judgment of VISCOUNT SIMON.

J. Millard Tucker, K.C., Frederick Grant, K.C., and *John W. P. Clements* for the appellants.

Sir Patrick Hastings, K.C., and *Reginald P. Hills* for the respondents.

The House took time to consider its opinion.

VISCOUNT SIMON: My Lords, the question to be decided in this appeal is as to the applicability of the Finance (No. 2) Act, 1939, s. 17 (1), to the calculation of excess profits tax claimed from the appellant company in respect of two chargeable accounting periods, *viz.* (*a*) from Apr. 1, 1939 (which was the date at which the application of the tax began), to July 31, 1939, and (*b*) from Aug. 1, 1939, to July 31, 1940.

Sect. 17 (1) provides as follows:

> Where any interest, annuity or other annual payment, or any royalty or rent, is paid by one body corporate to another body corporate, and one of those bodies corporate is a subsidiary of the other, or both are subsidiaries of a third body corporate, the capital, profits and losses of both bodies corporate shall be computed for the purposes of this Part of this Act as if (*a*) the interest, annuity, annual payment, royalty or rent were not payable; (*b*) any debt in respect of which any such interest is payable did not exist; and (*c*) any asset in respect of which any such royalty or rent is payable were the property of the body corporate paying the royalty or the rent.

For many years prior to Jan., 1937, the appellant company was a "subsidiary" of British Controlled Oilfields, Ltd. (hereinafter called "B.C.O.") in the sense defined in sect. 17 (6), that is to say, it was a company of which "not less than nine-tenths of its ordinary share capital" was owned by B.C.O. In Jan., 1937, this relation between the two companies (which I will call "the subsidiary relation") ceased to exist and it has not recurred since; the appellant company, by increasing its authorised capital, and creating new shares, the greater part of which have never been owned by B.C.O., ceased at that date to be a subsidiary. In the period during which the subsidiary relation existed loans at interest were made by the B.C.O. to the appellant company; the amount of the loans outstanding from the beginning of the year 1936 until Jan., 1937, was over £800,000. These loans were discharged in Jan., 1937. Thus, the appellant company was not a subsidiary in any part of either of the chargeable accounting periods referred to, and the computation of its capital profits and losses in each of these chargeable accounting periods had to be made in accordance with the ordinary provisions of Pt. III of the Act. On the other hand, the appellant company satisfied the definition of a subsidiary in the year 1935 which was one of the two years selected to constitute the standard period under sect. 13 (4) of the Act. If, therefore, the special provisions of sect. 17 (1) are to be applied in calculating capital profits and losses for the standard period, or rather for the year 1935 which is part of the standard period, even though on the facts of this case sect. 17 (1) does not apply to the computation of figures for the chargeable accounting periods at all, the appellant company will not be entitled to deduct the £800,000 debt from its figure for capital in 1935 or to treat the interest it paid in that year as an expense of the company. This is certainly an anomalous result, since like will not be compared with like, but the Court of Appeal (SCOTT, GODDARD and DU PARCQ, L.JJ.) reversing MACNAGHTEN, J., unanimously held that the section must be given this effect. Indeed, GODDARD, L.J., in agreeing with the view put forward by the Crown, declared that this was "a very clear case." I should not be prepared to go so far. But, treating the question (as it must be treated) as purely a question of the construction of the words found in sect. 17 (1), I think that the decision reached by the Court of Appeal is correct, for the following reasons.

The essence of the excess profits tax is that it is a tax upon the excess of one figure over another. It involves a comparison between two figures each of which is to be separately calculated by applying the appropriate method of computation. The ordinary method of computation is that contained in sects. 13 to 16 of this Act and in Sched. VII. But when the subsidiary relation exists —when one body corporate "is" a subsidiary of another—a modified method of computation contained in sect. 17 (1) is to be employed. The language is quite general, and there is nothing in the words used to confine the employment of the modified method to cases where the subsidiary relation exists, both in the standard and in the chargeable accounting period. The subsection, as SCOTT, L.J., observed ([1944] 1 All E.R. 667, at p. 668):

> . . . contains no hint of a condition that it is not to be applied in the standard period, unless the company is still subsidiary in the chargeable accounting period . . .

It may be that the draftsman was thinking only of the common case where the subsidiary relation exists throughout, but I can find nothing in the language used which would imply that the modified method of computation cannot be used for the standard period when the subsidiary relation exists in that period, unless the subsidiary relation also exists in the chargeable accounting period. We are not entitled to improve upon the section in order to produce what might seem a more just result: our duty is merely to interpret the words used. And, in my opinion, this statutory provision, interpreted according to the actual terms of the language used, amounts to saying: "Whether you are computing for the standard period or for a chargeable accounting period, employ the ordinary method of computation if there is no subsidiary relation during that period, but employ the modified method if and so far as there is."

I move that the appeal be dismissed with costs.

My Lords, LORD WRIGHT authorises me to say that he concurs in this motion.

LORD THANKERTON: My Lords, I agree with the opinion that has just been delivered by LORD SIMON, and I will only add an observation on one argument, which was submitted in support of the appeal. It was contended that, as subsects. (2) to (5) of sect. 17 were limited to cases where the relationship of principal and subsidiary existed during the whole or part of the chargeable accounting period, a similar restriction should be implied in subsect. (1). If the terms of subsect. (1) had been ambiguous, it might have been possible to apply the maxim *noscitur a sociis*, but if—as I think—the terms of subsect. (1) are clear and unambiguous, the qualification of its terms by an implication derived from the three following subsections is not legitimate, in my opinion.

Subsect. (1) provides that, in the case of the companies therein described:

> . . . the capital, profits and losses of both bodies corporate shall be computed for the purposes of this Part of this Act as if . . .

It is beyond doubt that the computation of the capital, profits and losses is equally essential in arriving at the standard profits or losses as in arriving at the profits or losses in the chargeable accounting period, in order that any excess of the latter over the former may be subjected to the tax charged by sect. 12 (1). Accordingly such computation in relation to the standard period is clearly included in subsect. (1) of sect. 17. Subsects. (2) to (5) enact special provisions for certain cases which are selected from the wider category covered by subsect. (1), and, in my opinion, it would be wholly illegitimate, as matter of construction, to extend the limitations of subsects. (2) to (5) to the previous subsection.

I agree that the appeal should be dismissed with costs.

LORD UTHWATT: My Lords, in this case the appellants do not base any contention founded on the fact that they were a subsidiary of B.C.O., Ltd., during part only of their standard period or upon the fact that the case stated does not in terms set out that any interest was paid by the appellants to B.C.O., Ltd., at a point of time during the appellants' standard period when the appellants were a subsidiary of B.C.O., Ltd. The sole contention on which they have throughout rested their case is that sect. 17 (1) does not apply in relation to either of their chargeable accounting periods under review by reason that in neither of them were they a subsidiary of B.C.O., Ltd. The point at issue therefore is purely a matter of construction of subsect. (1) of sect. 17 which is to be read in the light of the other provisions in the Act relating to excess profits tax.

The rules laid down in subsect. (1) of sect. 17 are rules of computation only. In the cases to which that subsection applies, the special rules vary the general rules of computation and, in considering the construction of the subsection, it is necessary to have in mind the general principles in accordance with which computations in general are directed to be made. This matter can be shortly stated and it is convenient at the same time to refer to some of the provisions which bear on the argument presented by the appellants.

First, sect. 14 (1) and (3) of the Act require that the profits and losses arising in the standard period and in any chargeable accounting period shall be separately computed and the provision as regards capital in sect. 14 (2) is on similar lines.

Second, the rules apply indifferently to the computation for a standard period and for each chargeable accounting period.

Third, in the case of all the rules it is only the facts as they stand in the period under review and events happening in that period which are taken into account. Capital and profits and losses for any period are ascertained exclusively by reference to the circumstances of that period.

It was suggested in argument that this was not the case as regards standard profits and losses. It is indeed true that sect. 13 (3) provides that, where the average capital employed in the business in any particular chargeable accounting period is greater or less than the average capital so employed in the standard period, the standard profits shall in relation to that chargeable accounting period be increased or diminished by a percentage of the increase or decrease. But that is not a re-assessment of the standard profits. The provision as to addition or subtraction in a particular chargeable accounting period does not enter into the computation of standard profits, which once fixed remain immutable.

With these matters in mind, one turns to sect. 17 (1). The effect of that section—where the two conditions as to payment of interest and interconnection exist—is to modify the general rules of computation. The modifying rules apply to computations made "for the purposes of this part of the Act," *i.e.*, computations for the standard period and any chargeable accounting period. The natural way to read the subsection is to read it consistently with the general principles in accordance with which computations generally are directed and the lines on which the general rules proceed. The rules laid down in the subsection will then apply as respects each period mentioned in the subsection by reference to the circumstances obtaining in that period. So construing the subsection, the result is that if the conditions as to payment of interest and interconnection are satisfied in the standard period, the modifying rules apply as respects that period and if those conditions are satisfied in any chargeable accounting period, the modifying rules apply to that chargeable accounting period. I so read the subsection. If that be the true construction of the subsection, there is in my view no room for the implication of the supposed condition.

The appellants' main argument was on the lines that unless their contention was correct, results that could not have been intended would follow. I am not by any means convinced that this argument is correct in substance, and the appellants' own contention might lead to whimsical results—namely, possible variation in standard profits and standard capital in different chargeable accounting periods. But, however, this may be, such an argument as the appellants presented is relevant only where there is an ambiguity in the provision under consideration. It finds no place where there is no ambiguity.

The appellants also relied on the succeeding subsections of sect. 17. Those subsections are in my opinion irrelevant. In the cases to which they apply—and they do not apply to all cases where one company is the subsidiary of another or to the case of two subsidiaries of a third company—the point and effect of the subsections is to throw the accounts of the two concerns together and to tax the principal company exclusively.

I would dismiss the appeal.

My Lords, Lord Porter authorises me to say that he concurs in this opinion.

Appeal dismissed with costs.

Solicitors: *Elvy Robb & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

STORES, LTD. [1949] 2 All E.R. 18.

Re TRUSTS OF HOBOURN AERO COMPONENTS, LTD.'S AIR-RAID DISTRESS FUND, RYAN AND OTHERS *v.* FORREST AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Somervell, L.JJ.), March 11, 12, 13, 1946.]

Charities—Charitable purposes—Fund raised by employees of a company to provide grants for contributors in respect of air-raid distress—No means test applied in considering claims—Claims by non-contributors not considered—Gift not for general public purposes nor within "poor relations" cases—Fund not subject to valid charitable trusts.

After the outbreak of the war, the employees of a company made voluntary contributions towards a war emergency fund for providing parcels and leave grants for ex-employees in the Forces and also, from Aug., 1940, grants for employees in respect of air-raid damage. By a circular sent out in Nov., 1940, in place of the former voluntary contributions to the war emergency fund, all employees of the company were asked to contribute 2*d.* in the £ a week from their wages towards the Air-Raid Distress Fund, the object of which, it was stated, was to help any employee "in dire distress as the result of enemy action." By the terms of the circular, the fund was to be administered by a committee whose decision on all matters connected with the fund was to be final. All the employees, excepting about seven, signed the circular and became subscribers to the fund. A very small proportion of the fund was subscribed by certain other people interested in the employees of the company. The fund was at first used for certain payments to ex-employees with the Forces as well as for grants in respect of air-raid distress, but in Jan., 1944, the committee resolved to discontinue grants to ex-employees with the Forces and to continue the fund solely as an air-raid distress fund for employees or ex-employees with the Forces. Only claims from subscribers to the fund were considered and no means test was applied in the administration of the fund; help was given to subscribers awkwardly situated as a result of air-raids whether they were in financial distress or not. In Sept., 1944, the fund was closed down and the question to be determined was what was to be done with the surplus moneys. It was contended by the Attorney-General that the fund was subject to a valid charitable trust because the relief of air-raid distress was a good charitable object within the fourth head of LORD MACNAGHTEN'S definition in *Pemsel's* case (2) and, therefore, since the purposes of the fund were of a public character, it was immaterial that the relief of poverty was not a necessary object :—

HELD : (i) although the fund was for the relief of air-raid distress, its purposes were of a personal, and not of a public, character, because it was merely for the benefit of the employees of a particular company who were themselves, for the main part, the subscribers to the fund, and, moreover, the benefits were confined to such of the employees as had subscribed to the fund.

(ii) since (*a*) the trusts of the fund were of a private nature and (*b*) poverty was not a necessary qualification in the recipients of benefit from the fund, the fund was not subject to a valid charitable trust.

Re Compton (1) *applied.*

Decision of COHEN, J. ([1945] 2 All E.R. 711) *affirmed.*

[**EDITORIAL NOTE**. The Court of Appeal affirm the court below, holding that the decision of COHEN, J., which applied the principle of *Re Compton* (1), was correct. It is clear that a fund for the relief of air-raid distress is a good charitable gift, within the fourth class in *Pemsel's* case (2), but the fund considered in this case, being limited to the employees of a particular firm, lacks the element of publicity necessary to make it a good charitable gift. LORD GREENE regards the fact that the potential beneficiaries themselves subscribed the money as of the greatest importance, and conclusive in stamping the character of a private and personal trust upon the fund. The element of poverty was absent, which, as LORD GREENE says, is a necessary object when the class of trust is one which, *prima facie*, is for the personal benefit of individuals.

AS TO ASSOCIATIONS FOR BENEFIT OF MEMBERS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 130, 131, para. 172; and FOR CASES, see DIGEST, Vol. 8, pp. 261-263, Nos. 240-252.]

Cases referred to:

*(1) *Re Compton, Powell* v. *Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158.

*(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 8 Digest 241, *1*; 61 L.J.Q.B. 265; 65 L.T. 621.

*(3) *Re Clark's Trust* (1875), 1 Ch.D. 497; 8 Digest 262, *241*; 45 L.J.Ch. 194.

*(4) *Spiller* v. *Maude* (1881), 32 Ch.D. 158, n.; 8 Digest 262, *245*.

*(5) *Pease* v. *Pattinson* (1886), 32 Ch.D. 154; 8 Digest 262, *244*; 55 L.J.Ch. 617; 54 L.T. 209.

*(6) *Shaw* v. *Halifax Corpn.*, [1915] 2 K.B. 170; 8 Digest 243, *21*; 84 L.J.K.B. 761; 112 L.T. 921.

*(7) *Re Forster, Gellatly* v. *Palmer*, [1938] 3 All E.R. 767; [1939] Ch. 22; Digest Supp.; 108 L.J.Ch. 18; 159 L.T. 613.

*(8) *Hall* v. *Derby Sanitary Authority* (1885), 16 Q.B.D. 163; 8 Digest 243, *26*; 55 L.J.M.C. 21; 54 L.T. 175.

*(9) *Re Hillier, Dauncey* v. *Finch and A.-G.*, [1944] 1 All E.R. 480.

*(10) *Re Drummond, Ashworth* v. *Drummond*, [1914] 2 Ch. 90; 8 Digest 244, *28*; 83 L.J.Ch. 817; 111 L.T. 156.

(11) *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] 1 Ch. 557; Digest Supp.; 98 L.J.Ch. 261; 140 L.T. 659; *varied on appeal, sub nom. A.-G.* v. *Plowden*, [1931] W.N. 89.

*(12) *Re Christchurch Inclosure Act* (1888), 38 Ch.D. 520; 8 Digest 289, *658*; 57 L.J.Ch. 564; 58 L.T. 827.

(13) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 8 Digest 327, *1099*; 52 L.J.Q.B. 193; 48 L.T. 239.

Appeal by the defendant H.M. Attorney-General from an order of Cohen, J., dated Nov. 7, 1945, and reported ([1945] 2 All E.R. 711), where the facts are fully set out.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), *Gerald Upjohn, K.C.*, and *H. O. Dankwerts* for the appellant.

J. G. Strangman for the trustees of the fund.

Harold Christie, K.C., and *Hector Hillaby* for the respondents other than the trustees.

Lord Greene, M.R.: In spite of the very full arguments which have been addressed to us, I am bound to confess that I do not find any real difficulty in this case. The first thing to do, of course, is to appreciate the facts, since all these cases must depend in the first place upon their own particular facts. The company, Hobourn Aero Components, Ltd., carried on, during the relevant period, a business at Coventry, Market Harborough and Kettering. They had a number of employees, altogether some 1,300, distributed in those three factories. The employees showed admirable habits of self-help and comradeship. They set up at one time a benevolent fund; we are not concerned with that. At a later stage, in the early months of the war, it occurred to them that it would be a good thing to do to provide some amenity for their fellow workmen who had left the company and joined the Forces. They accordingly instituted a collection which was called "a hat collection" and the funds so put up were managed by a committee, originally the same committee as the benevolent fund committee. Out of the proceeds there was paid the cost of parcels, cigarettes, and so forth sent to ex-employees in the Forces, and also payments in cash, or in the shape of savings certificates, either to the men themselves or, in some cases, to their families. In its ultimate development, the assistance so given to serving men was, I think, confined to payments in cash or by way of savings certificates. On Aug. 27, 1940, when the prospect of air raids was beginning to affect people's minds, a decision was taken by the benevolent fund committee. The soldier's parcels fund and the soldiers' leave fund out of which funds, derived from hat collections, the payments I have mentioned were made—had been kept in one bank account with the benevolent fund. The committee thought this was undesirable and two separate funds with two separate accounts were set up. One was the benevolent fund and the other was called the war emergency fund. The committee resolved that the latter should cover soldiers' parcels, soldiers' leave grants, and grants to employees who were awkwardly placed owing to air raids or other damage.

Unfortunately, this admirable spirit of self-help was not accompanied by any real appreciation of how, as a matter of business, this sort of arrangement should be conducted. We have the most exiguous material in the matter of accounts and minutes. There is no minute—and, apparently, none were kept—between Aug. 27, 1940, and Jan. 15, 1944, but we have a document, to which I shall now refer, which really originated the fund with which we now have to deal. It is a circular sent round to all the employees asking their approval of the proposals contained in it and their consent to certain deductions from wages intended to make it possible for those proposals to be carried out. It was sent out in Nov., 1940, *i.e.*, some months after the committee meeting to which I have just referred. It is headed "Pattison & Hobourn Air-Raid Distress Fund," and it starts off in this way:

> The purpose of this fund is to help any employee who is in dire distress as the result of enemy action. It does not aim at replacing all losses incurred, but to give a helping hand at a time when you most need it.

Then it provides how claims should be made and refers to a claims form. It then asks the employees to say whether they approve of electing a special committee consisting of five members of the benevolent fund committee and, if not approved, asking for nominations. It then continues:

> It is to be understood that by this vote you are investing in the committee the necessary powers to deal with all claims and that, subject to Mr. P. L. Hobourn's approval [he was the managing director of the company] their decision on all matters concerned with this fund is final. Further, it is suggested that the Saturday collection be discontinued, and instead a sum of 2*d.* in the £ per week be deducted from your wage. [The Saturday collection referred to was the hat collection.] Are you in agreement that 2*d.* in the £ be deducted each week for the Distress Fund for Pattison and Hobourn, Ltd. ?

That circular was signed by all the employees with the exception of about seven. Thereafter 2*d.* in the pound was duly deducted from the wages of the assenting employees. It is to be observed that this fund was quite clearly, according to the circular and according to the decision of the committee, administered to the entire exclusion of those employees who had not signed the form. They were not to be entitled to any benefit at all out of the fund.

The committee, which, as I have said, was really an off-shoot of the benevolent fund committee and had control of certain other funds, proceeded to transfer to the Air Raid Distress Fund as set up under that circular the sum of £108 7*s.* 7*d.*, which was the balance remaining from the hat collections.

There were also two contributions of £100 each from Mr. P. L. Hobourn, the managing director. Those sums, we were told were really paid over before the circular of Nov., was sent out. There were two other sums. Mr. Kirk, the officer commanding the Local Defence Volunteers in Coventry, provided £30, and the Local Defence Volunteers subscribed some £36. That made a total of £266 put up by Mr. Hobourn, Mr. Kirk, and the Local Defence Volunteers. The actual sum deducted from employees' wages and salaries while the fund was in being was £7,856 17*s.* The fund, therefore, save for a quite small amount, consisted entirely of money put up by the employees themselves.

Looking back for a moment to the terms of the circular, there are one or two observations which fall to be made. First, the circular was the document on the faith of which the employees agreed to the deduction from their wages. So far as the evidence goes, they had no knowledge of the terms of the minute of Aug. 27, 1940, nor is it possible, in my view, to accept Mr. Upjohn's suggestion that the employees who subscribed to this fund must be taken to have known and assented to everything that was done. That is an inference which is quite unjustifiable on the evidence. The first thing to notice about the circular is, I think, that the committee were given very wide powers on all matters concerned with the fund. That seems to me to have put them into the position of being able, within the four corners of the objects as stated, to decide what the purposes should be and, in general, how the fund should be administered, and I think it gave them a reasonable discretion in interpreting their charter, *viz.*, the circular.

The actual way in which the fund was administered was this: the committee continued to make grants out of it to serving ex-employees and their families in the shape of £1 a month or savings certificates and there were certain payments they made to men on leave. The question has been raised in the course of the argument as to whether or not that particular application of the moneys subscribed on the faith of this circular was one which on the terms of the circular could be regarded as permissible. I am bound to say that, in my opinion, that was going beyond what the committee was entitled to do and if any employee who had subscribed his money on the faith of this circular had heard of what was being done and had chosen to object, he would have been entitled to do so. I wish, however, to make it quite clear that nobody could suggest on these facts any criticism of the *bona fides* or the probity of this committee. They thought that was what they were entitled to do and I think it is extremely probable that, if a vote could have been obtained of every subscriber to the fund, every subscriber might very well have said : " We are content that that should be done." But, looking at the circular itself, I find myself unable to say on the true and proper construction of it that that particular application was right. That question is not, I think, one which need be decided for the purposes of the present case for the reason that, if the committee, under the wide powers given to them in the circular, were entitled to include that particular application of the moneys of the fund, they were equally entitled to exclude it from the trusts governing the fund. If the application was a proper one, it can only have been so because the committee were in a position under the circular to define the trusts on which the funds should be held at any particular moment. It is perfectly clear that the committee, on Jan. 15, 1944, decided to exclude from the objects to which the fund could be applied the grants to ex-employees serving with the Forces. That appears in the minute of Jan. 15, 1944, which was followed up by a circular to men in the Forces. The resolution provides :

> . . . that the fund be continued solely as an air-raid distress fund to assist employees or ex-employees with the Forces who have suffered the loss of their homes or contents by enemy action.

That seems to me to be putting the fund back into the position in which it ought to have been throughout. But, even if the inclusion among the objects of grants to serving ex-employees was permissible, thereafter it ceased to be, as the result of that resolution, one of the objects of the fund.

What we have to consider is what were the trusts governing this fund at the time when it ceased to be an effective fund because air raids had ceased and there was no further object to which the moneys could be applied. We have, therefore, to deal with a fund which, at the relevant time, was an air-raid distress fund and nothing else. The purpose of the fund, as described in the circular, was to help any employee who was in dire distress as the result of enemy action. There is some evidence of the way in which the committee decided to administer the fund for that purpose. They interpreted (and I think, having regard to their wide powers, they were entitled to interpret) the reference to " distress " in a wide manner, as appears from the evidence of one Denham in cross-examination :

> *Q.*—It has no reference to the money which the man had in his pocket—it was simply that, due to enemy activity, he was awkwardly situated ? *A.*—Yes.
>
> *Q.*—It was not a question of his being in distress, as we understand it in the ordinary sense of the word ? *A.*—No.

There are certain other matters with regard to the administration of the fund which are important. First apart from the possible cases—not more than a few apparently—of families of serving ex-employees who had suffered from air raids, the fund as an air-raid fund was applied and applied only for the benefit of those who had subscribed. Secondly, in the case of employees who had houses in London and had been moved to one of the towns in question for the purpose of work at the factories, it was thought that, as their houses would be let, they would not lose any clothes and their furniture would come under the war damage claim. The consequence was that people in London had very little assistance, but they did have assistance in one respect. They were reimbursed out of the fund two classes of expense : (i) the cost of their railway journey to London to see the state of their houses when those houses had suffered some damage from air raids ; (ii) in the early days they were reimbursed the cost of preparing their claim in respect of war damage. The next point which I think it is important to bear in mind is that there was no kind of means test applied in the administration of this fund. Many of these employees were earning very high wages and were, no doubt, perfectly able to pay, for instance, the cost of a journey to London or the cost of making out a war damage claim. The question of what money they had was never inquired into and it was in no sense a condition of the application of the moneys of this fund that the recipient should be in a state of poverty or comparative poverty.

There are one or two passages in the evidence of Denham which bear upon this aspect of the matter. First, the judge put this question :

> Before allowing their expenses, [*i.e.*, the expense of coming to London] did you make any inquiry as to whether they could afford to pay their own expenses or not ? *A.*—No ; I think we took it generally that they were entitled to their expenses.

The word "entitled" is, to my mind, rather significant. That was the way in which the committee was administering this fund. If a subscriber incurred an expense, the committee thought that he was entitled to be recouped the money that he paid, whether he could afford it or whether he could not. Then Denham was asked these questions by Mr. Christie in cross-examination :

> *Q.*—In regard to the payments for what is described as air-raid distress, do you know of any case where payment was refused on the ground that a man was in receipt of good wages ? *A.*—I do not know of any case, no.
>
> *Q.*—Do you happen to know of your own knowledge, maybe among those people who had payments made to them were men on the higher level of wages ? *A.*—Yes, there would be.
>
> *Q.*—Some of them earning over £10 per week ? *A.*—Yes. The committee took the degree of distress that might arise. If a man had no clothes or no cash or no bedding as a result of a raid, they would give him, perhaps, £10 to help him along until he had reasonable comfort again.
>
> *Q.*—But those men would not be out of work during that period ? *A.*—No, they were still in our employ.
>
> *Q.*—And still drawing their wages ? *A.*—And still drawing their full wages.

Then there is a reference to the London cases and Denham was asked whether he made payments on account of expenses. He said :

> Yes—their railway fares to London, for instance.
>
> *Q.*—And the expenses incurred in preparing and making their claim ? *A.*—I think at the end we restricted it to fares only.
>
> *Q.*—And they were given that without regard to their financial position ? *A.*—Yes, quite without regard to that.
>
> COHEN, J. : As regards cases of claim in respect of clothes, which you referred to just now, did you inquire whether the man had any savings out of which he could buy new clothes ? *A.*—No, my Lord.
>
> Mr. Harold Christie : It was based on what you thought the man had lost ? *A.*—Yes.
>
> *Q.*—Rather than on what he had left ? *A.*—Yes, quite.
>
> COHEN, J. : Well, not quite. I gather from your earlier answer it was based on what he had lost and immediately needed, irrespective of whether he could pay for it ; is that right ? *A.*—Yes, my Lord.

It is perfectly clear, therefore, that the element of the relief of poverty did not enter into this scheme at all. There is not a word about it in the circular, nor in the minute, and the committee, in administering the fund, did not make poverty in any sense, or in any way, a condition of making a grant. On the contrary, they made grants to which they thought a man was entitled.

Those are the principal facts in the case. The fund was closed down on Sept. 7, 1944. In Sept., it was decided to stop deductions from wages and it was then decided to close the fund down. The question is as to what should be done with the large surplus remaining. I should, perhaps, say that grants to serving ex-employees constituted by far the greater part of the money expended out of this fund. £2,102 was spent in that way, whereas the air-raid damage relief only amounted to £471. The question we have to decide is whether this Air-Raid Distress Fund was a charitable fund within the legal sense. The Attorney-General, with whom is Mr. Upjohn, have argued that it is and they admit that their argument involves that the Inland Revenue Commissioners were wrong in refusing to recognise it as a charity and to grant income tax relief. However, that is by the way.

COHEN, J., held that he was bound by the recent decision of this court in *Re Compton* (1) to hold that a fund of this kind, limited in its application to employees and, to a small extent, ex-employees of the company, was not a good charity because it lacked the necessary public element ; that it was a private charity having regard to the restricted and entirely personal nature of the relationship which bound together the potential beneficiaries. We have had an argument addressed to us to the effect that the observations of this court in *Re Compton* (1) on the question of a trust for the benefit of employees of a business, which, in *Re Compton* (1), we said constituted a purely private and personal trust, were *dicta* only and were not necessary for the decision. I have listened very attentively to all the arguments which have been put before us and to all the cases which have been cited. I may, perhaps, be allowed to say that nothing which has been said and no authority which has been cited leads me to doubt the correctness of the views which I ventured to express in *Re Compton* (1). The present case has a feature which was not present, of course, in *Re Compton* (1), which was not a case of employees, but a case of descendants of particular persons. That feature is that the fund now in question was one put up by the potential and contemplated beneficiaries themselves. We are not dealing with a fund put up by outside persons, although, even if we were, on the authority of *Re Compton* (1), I should feel constrained to hold that such a fund would not be a good charity. The point, to my mind, which really puts this case beyond reasonable doubt is the fact that a number of employees of this company, actuated by motives of self-help, agreed to a deduction from their wages to constitute a fund to be applied for their own benefit without any question of poverty coming into it. Such an arrangement seems to me to stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit. I am not concerned for one moment to dispute the proposition that a fund put up for air-raid distress in Coventry generally would be a good charitable gift. I have very little doubt that it would be. But there is all the difference in the world between such a fund and a fund put up by, it may be, a dozen inhabitants of a street, or, it may be, a thousand employees of a firm, to provide for themselves out of moneys subscribed by themselves some kind of immediate relief in case they suffer from an air raid. The Attorney-General and Mr. Upjohn wish to attribute to the fact that these people were putting up money for their own benefit a very slight importance. To my mind, it is of the greatest importance and is quite conclusive in stamping the character of a private and personal trust upon this fund.

It was suggested that that aspect of the matter should be disregarded because no individual was entitled as of right to any payment out of the fund. I cannot appreciate that argument. If a number of individuals put up a fund for their own mutual benefit, there are clearly two ways of doing it. They can either actuarially or in some other way decide that each subscriber shall be entitled in certain events to definite payments, or—especially when the object of the fund is something of the present kind—they may say: "Rather than have a cast-iron scheme laying down the grant that a subscriber is to be entitled to, we will leave it to the discretion of a committee in whom we have confidence, to decide how to apply the fund." Such an arrangement has all the benefits of elasticity and it seems to me that the attempt to base a distinction between such an arrangement and a more actuarially based arrangement, such as one finds in pension funds and so forth, entirely fails. Once the payments to ex-employees are out of the way (and I have given reasons why, in my opinion, in view of what has happened and the resolution of the committee, we are not concerned with them) it is admitted that the Air-Raid Distress Fund was mainly intended, as it was mainly applied, for the benefit of subscribers and subscribers only. Those employees who had refused to sign were, of course, excluded from the benefits of the fund. The only respect in which non-subscribers got any benefit at all was in the case of families of serving ex-employees (who may very well have been subscribers in their time before they joined the services) who had had their homes injured by air raids. What the extent of that application was I do not know, nor am I concerned to inquire whether or not the committee, in deciding to include such persons in the benefits of the fund, were acting within the scope of their charter. I would assume that they were entitled to make grants out of the fund to those persons. But it is quite clear that the paramount and principal object of this fund was to benefit subscribers and nobody else. That seems to me to stamp it with the character of a private arrangement, a private trust.

One other matter to which reference was made, though not very much reliance was placed upon it, was the fact that Mr. Hobourn, Mr. Kirk and the Local

Defence Volunteers had sent cheques to the fund. There again, I cannot attribute any importance to that fact on the facts of the present case. It formed a very small proportion of the funds that were received. It was not the result of some sort of public appeal; it was simply that a few persons who were interested (one of them being the managing director of the company and interested, naturally, in the welfare and contentment of his employees) sent subscriptions to the fund. It seems to me quite impossible, because of that circumstance, to attribute to the fund a different character. It was, in its essence, primarily and to the largest proportion of its receipts a fund put up by individuals for themselves and nobody else. The mere circumstance that somebody augmented the fund with a cheque cannot alter that position.

I must not be taken to be suggesting, for one moment, that the mere fact that the benefits of a fund are confined to members or subscribers would be sufficient of itself to exclude a fund from the category of charity. It all depends on the facts of each individual case. For instance, to explain what I mean, if a number of charitably-minded individuals in a parish got up a subscription for the purpose of providing a parish nurse for inhabitants unable to pay for nursing, the fund so subscribed would not be any the less a charitable fund because no person in the parish could obtain the services of the nurse unless he or she became a member of the association and paid, let me say, half a crown a year, or whatever it is villagers do pay in such circumstances. That would not turn what was in essence a charity into something which was not a charity. It is all a question, in these cases, of the real paramount and governing nature of the transaction. In the case I put, the elements which are present in the present case would, of course, not be present, because the paramount and primary purpose of this is, in my view, self-help and nothing else.

That leads me to the next branch of the argument, which was to this effect. It was said, and said quite truly, that in cases falling under the fourth of LORD MACNAGHTEN'S classes [in *Pemsel's* case (2)] of which this is said to be one, the relief of poverty is not necessary. Of course it is not. The relief of poverty comes under a separate head, and under the fourth class many trusts are included although they may benefit both rich and poor. It is then said—and I am prepared to accept it as correct—that the relief of air-raid distress would be in itself a good charitable object. That, of course, does not decide the question because the question here is not whether a particular object in the abstract is a good charitable object, but whether the purposes of this fund were a good charitable object, not from the point of view of the type of misfortune at which it was aimed, but from the point of view of the beneficiaries—whether the fund, on the facts of this case, was a purely personal or private affair (a private fund for private benefit), or had the necessary element of publicity.

It was argued that in some cases to which we were referred an association which had all the characteristics on its face of a private association for individual benefit had been regarded as a charity because it was directed to the relief of poverty; in other words, they were cases which suggested or, in some instances perhaps, decided that you may have a fund which is *prima facie* of a private and individual nature but which is saved by the fact that it is for the relief of poverty. Then the argument goes on "Why poverty alone? Why not include in such cases such an object of relief as air-raid distress?" It is said that the fact that this is air-raid distress makes it possible to predicate of its objects that they were not purely personal but had a public element sufficient to give them the character of charity. In my opinion, that is really a confusion of thought. The object is one thing; the people to benefit from that object are another. It is certainly not the law, as I understand the authorities, that, when you find that the persons to benefit are a private group of individuals, that circumstance can be discounted, or the effect of it destroyed, merely by introducing some object which, if it was for the benefit of a sufficiently public class of beneficiaries, would be a good charitable purpose within LORD MACNAGHTEN'S fourth class in *Pemsel's* case (2).

It is necessary to refer to some of those cases. First, I will read a passage from TUDOR ON CHARITIES, 5th Edn., p. 18:

> Friendly and other mutual benefit societies established to provide allowances for members in sickness or old age, or pensions for their widows, are not charitable, unless poverty is an essential qualification for the receipt of relief, for the object of such a

society, except where it involves the relief of poverty, is not one contemplated by the Statute of Elizabeth. And if the objects of the society are not such as to constitute it charitable the fact that it receives donations and subscriptions cannot alter its character.

A number of authorities are referred to in support of these propositions. We have been referred to practically all of them and it seems to me that they amply bear out the propositions stated in the text. This particular association may properly, I think, be described as a mutual benefit society, which cannot be charitable unless poverty is an essential qualification. In the *Compton* case (1), I referred to what are commonly known as the poor relations cases, in which, in the case of a class of potential beneficiaries of a strictly private and personal nature, it had been held in past days that a charitable character was, nevertheless, attributable to the trust if it was a trust for the relief of poverty. The cases mentioned in connection with this passage in TUDOR ON CHARITIES were not quoted to the court on that occasion, and if I have any criticism of the decision in *Re Compton* (1) it is that, in referring to the poor relations cases as in a category by themselves, I might have added a reference to the other cases mentioned in TUDOR ON CHARITIES as falling into the same category. But no authority has been cited to us which would justify the proposition that what is *prima facie* a personal or private trust can be saved except on the ground that its purpose is the relief of poverty.

What I have said will perhaps be made clearer by reference to one or two of the authorities which were cited. First, there is *Re Clark's Trust* (3). That was a case of a friendly society which was held not to be a good charitable institution on the ground that it was a private charity, *i.e.*, a charity not recognised as a charity by law. I can get no help out of that decision except that HALL, V.-C., calls attention to this in connection with the rules of the society (1 Ch.D. 497, at p. 500) :

> Poverty of the member at the time of his sickness or lameness, or in his old age, was not required to entitle him to an allowance. It appears to me that the society was not a charitable institution.

Then comes a decision of JESSEL, M.R., in *Spiller* v. *Maude* (4). That case really brings out exactly the point which I mentioned a moment ago. There there was a society which had every mark of a purely personal association with no public element in it at all. It was :

> . . . called the York Theatrical Fund Society . . . instituted in York by the voluntary association and subscriptions of the members of the York company of actors and actresses.

Under the rules no person save a member of the company was entitled to any benefit at all. The objects were the funeral expenses of a contributor dying in indigent circumstances, the relief of orphan children of contributors, the supply of medical advice and medicines to sick contributors unable to pay, and granting annuities to contributors on becoming incapacitated either by age, accident, or other infirmity, from exercising the duties of his or her profession as an actor or actress and not possessing an independent income of more than £50 per annum. It was a case which seems to me in every respect *prima facie* to lack any element of publicity and which could not in any sense be described as being for the benefit of a section of the public. It is true that the funds of the society were augmented by subscriptions from non-members, but the important thing about the case is the way in which JESSEL, M.R., dealt with it. He went through the rules and came to the conclusion :

> . . . that the whole fund was charitable, but that the particular charity had failed. He thought that poverty was clearly an ingredient in the qualification of members who were to receive the benefits of the society.

It is perfectly clear that he regarded poverty as the thing that saved it. I must confess, speaking for myself, that seems to me to be a very extreme decision, because the whole arrangement was of a personal nature. However, it was saved by the fact of poverty, but there is no suggestion in any of the cases put before us that such a body can be preserved as having a charitable purpose unless the relief of poverty is its object.

In *Pease* v. *Pattinson* (5), a decision of BACON, V.-C., the headnote is incorrect when it states that the friendly society in question was a charity. BACON, V.-C., decided no such thing. On the contrary, his decision quite clearly implies the contrary, because in directing that the fund with which he had to deal should be handed over for administration to that particular body, he directed that it should be kept separate and earmarked for a particular charitable purpose and he rejected an argument that the body could take it as part of its own funds as being itself a charity. The decision, moreover, is of no assistance whatever to the argument.

I do not propose to go through all the cases that were cited. I might refer, perhaps, to *Shaw* v. *Halifax Corpn.* (6), but that, again, really does not help us. It was a case which turned on the meaning of the phrase "public charity," within Towns Improvement Clauses Act, 1847. Then reliance was placed on *Re Forster, Gellatly* v. *Palmer* (7), decided by BENNETT, J. It is a decision which, I must confess, I have great difficulty in understanding. The judge found it possible there to hold that a fund for the relief of infirm, sick and aged Roman Catholic priests in a particular diocese was for the advancement of religion and, therefore, good, although the benefits from the fund were confined to members. He did not deal with it as a case for the relief of poverty, which it clearly was not, but he laid stress on the fact that the funds were mainly derived from donations from non-members. It may very well be that the decision could be justified on the principle I suggested a moment ago that, if you find a number of charitable persons setting up a fund for the benefit of a particular class, the fact that members of that class are required to join the fund and pay small subscriptions does not prevent it from being charitable. It may be possibly supported on that ground, but it is not a decision from which, with all respect, I find any help in the present case.

I shall only refer to two more cases. *Hall* v. *Derby Sanitary Authority* (8) was a trust for railway servants. It was said that if a trust for railway servants could be a good charity, why could not a trust for railway servants in the employment of a particular railway company be a good charity ? The reason, I think, is that in the one case it would be for railway servants in general and in the other case it would be for employees of a particular company, a fact which would limit the potential beneficiaries to a class ascertained on a purely personal basis. Moreover, the fund would benefit the particular railway company. *Re Hillier* (9), before VAISEY, J., the other case to which I wish to refer is, I think, of assistance, because it brings out what I think is the underlying fallacy of the appellant's argument. The testatrix left legacies for the sick and wounded. No question could arise as to the class being limited to a purely private circle. It was obviously for sick and wounded at large and, therefore, had every qualification of a public nature which could be required. Therefore, the question we are dealing with did not arise in that case. It was quoted to us in order to establish the proposition that such a trust could be good although it was not for the relief of poverty. It seems to me, with all respect to the argument, that that is pushing at an open door. Of course, cases which come under the fourth head of LORD MACNAGHTEN in *Pemsel's* case (2) do not require poverty as an element to make them good charities. All that *Re Hillier* (9) decided was that the object there was a good charitable object and the question of whether the public element was present in it did not arise.

The importance of poverty, in my opinion, is that it is a necessary object where the class of trust with which you are dealing is one which, *prima facie*, on its face is a scheme for the purely personal benefit of individuals. It may be possible on the authorities, as I have said, to get a trust of that kind into the category of charity, provided it is for the relief of poverty on its true construction. It is no argument to say that, because in *Re Hillier* (9) poverty was not regarded as essential, therefore, it is not to be regarded as essential in such a case as this. The two cases are quite different, owing to the fact that in the present case everything about this arrangement points, and points only, to a purely personal scheme for the individual benefit of subscribers, with a certain latitude left to the committee (assuming that they had got that latitude) to let in families of serving ex-employees whose houses were injured by air-raids.

COHEN, J., decided the case on the basis of *Re Compton* (1). I have no criticism to make of his decision in that respect, but I do call attention to the fact, which he does not mention, that the private character of this trust is, to my mind, made clear beyond the possibility of doubt by the fact that the paramount purpose of the subscription was to provide benefit for the subscribers and for nobody else. If there were indeed any doubt about the matter at all, that seems to me, on the facts of the present case, to exclude the fund from the class of charitable trusts.

MORTON, L.J. : I am of the same opinion and I have comparatively little to add. In *Re Compton* (1), a recent decision of this court, LORD GREENE, M.R., said ([1945] 1 All E.R. 198, at p. 200) :

> The fundamental requirement of a charitable gift is, in my opinion, correctly stated in the following passage in TUDOR ON CHARITIES, 5th Edn., at p. 11 : " In the first place it may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community.

In the present case I think there are three reasons why it is impossible to decide that the fund in question is held upon a charitable trust. In the first place, the only objects of the trust, as I see the matter, are employees of a particular company. It seems to me that, on the true construction of this circular, ex-employees are not included, although I am not suggesting that if ex-employees serving with the Forces had been included, that would in any way have altered the position.

In the course of the argument of the Attorney-General and Mr. Upjohn, *Re Drummond* (10) was criticised, notwithstanding the approval of it indicated by this court in *Re Compton* (1). It was said that any expressions of approval were not necessary for the decision of *Re Compton* (1) and that this court is not bound by them. I desire to say quite plainly that I entirely approve of the decision in *Re Drummond* (10). In considering the numerous cases as to trusts alleged to be directed to the benefit of the community, or of a section of the community, I have often felt inclined to echo the observations of RUSSELL, L.J., in *Re Grove-Grady* (11). He observed ([1929] 1 Ch. 557, at p. 582) :

> I cannot help feeling that in some instances matters have been stretched in favour of charities almost to bursting point : and that a decision benevolent to one doubtful charity has too often been the basis of a subsequent decision still more benevolent in favour of another.

It must have been very doubtful, until this court removed the doubt in *Re Christchurch Inclosure Act* (12), whether a right of cutting turf, vested in the occupiers for the time being of a few cottages, was of a sufficient public character to come within the legal definition of a charity. In that case, LINDLEY, L.J., said (38 Ch.D. 520, at p. 530) :

> Had it not been for the decision of the House of Lords in *Goodman* v. *Mayor of Saltash* (13) we should have felt great difficulty in holding this trust to be a charitable trust. For, although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not. Moreover, the trust is not for the inhabitants of a parish or district, but only for some of such persons. The trust is for a comparatively small and tolerably well-defined class of persons. The class consists of all the then and future occupiers of the cottages ; and there may be several occupiers of one cottage. The class, however, though limited, is as to its members uncertain, and is liable to fluctuation, and the trust for the class is perpetual. This being the case, we are unable to distinguish this case from the trust which both LORD SELBORNE and LORD CAIRNS held to be a charitable trust, and therefore valid, in *Goodman* v. *Mayor of Saltash* (13).

Charities are rightly privileged as regards freedom from income tax and freedom from the restrictions imposed by the rule against perpetuities, and it is important that those privileges should really be restricted to purposes which benefit the public or some section of the public. I think *Re Drummond* (10) imposed a very healthy check upon the extension of the legal definition of " charity," and I suspect that if the decision had been the other way it would have been followed by a case in which it would have been argued that, if the provision of holidays for the employees of a large company was a charitable object, so also was the provision of holidays for employees of a partnership firm employing say, 100 persons. Next there would have followed an argument that the same would apply in the case of a partnership firm employing eight persons. In the present case, as I have said, the trust is for the employees of a particular company and such a trust is not, in my view, a trust for the benefit of the community, or of a section of the community: see *per* LORD GREENE, M.R. ([1945] 1 All E.R. 198, at pp. 201, 202) in *Re Compton* (1).

In the second place, I think that those eligible to receive benefits were not even all the employees of the particular company. They were those who chose to join in the scheme and to allow 2*d*. a week to be deducted from their wages, and no one else. That is not expressly stated in the circular to which my Lord has referred, but I think it is clear from the whole tenor of the circular that those who were allowing the deduction from their wages were not intending to provide benefits for those who refused to allow any such deduction. As regards the payments which were made to ex-employees serving in the Forces, I only desire to say this. I respectfully agree that one cannot infer the consent of all those interested, but I think that these payments must have been known to a very large proportion of those interested, and it is a significant fact that there was never any protest, so far as we know, against the making of payments to ex-employees serving with the Forces. The only protest arose when those payments were stopped, and the protest came from those at home, who displayed, I think, a very generous spirit in so protesting. It seems to me that this arrangement, initiated by the circular of Nov., 1940, was a perfectly businesslike arrangement whereby payments were made into a fund which was to be applied for the benefit of persons making those payments. It is true that, under the circular, no one was given a contractual right to any particular sum, but a wide discretion was given to the trustees as to what payments should be made in respect of air-raid distress. As my Lord has pointed out, that does not alter the fact that this was a businesslike arrangement on the part of the subscribers for their own benefit.

The third point is that there is no element of poverty in the present case. That, of course, does not prevent a trust from coming within the fourth head of LORD MACNAGHTEN's classification in *Pemsel's* case (2), but the relevance of it in the present case is this: where poverty is essential in the qualification for benefits under a particular fund, there have been cases where trusts which would appear to be of a private nature have been held to be charitable. An example of this is *Spiller* v. *Maude* (4). The reason, as was suggested by LORD GREENE, M.R., in *Re Compton* (1), may be that the relief of poverty is regarded as being in itself beneficial to the community. That element being absent in the present case, the appellant cannot rely upon these cases. Mr. Upjohn has argued that in the present times the provision of relief for air-raid distress should be elevated to the same position as trusts for the relief of poverty. No doubt the provision of relief for air-raid distress is a most excellent object, and I should not myself doubt that a fund for the relief of air-raid distress in Coventry was a fund held upon charitable trusts. But I do not feel inclined to extend the somewhat anomalous line of cases where poverty has been held to take a trust out of the category of a private trust and into the category of a trust which is charitable in the legal sense.

I agree with the decision of COHEN, J., on this branch of the case.

SOMERVELL, L.J.: I agree.

Appeal dismissed. Party and party costs to be paid by the appellant; the difference between the respondents' party and party costs and solicitor and client costs to be paid out of the fund. Leave to appeal to the House of Lords granted on terms that the appellant should not seek to upset the orders as to costs made hitherto and should not oppose an order to pay the respondents' costs on appeal to the House of Lords as between solicitor and client in any event.

Solicitors: *Treasury Solicitor* (for the Attorney-General); *Edward & Childs* (for the trustees); *Crawley & de Reya* (for the respondents other than the trustees).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

GREENHALGH *v.* ARDERNE CINEMAS, LTD. AND ANOTHER.

[Court of Appeal (Lord Greene, M.R., Morton and [illegible] March 20, 21, 22, 1946.]

Dictum of Lord Greene, M *p.* 518, *applied.* *Re* John S Tadcaster Brewery Co., [1952] 2 All E.R. 751.

Companies—Private company—Alteration of rights of a c[illegible] *Subdivision of shares—10s. ordinary shares already issued, subdivided into 2s. ordinary shares ranking pari passu for all purposes with* [illegible] *2s. ordinary shares already issued—Rights of original holders of 2s* [illegible] *varied* [illegible] *—Companies Act,* 1929 (c. 23), s. 50, *Sched.* I, *Table A arts.* 3, 37, 54.

The respondent company, A.C. Ltd., was a private company, formed in 1936, with a nominal capital of £26,000, originally divided into 21,000 preference shares of 10*s.* each and 31,000 ordinary shares of 10*s.* each. The articles of the company incorporated certain articles of Table A, including arts. 3, 37 and 54. Under art. 54, on a poll every member was to have one vote for each share of which he was the holder. Under art. 37, the company had the power of subdividing its existing shares. By Mar., 1941, 26,295 of the ordinary shares had been issued. In Mar., 1941, the company was in financial difficulties and an agreement was entered into with G., the appellant, whereby debentures were to be issued to G. for the sum of £11,000 advanced by him to the company. The agreement further provided that the company was to subdivide the whole of the unissued ordinary shares of 10*s.* each into ordinary shares of 2*s.* each, ranking *pari passu* with the issued ordinary shares for all purposes; the new subdivided shares (called the 1941 2*s.* shares) were to be allotted as to 19,213 shares to G., and as to 4,312 shares to certain directors of the company; and G. was to be appointed an additional director. In order further to protect his interests during the continuance of the debenture debt, G. entered into a collateral agreement with the three directors to whom the new shares were issued. By this agreement, it was provided that these three directors should vote with and support G., as and when required by him, and that G. would use his votes to re-elect them as directors upon their retirement by rotation. In Nov., 1941, however, each of the three directors transferred his 2*s.* shares and some of his 10*s.* ordinary shares to other members of the company, and it was held, in an action brought at the time by G., that the transferees held the shares free from any obligation arising under the collateral agreement. As a result, G. lost to a certain extent the protection which he had endeavoured to secure under the two agreements. On Mar. 12, 1943, at an extraordinary general meeting of the company, it was resolved, by a small majority, that the existing 10*s.* ordinary shares should be subdivided into 2*s.* shares ranking so as to form one class of shares with the 1941 2*s.* shares and carrying the same voting rights, etc. The effect of this was that G. was no longer able to enforce any control whatever over the affairs of the company. It was contended on behalf of G. that this resolution for subdivision was void because (i) it constituted a breach of an implied term in the agreement of Mar., 1941, to the effect that the company would be precluded from acting in any way which would interfere with the voting control acquired by G. as a result of the agreement; (ii) the resolution varied the voting rights attached to the 1941 2*s.* shares without the consent of the holders of those shares which was required under the provisions of Table A, art. 3:—

26295
4705
5
23525

19213
4312
23525

Held: (i) there could not be implied in the agreement of Mar., 1941, a term that the company would be precluded from acting in any way which would interfere with the voting control acquired by G. as a result of the agreement. Only in a very exceptional and absolutely clear case could an implied term be read into a contract.

(ii) the voting rights of the holders of the 1941 2*s.* ordinary shares had not been varied by the resolution of Mar. 12, 1943. The only voting right attached to that class of shares was the right to have one vote per share *pari passu* with the other ordinary shares of the company for the time being issued, and that right remained.

(iii) since the company had the power to subdivide its existing shares, the resolution of Mar. 12, 1943, was valid and effectual.

Decision of Vaisey, J., ([1945] 2 All E.R. 719) *affirmed.*

[**EDITORIAL NOTE.** The Court of Appeal uphold the court below, holding that the subdivision of shares herein considered did not result in a "variation" of the voting powers, within the meaning of that term in Table A, r. 3.

As to Implied Terms, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322, 323, para. 451; and for Cases, see DIGEST, Vol. 12, pp. 609-612, Nos. 5034-5057, and Supplement.

As to Subdivision of Shares, see HALSBURY, Hailsham Edn., Vol. 5, p. 168, para. 300, and p. 290, para. 499.

As to Variation of Rights Attached to Classes of Shares, see HALSBURY, Hailsham Edn., Vol. 5, pp. 156, 157, para. 281; and for Cases, see DIGEST, Vol. 10, pp. 776-780, Nos. 4857-4882, and Supplement.]

Cases referred to:

(1) *Greenhalgh* v. *Mallard*, [1943] 2 All E.R. 234.

*(2) *Re Mackenzie & Co., Ltd.*, [1916] 2 Ch. 450; 9 Digest 158, *903*; 85 L.J.Ch. 804; 115 L.T. 440.

B APPEAL by the plaintiff from an order of VAISEY, J., dated Nov. 1, 1945, and reported ([1945] 2 All E.R. 719) where the facts are fully set out.

Gerald Upjohn, K.C., and *I. J. Lindner* for the appellant.

Valentine Holmes, K.C., and *J. Pennycuick* for the respondent company.

G. Russell Vick, K.C., and *H. O. Danckwerts* for the second respondent.

C LORD GREENE, M.R.,: The events which have led up to this particular controversy are well summarised in the judgment of VAISEY, J. ([1945] 2 All E.R. 719 at pp. 720-722). It is not necessary to go over them again. Many of them have already been dealt with in judgments in previous litigation between the parties. The appellant, I think, deserves some measure of sympathy because, with great determination, he has fought for what he conceives to be his rights, and it has landed him in a series of unsuccessful actions.

D In the present case he is endeavouring to maintain a certain voting power which he acquired when he first became associated with the defendant company, and he contends that on one or other of two grounds he is entitled to conserve the position of comparative safety in the company which he originally obtained in that respect. However, in my opinion, he fails on both grounds. He could, no doubt, in one way or another at the outset have secured for himself that measure of control which he now says he is entitled to keep. If it had been E the intention of the parties that his position should be secured in a manner which would be effective in law, there were various devices by which that result could have been achieved, but those methods were not incorporated in the bargain which the parties made. In a previous appeal in earlier litigation [*Greenhalgh* v. *Mallard* (1)] I expressed the view that the fact that the arrangement to which the parties had come did not provide for certain matters was not F improbably due to the fact that the parties, being under the impression that they were entering into a permanent and friendly alliance, had not troubled their heads about them. Similar observations were made by VAISEY, J. ([1945] 2 All E.R. 719, at p. 724), in connection with the circumstances of the present case.

The object of these proceedings is to attack the validity of a resolution of the company which subdivided certain 10*s*. ordinary shares, part of the G issued capital of the company, into five 2*s*. ordinary shares. That is the first resolution that was attacked. The second resolution that was attacked was a resolution for increasing the capital of the company by the issue of further ordinary shares. As a result of those two resolutions, if they are valid, the voting power of the appellant, which previously gave him a satisfactory measure of voting control, is liable to be completely swamped by the votes of the other ordinary shareholders. The second resolution, regarded merely as a resolution H to increase the capital by the issue of further ordinary shares, would not, it is admitted, of itself amount to any violation of the appellant's alleged rights, but it is attacked because the passing of it was secured by the votes which had been created when the 10*s*. shares were subdivided. The fate of that resolution, therefore, depends upon the fate of the earlier resolution which subdivided the shares, and it is with the earlier resolution alone that I need concern myself.

The appellant's case is put on two grounds: First, it is said that in the original agreement which was signed when the appellant first became associated with the company, a term is to be implied as a result of which the company would be precluded from acting in any way which would interfere with the voting control which he acquired as a result of that agreement. The agreement, to which (it is now admitted) the company must be treated as being a party, is set out in the statement of claim, and there are only two paragraphs that I need read. The appellant was putting a considerable amount of money into the company, which at the time was in a bad financial position, and it would not be unreasonable to expect that he would insist upon a very stringent measure of security. However, he has, I am afraid, failed to get it. The clauses of the agreement to which attention may be called are, first, cl. 2:

> That the company subdivide the whole of the present unissued ordinary shares of 10*s.* each into ordinary shares of 2*s.* each ranking *pari passu* with the other ordinary shares for voting and dividend . . .

Then cl. 3 provides that to carry out the provisions of that clause an extraordinary general meeting was to be called for the purpose of passing a resolution for the subdivision of the shares in accordance with cl. 2 and for authorising their allotment in various proportions. The great bulk of them were to be allotted to the appellant, and, by later provisions, he was to become the chairman of the company. The effect of that transaction, the subdivision and issuing of those unissued ordinary shares, was to put the appellant in a position in which, by force of his own voting power alone, he could prevent the passing of a special resolution. He obtained control of a further measure of voting power by means of a collateral agreement with the other principal shareholders under which they agreed to use their votes in support of him in the future. The effect of that collateral agreement would have been, as I say, to give the appellant a substantially greater measure of voting control. That agreement, however, was side-tracked by a manoeuvre executed by the other parties under which they disposed of the greater part of their shares; and in previous litigation it was held—and this court affirmed it [*Greenhalgh* v. *Mallard* (1)]—that neither could they be prevented from parting with their shares nor would the transferees of the shares be bound by the collateral agreement. In the result, the appellant lost the benefit of that agreement. He was, therefore, driven back on to his own shareholding as his safeguard against the passing of special resolutions or extraordinary resolutions which might be contrary to his wishes. It was that remaining measure of control which was attacked and sought to be destroyed by the next manoeuvre, which was the passing of the resolution now in question under which the issued 10*s.* shares were split, with the consequence that the holders of each of those shares acquired five times as many votes as they originally had.

At the request of the court, counsel for the appellant formulated what he said was the undertaking which must be implied in this agreement in order to give it effect, and this is what he said:

> That the company will not alter the measure of voting control of Mr. Greenhalgh resulting from the alteration in and the issue of capital hereinbefore agreed to either by the creation of new capital or by the alteration of the rights of the existing capital without the consent of Mr. Greenhalgh.

To imply into this contract such a term would, I think, be a very serious operation. It is a very far-reaching clause and gives to Greenhalgh, among other things, the power to veto the creation of any new capital in the company. I do not propose to examine in detail the nature of this clause or to examine the law which deals with the implication of terms in contracts. I may, however, say this: for a court to imply, in a complicated business agreement, a far-reaching term is a very serious matter. There is the pronouncement of SCRUTTON, L.J., [see *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*)] which is very frequently referred to, that the clause must be such that an impartial onlooker, who asked whether the parties intended it, would in effect be met with the answer, "Of course we did." For the court to say that such an answer would be given, without the assistance of knowing all the circumstances, is in any case a very serious responsibility. For example, I cannot myself see that evidence would be admissible to prove that the parties had in effect considered such a term and had rejected it, since the question is fundamentally one of construction; and in the absence of any such evidence as that, it is putting upon the court the responsibility of saying, merely by looking at the agreement and without knowing all the circumstances, that the parties must have meant it. I am not saying that implied terms cannot be read into contracts; of course they can. There is abundant authority to that effect. But the case must be very exceptional and absolutely clear, and the court must remember that there may be many things of which it must necessarily be ignorant. In the present case, I cannot by any effort bring myself to think that the parties, if they had been asked whether this particular clause was one which they must have intended to put in, would have answered, "Yes." Both parties must answer; it is not sufficient for one to answer, "Yes." I can only say that I am quite unable to be convinced that any such clause can be implied.

The other argument is of a more technical nature. It is to this effect. The articles of association of the company incorporate certain of the provisions of Table A, and among others they incorporate art. 3 of Table A, which is in the following terms:

> If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class.

The rest of the article merely deals with procedure. It is said that the 2*s.* shares which came into existence through the subdivision of the unissued 10*s.* shares under the agreement between Greenhalgh and the company form a class of shares within the meaning of that article. VAISEY, J., was inclined to think that that was so, although he did not find it necessary to decide it. We also do not find it necessary to decide it, and I, like VAISEY, J., am inclined to think that these shares form a class of shares within the meaning of the article, but it is not necessary to give a final answer to that question.

It is then said that the effect of the resolution which is now impugned is to vary the rights attached to those 2*s.* shares, and, as neither the consent in writing of the holders of three-fourths of those shares nor the sanction of an extraordinary resolution had been obtained, the resolution of the company which purported to subdivide the issue of the 10*s.* shares was not effective.

The first thing to ascertain is: What are the rights attached to those original 2*s.* shares? In order to find that out one must look at the articles and the resolutions. I may say that we are not concerned with any rights except the voting rights. No question arises as to the dividend right or any other right. The voting powers attached to the shares of the company are to be found first in art. 21 of the company's articles. In para. (*a*) of that article the preference shareholders' voting rights are restricted by certain conditions, and then by para. (*b*), subject to those provisions as to the preference shares, arts. 54-62 of Table A are to apply. Art. 54 of Table A is as follows:

> On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

Now I turn to the provisions relating to the subdivision of shares which are to be found in sect. 50 of the Act itself. Sect. 50 (1) provides:

> A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum as follows . . . it may . . . (*b*) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares . . . (*d*) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum . . .

Then there is a provision:

> . . . that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived.

The necessary sanction in the articles is to be found by referring to art. 14 of the company's articles, which incorporates art. 37 of Table A. Art. 37 of Table A says:

> The company may by ordinary resolution . . . (*b*) subdivide its existing shares, or any of them, into shares of smaller amount than is fixed by the memorandum of association subject, nevertheless, to the provisions of sect. 50 (1) (*d*) of the Act.

The resolution passed at an extraordinary general meeting of the company held on Apr. 16, 1941, was to this effect:

> That the 4,705 ordinary shares of 10*s.* each be subdivided into 23,525 ordinary shares of 2*s.* each, ranking for dividend, voting and winding-up *pari passu* with the other ordinary shares for the time being issued.

The effect of what I have referred to is this: Each of those split 2*s.* shares was given one vote per share, and in that respect they rank *pari passu* with the 10*s.* ordinary shares for voting. Each 10*s.* share had one vote and each 2*s.* share had one vote, and that right was attached unquestionably to the 2*s.* shares. The resolution which is attacked is the resolution of Mar. 12, 1943, which is to this effect:

> That subject to the necessary consent in writing (in accordance with the articles of association of the company) of the holders of the present 10*s.* shares, the 26,295 issued ordinary shares of 10*s.* each to be subdivided into 131,475 ordinary shares of 2*s.* each ranking so as to form one class of shares with the existing 23,525 ordinary shares of 2*s.* each, and ranking for dividend, voting and winding-up *pari passu* with the said existing 2*s.* shares.

The 10*s.* shares so split into 2*s.* shares were those which throughout the relevant history were held, or the greater part of which were held, by the parties in the company who were opposing Greenhalgh. The 23,525 ordinary shares of 2*s.* each referred to in that resolution were the 2*s.* shares which resulted from the subdivision and issue in pursuance of the original agreement.

Looking at the position of the original 2*s.* ordinary shares, one asks oneself: What are the rights in respect of voting attached to that class within the meaning of art. 3 of Table A which are to be unalterable save with the necessary consents of the holders? The only right of voting which is attached in terms to the shares of that class is the right to have one vote per share *pari passu* with the other ordinary shares of the company for the time being issued. That right has not been taken away. Of course, if it had been attempted to reduce that voting right, *e.g.*, by providing or attempting to provide that there should be one vote for every five of such shares, that would have been an interference with the voting rights attached to that class of shares. But nothing of the kind has been done; the right to have one vote per share is left undisturbed. In order, therefore, to make good the argument that what was done was an interference with the voting rights of that class of shares, it had to be argued, in effect, that those shares had attached to them a right within the meaning of art. 3 to object to the other ordinary shares being split so as to increase their voting power: in other words, that it was a right attached to these 2*s.* shares that they could object to any increase in the voting power attached to the 10*s.* shares resulting from a subdivision of those shares. If an attempt had been made, without subdividing the 10*s.* shares, to give them five votes per share, it may very well be that the rights attached to the original 2*s.* shares would have been varied, because one of the rights attached to that class of shares was that they should have voting powers *pari passu* with the other ordinary shares of the company and that right might well have been affected if in the result you had two kinds of ordinary shares, one a 10*s.* share carrying five votes and the other a 2*s.* share carrying one vote. But that is not what was done. The present position under the resolution which is attacked is that the ordinary shares are now all 2*s.* ordinary shares and each of them has one vote per share, and accordingly the voting power of the original 2*s.* shares is in fact entirely *pari passu* with the other ordinary shares. It only shows that these things are of a technical nature; but I cannot myself see how it can be said that there is attached to the original 2*s.* shares a right to object to the other ordinary shares having more than one vote, provided that is done, as I say, by the method of subdivision, which was the method employed here.

I now come to a point which to my mind, throws a good deal of light on the validity of the argument. It was conceded by counsel for the appellant that if the company had created a number of new ordinary shares of 2*s.* each and had issued them, each share carrying one vote, that would not have been an interference with the rights of the original 2*s.* shares. Had that been done, of course, it would have been just as possible to swamp the appellant's voting rights as it has turned out to be by the passing of these resolutions. I do not find anything in the answers of counsel which satisfactorily explains why it would be an interference with the 2*s.* shares in the one case and not in the other case, because, if the 2*s.* shares had the right to prevent the voting equilibrium being upset in the way in which it has been upset, I cannot see why they could not object to the creation of new shares which would have the same result. However, it was said that the right claimed was limited to a right to veto the conferring on the existing 10*s.* shareholders, by the method of subdivision, an aggregate voting power greater than that which they had possessed in the past. It will be seen, as I have pointed out, that any such right could only arise by implication; it was not expressly conferred by the articles, or by the resolution, or by anything in the Act, or the general law, and I myself cannot find any justification for reading into the provisions of art. 3 of Table A any implied right of that kind. It is important, I think, in considering this matter, to remember that art. 3 is merely one clause in the constitution of this company. The constitution of the company is to be found in various documents; part of it is in the Act, part of it is in the articles, part of it is in Table A incorporated in the articles, and part of it is to be found in the relevant resolution. Art. 3 of Table A is merely one clause in the constitution of this company, and it must be construed in relation to the constitution as a whole. In the constitution as a whole, there is the power to subdivide the shares, and it is necessary for the appellant's argument to read that power to subdivide the shares as cut down by the suggested implied right in art. 3. As a matter of construction, I cannot do that. A person who took one of the original 2*s.* shares did so on the footing that the company by its constitution had power to subdivide its 10*s.* shares.

Several authorities have been cited, but the only one, I think, which throws any light on the matter is *Re Mackenzie & Co.* (2), a decision of ASTBURY, J., which I do find, up to a point, helpful. It was a case of a petition for reduction of capital, and under the memorandum and articles the only right of the preference shareholders was to have a fixed cumulative preferential dividend of a certain amount. A rateable reduction of all the shares, preference and ordinary, was proposed to be carried out, subject to the sanction of the court. All the shares, preference and ordinary, suffered the rateable reduction, and the result of that was that the dividend rights of the preference shareholders were substantially affected because, by reducing their capital, as they were only entitled to a fixed cumulative preferential dividend on the nominal amount of their capital for the time being paid up, it reduced the dividend accordingly, although the dividend still remained at 4 per cent. That reduction operated in a certain way to the benefit of the ordinary shareholders, who were entitled to what is commonly called the equity. The argument for the preference shareholders was this: "The reduction decreases our fixed dividend. The bargain was that we should have a fixed dividend notwithstanding reduction from loss of capital." ASTBURY, J., pointed out that the only dividend right was a right to 4 per cent, per annum on the nominal amount of the capital from time to time paid up or credited as paid up, and that, under the articles, the company had power to reduce its capital. He then said ([1916] 2 Ch. 450, at p. 457):

> The result of the memorandum and articles shortly is this. Subject to the right of the company to reduce its capital by the votes of the ordinary shareholders in any manner sanctioned by statute these preference shares are to be of the denomination of £20 each, and the only special right, privilege, or advantage attached to those shares is a cumulative 4 per cent. preferential dividend on the nominal amount of capital from time to time paid up or credited as paid up thereon.

There, I think, the judge was applying the principle which (as I have just said) must be remembered in construing these provisions, *viz.*, that a provision dealing with class rights is only one clause in the company's constitution, which must be construed as a whole. He found in the company's constitution an unqualified right to reduce the capital, and he negatived the suggestion that the class rights clause in the articles over-rode the power to reduce the capital.

Construing the provisions here, we must read the class rights as being confined to the express terms of the article, which alone can restrict the power of subdivision given by the Act and the articles. To that extent, *Re Mackenzie & Co.* (3) gives me some assistance. As VAISEY, J., pointed out, and I agree, the effect of this resolution is, of course, to alter the position of the 1941 2*s*. shareholders. Instead of Greenhalgh finding himself in a position of control, he finds himself in a position where the control has gone, and to that extent the rights of the 1941 2*s*. shareholders are affected, as a matter of business. As a matter of law, I am quite unable to hold that, as a result of the transaction, the rights are varied; they remain what they always were—a right to have one vote per share *pari passu* with the ordinary shares for the time being issued which include the new 2*s*. ordinary shares resulting from the subdivision.

In the result, the appeal must be dismissed with costs.

Morton, L.J.: I agree.

On the question as to whether there can be implied in the agreement of Mar. 27, 1941, the term which counsel for the appellant asked us to imply, I do not desire to add anything.

As to the question whether the rights attached to the so-called "1941 2*s*. shares" are varied by the resolution for subdivision dated Mar. 12, 1943, I only desire to make two observations. In the first place, it became clear in the course of the argument that it was not necessary for this court to decide whether the 23,525 2*s*. shares issued in 1941 did or did not constitute a separate class within the meaning of art. 3 of Table A. That being so, for my part I have formed no opinion at all in regard to that matter. Secondly, it seems to me that the answer to the admirable argument of counsel for the appellant may be summarised as follows: it is said that the rights attached to the 1941 2*s*. shares, assuming them to be a class, have been varied; the only right which is said to be varied by the resolution is the voting right attached to that class. The existing voting right is defined in art. 54 of Table A:

> On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

To my mind it is impossible to say that that voting right has been varied by the resolution of Mar. 12, 1943. All that has happened is that the company has exercised the power which it possesses under art. 37 of Table A of subdividing some of its other issued shares. The plaintiff, the present appellant, took his shares in 1941 on the footing of the company's memorandum and articles, *i.e.*, he took them on the footing that the company had the power of subdivision. Thus the subdivision in 1943 took place under a provision which was part of the bargain under which Greenhalgh took his shares. He might, as my Lord has said, have preserved the balance of voting power by inserting some appropriate provision in the agreement of 1941, although I do not think it would have been a very easy provision to draft. No such provision, however, appears in the agreement. He is, therefore, unable to object, successfully to the resolution of Mar. 12, 1943. That being so, it is conceded by counsel for the appellant that no objection can be taken to the resolution of June 16, 1944, under which the capital of the company was increased. The only objection put forward to that resolution was that the voting rights were exercised on the footing that the earlier resolution of Mar. 12, 1943, was valid and effectual. As we have held that that earlier resolution was valid and effectual, the only objection to the second resolution falls to the ground.

I agree that the appeal must be dismissed with costs.

Somervell, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *S. A. Bailey & Co.* (for the appellant); *Pritchard, Englefield & Co.*, agents for *Field, Cunningham & Co.*, Manchester (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

VICTOR BATTERY CO., LTD. *v.* CURRY'S, LTD. AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), February 22, 25, 26, 27, 28, March 1, 1946.]

Companies—Shares—Purchase of shares with financial assistance of company—Validity of debenture issued in connection with purchase of shares—Companies Act, 1929 (*c.* 23), *s.* 45.

J. had agreed to buy the whole of the issued share capital of V.B. Co. from certain vendors for the sum of £15,000. He was, however, only able to pay down £6,000, for which he received 40 per cent. of the shares. In order to obtain the £9,000 necessary to enable him to purchase the remaining shares, J. entered into an agreement with C., Ltd. whereby C., Ltd. lent the sum of £10,000, the greater part of which was used, through the medium of two other companies with which J. was connected, in paying the vendors for these remaining shares. After the transfers had been executed, V.B. Co. issued a debenture for £10,000 to C. Ltd. It was contended by V.B. Co. that the debenture was void because it had been issued in contravention of the Companies Act, 1929, s. 45, which provided that it should not be lawful for a company by means of the provision of security to give any financial assistance in connection with the purchase of shares in the company:—

HELD: (i) upon its true construction, sect. 45 did not invalidate or avoid the security to which it referred. The debenture was, therefore, valid.

(ii) assuming that the issue of the debenture was an illegal transaction by reason of sect. 45, V.B. Co. could not maintain an action to be relieved thereof, because the object of sect. 45 was not to protect but to punish a company providing security in contravention of the section, and therefore V.B. Co. did not come within the exception to the maxim "*in pari delicto potior est conditio defendentis.*"

[**EDITORIAL NOTE.** Sect. 45 of the Companies Act, 1929, contained a new provision designed to prevent schemes whereby a company might by indirect means purchase its own shares. The section does not contain any indication of intention to avoid the security to which it refers, and it is accordingly held that, while an offending company may be punishable by fine, yet the debenture in the case reported remains valid. A contrary decision would have the fantastic effect of penalising the debenture-holder to an unlimited extent, while the offending company remained liable only to a fine not exceeding one hundred pounds.

AS TO COMPANIES ACT, 1929, s. 45, see HALSBURY, Hailsham Edn., Vol. 5, pp. 188, 189, para. 335; and FOR CASE, see DIGEST, Supplement, Companies, No. 2456a.]

Cases referred to:

(1) *Spink* (*Bournemouth*), *Ltd.* v. *Spink*, [1936] 1 All E.R. 597; [1936] Ch. 544; Digest Supp.; 105 L.J.Ch. 165; 155 L.T. 18.

*(2) *Re V. G. M. Holdings, Ltd.*, [1942] 1 All E.R. 224; [1942] Ch. 235; 111 L.J.Ch. 145.

*(3) *Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; 35 Digest 205, *303*; 76 L.J.Ch. 187; 96 L.T. 301.

ACTION claiming a declaration that a debenture issued by the plaintiff company was void and of no effect, as having been given in contravention of the Companies Act, 1929, s. 45. The facts are fully set out in the judgment.

G. O. Slade, K.C., *I. J. Lindner* and *C. A Settle* for the plaintiffs.

Valentine Holmes, K.C., and *E. J. Heckscher* for the defendants.

ROXBURGH, J.: By a debenture dated Oct. 5, 1943, the plaintiff company, Victor Battery Co., Ltd., covenanted to pay a sum of £10,000 and interest, and gave a charge on its assets to secure such payment. This debenture was issued to the defendant Frederick Thomas Wright as nominee of the defendants, Curry's, Ltd. On May 3, 1944, leave was obtained to appoint a receiver under the Courts (Emergency Powers) Act, 1943, and on May 5, 1944, the defendant George Robert Lowe was appointed receiver out of court. On Dec. 18, 1944, the writ in this action was issued, claiming a declaration that the debenture was void and of no effect, as having been given in contravention of the Companies Act, 1929, s. 45, and also claiming certain injunctions. There was, and is, no allegation that the debenture was *ultra vires* the company.

The Companies Act, 1929, s. 45, provides :

(1) . . . it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company . . . (3) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding £100.

One Jaina was, through the medium of two companies, British Lion Battery Co., Ltd., and Princely Battery Co., Ltd., a supplier of torch batteries. The defendant company was a keen buyer of such articles. On May 27, 1943, Jaina agreed to buy the whole of the issued share capital of the plaintiff company (which also supplied torch batteries) from certain vendors for the sum of £15,000. He paid £6,000 down and obtained transfers of 40 per cent. of the issued capital, but in order to obtain the remaining 60 per cent. of the issued share capital he had to find another £9,000 which was, under the contract, payable by instalments. This he was unable to do without financial assistance. Therefore he wanted money—and the defendant company wanted batteries. At a meeting at Leicester in Aug., 1943, at which Jaina and his solicitor and representatives of the defendant company were present, the representatives of the defendant company indicated willingness to assist Jaina to complete his purchase of the shares, in the belief that this would enable them to get more torch batteries. But the chairman of the defendant company was not there, and it was agreed that the matter should be referred to him for consideration. This resulted in a meeting in London, at which Jaina, his solicitor and the chairman of the defendant company were present throughout, and other persons were present during part of the time. Negotiations then took place which led to an agreement in writing dated Aug. 31, 1943.

After the agreement had been signed, the defendant company handed to a clerk of the solicitors retained by it three bankers' drafts ; one in favour of British Lion Battery Co., Ltd., for £6,000, one in favour of Princely Battery Co., Ltd., for £2,000, and one in favour of the plaintiff company for £2,000. The clerk then accompanied Jaina and his solicitor to the bank at which British Lion Battery Co., and Princely Battery Co. had banking accounts, but not at that time the plaintiff company. Jaina paid the £6,000 draft into the account of British Lion Co., and the £2,000 draft in favour of Princely Co. into Princely Co.'s account. He then procured from that bank a bankers' draft for £9,000, which was debited as to £6,000 to British Lion Co., and as to £3,000 to Princely Co., Princely Co. being allowed to overdraw for the purpose. This overdraft was secured by the deposit by Jaina of the draft for £2,000 in favour of the plaintiff company. This deposit Jaina had no authority from the plaintiff company to make. The parties then went to the office of the vendors' solicitors ; the £9,000 draft was handed to them ; the vendors executed transfers in blank of the remaining 60 per cent. of the capital of the plaintiff company, and these transfers were handed to the clerk of the defendants' solicitors to be held by the defendants as security. Jaina then proceeded to procure the necessary resolution for the issue of a debenture, which was sealed on Oct. 5, 1943.

It will be observed that the defendant company undoubtedly lent £6,000 to British Lion Co., £2,000 to Princely Co., and £2,000 to the plaintiff company, making £10,000 in all. Undoubtedly British Lion Co., and Princely Co. between them provided the whole of the £9,000 paid to the vendors. It is not proved how the stamp duty on the transfers was provided. On Sept. 2, 1943, the plaintiff company opened a new account and paid into it the draft for £2,000. On the next day the plaintiff company paid £1,250 to Jaina. Jaina says that he paid "round about £1,000" to Princely Co. It is apparent, therefore, that the greater part, but not the whole, of the £10,000 was employed in the purchase of the shares. But at any rate part of the £2,000 received by the plaintiff company was employed by it for other purposes : there is no evidence as to how that other part was actually employed. Accordingly, the security (*i.e.*, the debenture) was issued by the plaintiff company in connection with a purchase made by a person (namely, Jaina) of shares in the plaintiff company. But while the main purpose of the debenture was to facilitate that purchase, it was also intended to be, and was, security for some money advanced to the plaintiff company for some other purpose, and used by it for some other purpose. I hold that the defendant company knew these facts, but it is neither pleaded nor proved that the defendants knew that the transaction as carried out contravened the Companies Act, 1929, s. 45.

Counsel for the plaintiffs submitted that the law is that, if a debenture-holder knows that the borrowing company is; by means of that debenture, giving even the smallest degree of financial assistance to any person in connection with the purchase of any of its shares, then the debenture will be altogether invalid, even though the amount involved in the purchase of the shares might be only £50 or less and the loan made by the debenture-holder to the company and secured by the debenture might be £100,000 or more. He says that I must apply well settled principles of law to the interpretation of sect. 45, which will drive me to hold that, although in terms it apparently only imposes upon the person who actually does the prohibited act a maximum penalty of £100, it may operate to impose what is in effect a penalty with no fixed upper limit on a person whose offence is knowledge of what the principal offender is doing. If the submissions of counsel for the plaintiffs are well founded, the section may, indeed, prove a positive boon to the principal offender. In the present case, the plaintiff company would obtain for itself, without expense to itself and at the expense of the defendant company, a sum much larger than any fine which could be imposed upon it under the section.

Can this be the law ? If it is, the practical result of the transactions carried out in the present case would apparently be that the defendant company has made an involuntary present to Jaina of shares which cost the defendant company £9,000, and a present of £1,000 to the plaintiff company. But counsel for the plaintiffs says truly that, if such is the law, I must not shrink from its consequences.

In my judgment, however, there are two answers in a court of law to the submission of counsel for the plaintiffs. The first is, I think, to be found in the construction of the section itself. Two cases have been decided on that section. To one of them I will refer later in this judgment. The other is *Spink (Bournemouth), Ltd.* v. *Spink* (1). I am afraid that I cannot hold that that case, on close analysis, throws any direct light upon the point which I have to determine, but I think that I may fairly say that it is apparent from the language which Luxmoore, J., used that the conclusion which I am about to reach would not have caused him any surprise.

Let me turn, then, to sect. 45. The section contains no indication at all on the face of it of any intention to avoid the security to which it refers, or to punish the lender. In this respect it is in marked contrast to sect. 79 of the Act. Had it been intended to punish the lender, his punishment would have been expected to bear some relation to that imposed upon the principal offender. That is limited to £100. If the submissions of counsel for the plaintiffs are right, what is in effect a penalty on the lender is altogether unlimited and might amount to £100,000, or even more. Moreover, as questions of a cognate character have long since arisen in relation to *ultra vires* transactions by a company, and are well known to have given rise to complicated situations, if the intention of sect. 45 was to punish the lender by the destruction of his security, some rather special consequential provisions would have been expected.

This section first came into the Companies Act in 1929. I think that, in approaching its construction, I am entitled to have regard to *Re V. G. M. Holdings, Ltd.* (2) in the Court of Appeal. The following passage occurs in the judgment of Lord Greene, M.R. ([1942] 1 All E.R. 224, at p. 225) :

> Those whose memories enable them to recall what had been happening for several years after the last war will remember that a very common form of transaction in connection with companies was one by which persons—call them financiers, speculators or what you will—finding a company with a substantial cash balance or easily realisable assets, such as war loan, bought up the whole, or the greater part, of the shares of the company for cash, and so arranged matters that the purchase money which they then became bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realisation of its liquid investments. That type of transaction was a common one, and it gave rise to great dissatisfaction and, in some cases, great scandals. I think that it is not illegitimate to bear in mind that notorious practice in considering the ambit of the section. By that I do not mean that, if the language of the section is wide enough to extend beyond transactions of that general character, that would afford any ground for cutting the

> language down. The only use which I think it is legitimate to make of it is that the existence of this very questionable practice affords a reason for the word "purchase" in the section.

The point in that case was the meaning of the word "purchase" in this section —a point which is not directly relevant here. But I am entitled, and perhaps bound, to approach the construction of this section with those observations of LORD GREENE, M.R., in my mind.

It will be observed that the section does not say that it shall not be lawful for a company to provide a security in order to give financial assistance; what it does say is that it shall not be lawful for a company by means of the provision of security to give any financial assistance. "Security," in my judgment, *prima facie* means valid security. I do not say that it must mean that, but that, I think, is its *prima facie* meaning. Moreover, I cannot see how an invalid debenture could give any financial assistance, and the section does not say "purport to give financial assistance," but "give financial assistance." If, then, the section is, as I hold it is, referring to the provision of a valid security, and is treating the security as valid at the moment of the commission of the offence by the borrower, what is there to invalidate it subsequently? The section, as I hold, proceeds to punish the borrowing company on the footing that the security provided was, and remains, valid. If this is so, there is no room to import into this section those principles of law to which counsel for the plaintiffs referred me, and indeed I find it impossible to believe that the legislature could have intended them to be imported, since they would appear to lead to the extravagant consequences which I have indicated.

. The second answer, in my judgment, to the submissions of counsel for the plaintiffs is to be found in the proposition which he read to me from ANSON ON CONTRACTS, 19th Edn., pp. 238, 239. For the purpose of the second point it must, of course, be assumed, contrary to my holding on the first point, that the debenture in question is properly to be described as an illegal contract. Upon that footing, counsel for the plaintiffs referred to me the following passage:

> It remains to consider whether a party to an illegal contract can under any circumstances make it a cause of action. The rule is clear that a party to such a contract cannot come into a court of law and ask to have his illegal object carried out; nor can he set up a case in which he must necessarily disclose an illegal transaction as the groundwork of his claim; and this rule holds although neither party had any intention of breaking the law. The rule is expressed in the maxim, "*in pari delicto potior est conditio defendentis.*" But there are exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. They fall into three classes; (i) the contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one . . .

The submission of counsel for the plaintiffs is that the plaintiff company in the present case falls within that first exception. That being so, I shall refer to the statement of the exception by PARKER, J., in *Lodge* v. *National Union Investment Co., Ltd.* (3). PARKER, J., stated the position as follows ([1907] 1 Ch.D. 300, at p. 306):

> The usual rule is that in the case of a transaction void for illegality neither party can take any proceedings against the other party for the restoration of any property or for the repayment of any money which has been transferred or paid in the course of the illegal transaction. To this rule, however, there are exceptions, one of them being in favour of the persons for whose protection the illegality of the contract has been created. . .

It is to be noted—and that is why I desired to read a statement of the exception from such an authoritative source—that it is not made quite clear whether that means that the illegality was created solely or primarily to protect a particular class and, if I thought that in this case the illegality was created primarily in favour of the class of person of whom the plaintiff was one, I should have wished to hear much further argument on the precise content of that exception.

In the Companies Act, 1929, s. 45, the only person who is by name singled out for punishment is the company. Counsel for the plaintiffs contends—and I think he is entitled to contend—that, notwithstanding that fact, the primary class of persons for whose protection the illegality of the contract (assuming it to be illegal, of course) has been created is companies. It is not easy to conduct an investigation into the purpose or purposes underlying particular provisions in a complex statute like the Companies Act, and in this case the investigation did not proceed very far; but I have for my guidance the passage in the judgment of LORD GREENE, M.R., in *Re V. G. M. Holdings, Ltd.* (2), which I have already read. Looking at the position with that guidance, I am unable to hold that the plaintiff company has been shown to come within the ambit of the exception, and accordingly it is put out of court by the application of the general principle, which its counsel did not dispute. Accordingly the action is dismissed with costs.

Judgment for the defendants with costs.

Solicitors: *Canter Hellyar & Co.* (for the plaintiffs); *Mawby, Barrie & Letts* (for the defendants).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

NOTE.

CRADDOCK (INSPECTOR OF TAXES) *v.* ZEVO FINANCE CO. LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Wright, Lord Porter and Lord Simonds), January 22, 23, 24, March 22, 1946.]

An appeal from the majority decision of the Court of Appeal (LORD GREENE, M.R., and MACKINNON, L.J., LUXMOORE, L.J., dissenting), reported ([1944] 1 All E.R. 566), was dismissed.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), *Sir Donald Somervell, K.C.*, *J. H. Stamp* and *Reginald P. Hills* for the appellant.

J. Millard Tucker, K.C., *Terence Donovan, K.C.*, and *L.C. Graham-Dixon* for the respondents.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Coward, Chance & Co.* (for the respondents).

NOTE.

NO-NAIL CASES PROPRIETARY LTD. *v.* NO-NAIL BOXES LTD.

[HOUSE OF LORDS (Lord Thankerton, Lord Simonds and Lord Uthwatt), March 6, 7, 29, 1946.]

In this appeal from the decision of the Court of Appeal, given on Apr. 21, 1944, and reported ([1944] 1 All E.R. 528), the appellants no longer pursued their claim for royalties in respect of the whole output of the respondents, which was rejected by both courts below, and confined the appeal to the alternative claims for the minimum royalty provided for by cl. 7 of the deed. The House of Lords upheld the decision of the Court of Appeal under this head and dismissed the appeal.

J. D. Casswell, K.C., *G. Granville Sharp* and *Kenneth Diplock* for the appellants.

Sir Walter Monckton, K.C., and *Valentine Holmes, K.C.* (with them *B. J. M. McKenna*) for the respondents.

Solicitors: *Markby, Stewart & Wadesons* (for the appellants); *George Martin & Co.* (for the respondents).

R. *v.* LEONARD HOLMES.

[COURT OF CRIMINAL APPEAL (Lord Goddard, L.C.J., Wrottesley and Croom-Johnson, JJ.), March 25, April 5, 1946.]

Criminal Law—Murder—Provocation—Wife's confession of adultery—Whether sufficient provocation to reduce murder to manslaughter.

A husband, who was himself unfaithful to his wife, had for some time suspected her of being unfaithful to him. During a quarrel between them, she confessed that she had been unfaithful, whereupon he struck her on the head with a hammer and then proceeded to strangle her. It was contended on his behalf that the wife's confession of adultery was such provocation as to reduce what would be murder to manslaughter:—

HELD: the wife's confession of adultery was not such provocation as to reduce the unlawful killing by the husband from murder to manslaughter. The exception, in the case of a sudden confession of adultery, to the general rule that no words are sufficient provocation to reduce murder to manslaughter could not be extended to cover a case (*a*) where the husband had for some time suspected his wife's adultery and had himself been unfaithful, and (*b*) where the killing was not the result of a single blow but of a course of conduct repeated and prosecuted with determination.

R. v. *Rothwell* (2) *distinguished.*

[**EDITORIAL NOTE.** As a general rule, provocation of words is not sufficient to reduce the crime of murder to manslaughter, but in *R.* v. *Rothwell* (2) BLACKBURN, J., said that it might be manslaughter if a husband suddenly heard from his wife that she had committed adultery, he having no previous idea of this, and he thereupon killed her. This was followed by BUCKNILL, J., in *R.* v. *Jones* (4), but in *R.* v. *Birchall* (6) the court refused to extend the doctrine to a similar confession by a mistress, holding that BLACKBURN, J., had dealt with an extreme case which should not be extended. The Court of Criminal Appeal in the case now reported agree with this expression of opinion, and refuse to apply the exception to the present circumstances, in which the husband had previous suspicion of the infidelity, and did not kill his wife by a sudden blow.

AS TO PROVOCATION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 434, 435, para. 745; and FOR CASES, see DIGEST, Vol. 15, pp. 776-782, Nos. 8305-8384.]

Cases referred to:

*(1) *R.* v. *Pearson* (1835), 2 Lew. C.C. 216; 15 Digest 781, *8378*.
*(2) *R.* v. *Rothwell* (1871), 12 Cox, C.C. 145; 15 Digest 780, *8350*.
*(3) *R.* v. *Palmer*, [1913] 2 K.B. 29; 15 Digest 780, *8354*; 82 L.J.K.B. 531; 108 L.T. 814; 23 Cox, C.C. 377; 8 Cr. App. Rep. 191.
*(4) *R.* v. *Jones* (1908), 72 J.P. 215; 15 Digest 780, *8352*.
*(5) *R.* v. *Greening*, [1913] 3 K.B. 846; 15 Digest 781, *8381*; 83 L.J.K.B. 195; 109 L.T. 720; 23 Cox, C.C. 601; 9 Cr. App. Rep. 105.
*(6) *R.* v. *Birchall* (1913), 9 Cr. App. Rep. 91; 15 Digest 780, *8353*; 109 L.T. 478; 23 Cox, C.C. 579.

APPEAL against a conviction of murder before CHARLES, J., at the Nottingham Assizes. The facts are fully set out in the judgment of the court delivered by WROTTESLEY, J.

P. E. Sandlands, K.C., and *Elizabeth K. Lane* for the appellant.

C. R. N. Winn for the Crown.

Cur. adv. vult.

LORD GODDARD, L.C.J.: WROTTESLEY, J., will read the judgment of the court.

WROTTESLEY, J. [delivering the judgment of the court]: The appellant was tried and convicted before CHARLES, J., at the Nottingham Assizes of the murder of his wife. He applied for leave to appeal against this conviction and the court treated this application as the actual appeal.

His wife's body was discovered in the house in which they both lived on Tuesday, Nov. 20, 1945. The appellant had recently been demobilised and returned to his home. The medical evidence, which was not challenged, showed that the dead woman had received a wound on the head, which might have been caused by the hammer-head found in the hot cupboard near the dead body. There were various bruises on the body, caused apparently in a struggle, but she had actually died from being strangled by hand. It is clear that she had been lying in the cottage in front of the fireplace since the previous Sunday night or early Monday morning. During the interval the appellant had left the house and gone to the house of a woman with whom he had been intimate during the last two years and to whom he told a story that his wife had left him. The opinion of the doctor who conducted the post mortem examination was that she had first been partially strangled, then struck on the side of the head so as to split the forehead, by a weapon such as the hammer-head, and finally finished off by strangulation.

On Wednesday, Nov. 21, the appellant was stopped by the police, who were inquiring into the matter, and to them he said: "All right, I know what you want me for." Later after caution, he said:

> Yes, it happened on Sunday night. It was all over something she said. I hit her with a hammer-head from out of the hot cupboard.

When charged with murder, he said:

> There is only one answer to the charge, I admit it.

Next day he made a statement in which he related the circumstances under which he had killed the woman. In this statement, after complaining that he had seen some persons winking in the direction of his wife in a public house that evening, and after saying that he had always had slight suspicions with regard to other men in the village, and that there had been suggestions to him concerning his own younger brother, he went on to say that with all this at the back of his mind a quarrel broke out when they got home on the Sunday night. A heated argument occurred, in the course of which he alleged that she said:

> Well, if it will ease your mind, I have been untrue to you. I know I have done wrong, but I have no proof that you haven't at Mrs. Shaw's. [Mrs. Shaw was the woman to whom he had gone after killing his wife]. Admitted, she's been a good friend to you and to me by having me at their house.

With this, the appellant's statement continues:

> I lost my temper and picked up the hammer-head from the hot box and struck her with the same on the side of the head. She fell to her knees and then rolled over on her back. Her last words being: "It's too late now, but look after the children." She struggled just a few moments and I could see she was too far gone to do anything. I did not like to see her lay there and suffer, so I just put both hands round her neck until she stopped breathing, which was only a few seconds.

In addition, the appellant went into the witness box and gave on oath practically the same account of the killing. When asked in cross-examination:

> When you put your hands round that woman's neck and gave pressure through your fingers, you intended to end your wife's life, did you not?

He answered, "Yes." Upon that evidence the judge at the trial told the jury that, having regard to the law, it was not open to them to find a verdict of manslaughter, and that that which was put forward as provocation by the counsel for the accused, *viz.*, the statement by the woman to the man that she had been unfaithful to him, was not such provocation as would justify them in returning a verdict of manslaughter instead of murder.

We are clearly of opinion that the judge was right in giving this direction to the jury upon this evidence. Generally speaking, the killing of a man or woman by a person who either intends to kill or do grievous bodily harm is murder, and the use of a lethal weapon such as a hammer-head or pick, or the employment of such a means as manual strangulation, is by itself sufficient evidence of such intention to kill or harm. On the other hand, the law has always recognised that provocation may induce a person to resentment and may thus negative the intention which is a necessary ingredient in the crime of murder, reducing the unlawful killing to killing without intention or malice, and so to manslaughter. Thus, if a man be provoked by violence, such as a blow, and retaliate forthwith and death result from that retaliation, he will be guilty of manslaughter and not of murder, provided the retaliation be that which may be expected of an ordinary reasonable man so provoked, and in this connection the instrument used must be taken into account. A blow with the fist is a thing which may readily be expected in such circumstances, but a blow with an axe or a hammer is another matter. The test is whether that which provoked the retaliation was such as would deprive a reasonable man of his self-control and induce him to act hastily in the way in which the man accused in fact acted. It is not therefore surprising to find that one form of provocation which would reduce what would be murder to manslaughter is the sudden discovery by a husband of his wife in the act of adultery; it is indeed difficult to imagine circumstances more likely to deprive a reasonable man of his self-control: see *Pearson's* case (1), *per* Parke, B. But it is to be noted that what Parke, B., said in that case was this (2 Lew. 216, at pp. 216, 217):

> If a man kill his wife, or the adulterer, in the act of adultery, it is manslaughter, provided the husband has ocular inspection of the act, and only then.

Nevertheless, in *R.* v. *Rothwell* (2), Blackburn, J., summing up to a jury in a case of a man charged with murdering his wife, went so far as to say (12 Cox C.C. 145, at p. 147):

> As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter.

In that case the tongs were ready to the accused man's hand, and with them he struck the woman the blow which killed her. That summing up of Blackburn, J., is not binding on this court, but in *R.* v. *Palmer* (3) this court, while not dissenting from it, refused to extend the exception to cover the case of a man engaged to be married to a young woman whom he killed when the young woman had confessed to illicit intercourse with someone else. Channell, J., delivering the judgment of the court, said ([1913] 2 K.B. 29, at pp. 30, 31)

> It would perhaps have been more accurate in view of modern decisions if he had said that words cannot constitute sufficient provocation except in very special circumstances. But the only special circumstances which have been held sufficient for that purpose are where the words involved a confession of adultery. It is well established law that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of manslaughter only and not of murder. That has been extended in *R.* v. *Rothwell* (2) and *R.* v. *Jones* (4) to a sudden confession by a wife of past adultery, an extension which no doubt creates an exception to the general rule that provocation by words is not enough. The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself.

Later in the same year this court refused to extend the rule to cover the case of a man and woman living together, but not married: see *R.* v. *Greening* (5). In both *R.* v. *Palmer* (3) and *R.* v. *Greening* (5) stress was laid upon the suddenness of the alleged confession in *R.* v. *Rothwell* (2). In *R.* v. *Birchall* (6), in laying down that mere suspicion of a wife's adultery was not sufficient to reduce a husband's homicide of the suspected person to manslaughter, the court said that the instance dealt with by Blackburn, J., in *R.* v. *Rothwell* (2) was an extreme case, that there was no case which went any further and that in the opinion of the court there should be no extension of the doctrine there laid down. With this expression of opinion we are completely in agreement.

The appellant in the case before us was not informed of something of which he had no idea beforehand. He did not kill his wife by one blow alone, but, on his own confession, after getting the denture out of her throat, which otherwise might have choked her, he then proceeded to strangle her to death. To hold that a killing in these circumstances could fall within the exception of the general rule that no words are sufficient provocation would be to extend the exception in two directions: first, to a case where the husband, himself unfaithful, had—and for some time had had—an idea that his wife had been unfaithful; and, secondly, to a case where the killing was not the result, as in *Rothwell's* case (2), of a mere blow, but to a course of conduct intermittent, then repeated and prosecuted with determination until the man's wife lay dead.

For these reasons we think that the appeal must be dismissed. We think that it cannot be too widely known that a person who, after absence for some reason such as service, either suspects already, or discovers on his return, that his wife has been unfaithful during his absence, is not on that account, even if she confesses the adultery, a person who may use lethal weapons upon his wife, and, if that violence should result in her death, claim to have suffered such provocation as would reduce the crime from murder to manslaughter.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

Approved. BILLINGHAM *v.* HUGHES.
[1949] 1 All E.R. 684.

JORDAN *v.* LIMMER & TRINIDAD LAKE ASHPHALT CO., LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Atkinson, J.), March 19, 1946.]

Damages—Special damage—Loss of earnings through injuries—No deduction in respect of income tax.

In assessing the amount of special damage to be awarded for loss of earnings due to absence from employment as a result of personal injuries by accident, no deduction should be made in respect of income tax to which the plaintiff would have been liable, if he had been able to continue in employment.

[**EDITORIAL NOTE.** A sum of money awarded as special damages for loss of earnings is something different in principle from the lost earnings, which provide the measure for the purpose of assessment. Such a sum is not "income" assessable to income tax, and an employer is not entitled to have the damages reduced because, if the sum had been paid as earnings, it would have been subsequently reduced by being charged to tax. ATKINSON, J., suggests that the introduction of P.A.Y.E. may have altered the matter, but it would seem that this system, which is a mere matter of machinery having no effect on liability to assessment, cannot make a sum taxable if it were not so before, nor can it alter the quality of a sum awarded as damages.

Case referred to:

*(1) *Fairholme* v. *Firth & Brown, Ltd.* (1933), 49 T.L.R. 470; Digest Supp.; 149 L.T. 332.

ACTION for damages for personal injuries. The facts are sufficiently set out in the judgment, the report of which is confined to the question raised as to whether income tax, which would have been payable if the plaintiff had been able to continue in employment, should be taken into account in assessing the amount of special damage in respect of loss of earnings.

G. Russell Vick, K.C., and *Guy W. Willett* for the plaintiff.

Stephen H. Murray for the defendants.

ATKINSON, J.: The plaintiff met with an accident in Jan. of last year and the defendants accept responsibility . . . The first question that arises is with regard to the special damage, which is agreed at £385 19*s.*, provided that his loss of wages at £11 10*s.* 6*d.* is taken at the full figure. The argument for the defendants is that, if he gets that figure, he is getting more than he would have got, and that the only liability is to compensate him for his loss, and that he would have had a deduction of maybe £3 or thereabouts from that £11 10*s.* 6*d.* That point has been settled adversely to the defendants by *Fairholme* v. *Firth & Brown, Ltd.*, (1). It was certainly before the days of the employer being compelled to deduct income tax; but the same point was relied upon. That was a case where a man had been wrongfully dismissed, and the damages were very large, £18,000, subject to this question whether the income tax which he would have had to pay ought to be deducted. There they knew exactly what the income tax would have been, because they knew what his salary had been, or would have been, and they knew what the income tax had been.

DU PARCQ, J., said that it was agreed that one of the issues remaining to be determined in the action was whether the fact that the plaintiff would have been liable for income tax and/or surtax in respect of his salary if it had been paid under the agreement was as a matter of law to be taken into account in assessing the damages and, if so, what deduction, if any, was to be made from the £18,000. The question whether any sum awarded to the plaintiff by way of damages in the action was liable to income tax and/or surtax was not argued. Without deciding that point, he assumed that it was not so liable. Therefore the judge dealt with the point on a footing adverse to the plaintiff. It was perfectly plain that the plaintiff would be getting a sum of money from which no deduction would be made, although he would have had to pay a substantial slice out of it in income tax if he had earned the money. I need not read the judgment, but the judge said that he would be reluctant to give a decision which would seek to alter an inveterate practice unless he were convinced that the practice was inconsistent with principle and unjust; and he was not so convinced in the present case. On the contrary, he was of opinion that it was right in principle, in assessing damages as between master and servant, to have no regard to the servant's liability to the Crown, which was truly *res inter alios acta*.

I am not bound by a judgment of a judge sitting in a court of first instance, but one is very loth to depart from a principle which has been so clearly enunciated. The true way of looking at it is this. What were his contractual rights against his employer ? His contractual right was to receive £11 10*s.* 6*d.* in wages, and the mere fact that some of that had to go, or would have gone, to the Inland Revenue does not seem to me to affect the question : What was the amount of his wages ? That was what he was entitled to receive, subject to a deduction of what was due to the Crown. If the principle of an employer being made to deduct income tax has in any way altered the law, it may have altered it in this respect, that the Inland Revenue may possibly now consider that they are entitled to assess a plaintiff recovering damages which include loss of wages. They may now raise the question whether they are entitled to some payment out of it ; but that is a matter for them. If they do not take that view, or if they take that view and fail, that is so much the better for the plaintiff. The plaintiff will get more than he would have got, but the practice of ignoring that is too well established now for at any rate a judge of first instance to interfere with it. Therefore in the figure I am going to give I shall include the full sum of £385 19*s.*

The next matter in respect of which the plaintiff is entitled to damages is pain and suffering . . .

The sum at which I have arrived, including special damage, is the figure of £985 19*s.*

Judgment for the plaintiff for £985 19*s.*, *and costs.*

Solicitors : *Ponsford & Devenish* (for the plaintiff) ; *Ince, Roscoe, Willis & Glover* (for the defendants).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

AUSTRALIAN MUTUAL PROVIDENT SOCIETY *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Lord Greene, M.R., Somervell and Cohen, L.JJ.), February 22, 25, March 7, 1946.]

Income Tax—Provident society—Non-resident—Head office in Australia, branch office in London—Income from investments of life assurance fund—Taxation of income from business carried on by London branch—Basis for ascertaining income so chargeable—Income from certain investments exempted from United Kingdom tax by statutory provision—Assessments to tax excessive by reason of error in returns—Relief—Method of computation to be followed in respect of portion of income specifically exempted from tax but included in income from investments chargeable to United Kingdom tax—Income Tax Act, 1918 (*c.* 40), *s.* 46, *Sched. C, r.* 2 (*d*), *Sched. D, Case III, r.* 3 (1), (2), (4), *Miscellaneous Rules, r.* 7*—Finance Act,* 1923 (*c.* 14), *s.* 24.

The appellant society, the Australian Mutual Provident Society, claimed relief under the Finance Act, 1923, s. 24, on the ground that the assessments to tax made upon it for the years 1937, 1938, 1939 and 1940 were excessive by reason of an error or mistake in the returns made by it for the purposes of those assessments. The income from the investments of the society's life assurance fund included interest and dividends which by the provisions of the Income Tax Act, 1918, namely, (i) sect. 46, (ii) Sched. C, r. 2 (*d*), (iii) Sched. D, Miscellaneous Rules, r. 7, were exempt from income tax in the United Kingdom because the society was not resident here. In 1937 the total income from the investments of the appellant society's life assurance fund was £4,145,067, of which £72,354 was income exempted from tax in the United Kingdom. The fraction of the total income, in accordance with the Income Tax Act, 1918, Sched. D, Case III, r. 3, and the regulation made by the Commissioners of Inland Revenue thereunder, was .05565268, and it amounted to £230,684, which, by r. 3 (1) was to be deemed to be " profits " chargeable to tax under Sched. D. Case III. But since the total income included £72,354 the appellant society claimed relief in respect of that sum which was not by law chargeable. The Commissioners of Inland Revenue recognised the validity of the claim by deducting from the total income £72,354, thereby reducing the total income from £4,145,067 to £4,072,713, with the result that the fraction chargeable to income tax under the Income Tax Act, 1918, Sched. D, Case III, r. 3, was £226,646. The appellant society contended that the Income Tax Act, 1918, Sched. D, Case III, r. 3, afforded no warrant for making any reduction of the total income from the investments of the life assurance fund since the rule provided that the income chargeable to tax under Sched. D should be a portion of any income of the society from the investments of its life assurance fund wherever received. Further the appellant society contended that the sum of £72,354 ought to be deducted, not from the total income of £4,145,067 but from £230,684, which was deemed to be "profits comprised within Sched. D," with the result that the chargeable income would become £158,330. The appellant society based this contention on the Income Tax Act, 1918, Sched. D, Case III, r. 3 (4), which provides that: "Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced":—

HELD: the correct procedure in computing the appellant society's liability to tax would be to deduct the sum of £72,354, being income exempted from United Kingdom tax, from that fraction of £230,684, deemed to be profits under Sched. D, reducing the chargeable income to £158,330, and not from the total income of the company, *i.e.*, £4,145,067, reducing the chargeable income to £226,646.

Hughes v. *Bank of New Zealand* (1) and *Cadbury Bros., Ltd.* v. *Sinclair* (2) *applied.*

Decision of MACNAGHTEN, J. ([1946] 1 All E.R. 236) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal reverse the decision of the court below, holding that the method of calculation adopted by the Commissioners in regard to the profits of non-resident insurance companies is not justified. The principle deducible from the authorities is that where an exemption is conferred by statute, the Crown must not get the tax either directly or indirectly and the sub-paragraph in issue must accordingly be construed so as to avoid this result.

AS TO INVESTMENT INCOME OF FOREIGN ASSURANCE COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, p. 185, para. 383; and FOR CASES, see DIGEST, Vol. 28, pp. 57-61, Nos. 293-209.]

Cases referred to:

*(1) *Hughes* v. *Bank of New Zealand*, [1938] 1 All E.R. 778; [1938] A.C. 366; Digest Supp.; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472.

*(2) *Cadbury Bros., Ltd.* v. *Sinclair*, [1933] 103 L.J.K.B. 29; Digest Supp.; 149 L.T. 412; 18 Tax Cas. 157.

APPEAL by the taxpayer from a decision of MACNAGHTEN, J., dated Nov. 26, 1945, and reported ([1946] 1 All E.R. 236), where the facts are fully set out.

J. Millard Tucker, K.C., and *J. S. Scrimgeour, K.C.*, for the appellants.

The Solicitor-General (*Sir Frank Soskice, K.C.*), and *Reginald P. Hills* for the respondents (Commissioners of Inland Revenue).

Cur. adv. vult.

LORD GREENE, M.R.: The judgment of the court will be read by SOMERVELL, L.J.

SOMERVELL, L.J.: The appellant carries on mutual life assurance business, the head office being in New South Wales, with a branch in London. The assessment of such a business to income tax is dealt with in r. 3 to Case III of Sched. D. Under that rule the assurance company preserves its character as a non-resident, but the rule provides for a notional apportionment of the income from the investments of its life assurance fund either in accordance with the principle stated in r. 3 (2), or, in the case of assurance companies with their head offices in British possessions, in accordance with a regulation made by the Commissioners of Inland Revenue. Such a regulation was made in the present case on the application of the appellant, and no question arises as to its terms. R. 3 (2) provides that only that part of the income apportioned to represent the income of the branch in the United Kingdom is to be charged to tax. This must be read with r. 3 (4) which reads as follows:

> Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule . . . and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced.

The effect of this is to allow the company to set off against the tax which would otherwise be chargeable on the apportioned income on its life assurance fund, the tax to which it has been charged by deduction or otherwise, not in its capacity as an assurance company, but in its capacity as holder or owner of United Kingdom investments. It is allowed, in other words, to attribute to the business carried on by the branch the whole of the tax charged on United Kingdom investments.

The dispute in the present appeal arises from the fact that the appellant at all material times held, as part of the investments representing its life assurance fund, securities and investments, the interest and dividends on which are exempted from United Kingdom income tax, if in the beneficial ownership of a non-resident, either under the Income Tax Act, 1918, s. 46, or under Sched. C, r. 2 (*d*), or under Sched. D, Miscellaneous Rules, r. 7. These exemptions apply to certain British Government securities, and to certain other securities outside the United Kingdom which normally become liable to United Kingdom income tax, because the interest or dividends are payable in the United Kingdom. We refer to investments falling under these provisions as exempted investments.

The effect of these exemptions was considered in *Hughes* v. *Bank of New Zealand* (1). In that case the Bank of New Zealand had a branch office in London. The branch was admittedly assessable to income tax under Case I of Sched. D on the profits arising from the trade exercised at the London branch office. The London branch held, as part of its assets, certain exempted investments, the interest on which was included in the trading receipts in the profit and loss account of the London branch. All the classes of exempted securities, as referred to above, were involved. Though the argument in respect of each class differed, the Crown submitted that none of the exemptions applied when the interest, as in that case, came under computation as a trading receipt of a trade exercised in the United Kingdom, but that they should be limited to cases where the owner would, apart from the exemption, be liable under Sched. C or Case III of Sched. D. The Crown took a further point that, if the exemption applied so as to strike the interest out of trading receipts, the expenses referable to the acquisition of the investments should be struck out of the other side of the account. The Crown failed on all points. It was held that the exemptions being absolute and unlimited must be construed as excluding the interest from the computation under Case I. It was also held that the expenses, namely, the cost of obtaining the capital engaged in the exempted investments, was deductible, being an expense wholly and exclusively laid out for the purpose of the trade of the London branch. This right to deduct was, in other words, not affected by the fact that the interest was excluded from the income tax computation.

This is a clear authority for the unqualified effect to be given to the exemptions, and the question is how it has to be applied in the present case. For the purposes of the argument both sides used round figures, which we will adopt, to illustrate the rival contentions. Assume the total income of a life assurance fund is £500,000. Applying the apportionment formula, one quarter of this, *i.e.*, £125,000, is, under r. 3 (1), chargeable to tax in respect of the United Kingdom branch business. The £500,000 income includes £50,000 income from exempted investments.

Counsel for the appellants contended that the £50,000 should be deducted from the £125,000 leaving £75,000 to bear tax at the standard rate. He argued that, if the securities had been charged to tax, that tax would have all been brought in in relief of the company's tax liability under r. 3. Full effect would not be given to the exemption, unless the whole of the tax from which the securities were exempted was deducted from the tax which would have been payable if the whole of the life assurance fund had consisted of foreign investments not charged to tax by deduction or otherwise. The Solicitor-General in effect said that the basis of the rule being a notional apportionment, a quarter of the £50,000 should be treated as apportioned to the business done by the United Kingdom branch.

He therefore deducted £12,500 from the £125,000, leaving £112,500 to bear tax at the standard rate.

The actual method adopted by the Revenue which the Solicitor-General supported in the alternative, though it led to the same result, was on a different basis. The Revenue deducted the £50,000 from the total income before apportionment, applying the apportionment fraction of one quarter to what was left. The judge, who found in favour of the Crown, considered that the first approach was in accordance with the rules and with principle. We agree with the judge as to the proper method of formulating the argument for the Crown, though it may be there is little, if any, difference in principle as there is clearly none in the result.

Counsel for the appellants relied on *Sinclair* v. *Cadbury Bros.* (2). That was a case in which the company was the lessee, at an annual rent, of land on which it built a factory. The land was, by an Act of Parliament of 1660, exempted from taxation, and the land was therefore not assessed under Sched. A. R. 5 to Cases I and II of Sched. D, as amended in 1926, provided that the computation of tax was to be made exclusive of the annual value of land occupied for the purposes of the trade, and separately assessed and charged under Sched. A. The argument for the Crown was based on the concluding words introduced in 1926. This land was not assessed under Sched. A, and, therefore, it was argued its annual value could not be excluded. The company sought to deduct the annual value. This court, reversing FINLAY, J., held that the deduction was admissible. LORD HANWORTH, M.R., held that, unless the deduction was allowed, the court would be failing to give effect to the immunity conferred by the Act of Parliament. In other words, and this is stated by P. O. LAWRENCE, L.J., the occupiers would be "indirectly taxed" in respect of land which was given immunity by Act of Parliament. Counsel for the appellants relied on this case as one in which there was no attempt to tax the exempted property directly. The court proceeded on the basis that you must look at the result. If the land had not been exempted, the Crown would have got the Sched. A tax ultimately borne by the owner, and the company would have deducted the annual value. By refusing to allow the deduction the Crown were indirectly collecting the Sched. A tax from the company.

This, and the earlier cases, lay down quite clearly that, if an exemption is conferred, the Crown must not get the tax either directly or indirectly. The application of this principle to the present case is not without difficulty. The exempted securities were held as part of the general life assurance fund of the appellant. They were not, as in the *New Zealand Bank* case (1), assets of the London branch. As r. 3 is based on the principle of apportionment, one might expect to apportion to the United Kingdom branch the appropriate proportion and allow the exemption on that amount to operate on the tax liability of the branch. The remainder would go tax free to the funds of the business employed outside the United Kingdom. The argument of counsel for the appellants depends on the wording and implications of r. 3 (4) which is dealing with income from United Kingdom sources charged to tax. Its broad result is to allow that charge, which would, of course, exist, even if the company had no branch here, to be set against the tax otherwise exigible on the apportioned income. This may operate as a considerable inducement to a foreign assurance company to establish a branch here. If, for ordinary commercial reasons, it holds United Kingdom securities producing £50,000 of income which would suffer tax by deduction, it can open a branch here without paying any further tax until the income as apportioned to the branch business under the rule exceeds £50,000. The words of the rule do not, in our opinion, apply to income from exempted securities in the sense which counsel for the appellants [Mr. Scrimgeour] suggested. He wished to construe r. 3 (4) as meaning in effect that the credit given under it should be extended so as to include the tax which would have been paid on the exempted securities if they had not been exempted. The language will not bear such a construction. Nevertheless, the rule must be construed together with the exempting provisions which, in our opinion, must be regarded as paramount. In so far as the rule, if taken in isolation, would have the effect of indirectly depriving the company of any part of the benefit of the exemption, its operation must be cut down so as to prevent any such result, and to allow the exemption to operate to its full extent. This appears to us to be the effect of the authorities cited to us. In the present case, if there had been no exemption, the appellant would have suffered tax by way of deduction on £50,000. In computing the liability of the United Kingdom branch, the tax on the apportioned income would have been reduced by the tax on that £50,000. In other words, the burden of the tax for which credit is to be given under r. 3 (4) is treated as a burden falling on the business carried on by the branch. The branch is not fully relieved of that burden as, under the exemption provisions, it ought to be, unless its further tax liability on the excess of the apportioned income over the income of the investments in question is left unaffected. On the figures set out the £50,000, if charged, would have left £75,000 to bear tax. If the burden of the tax on the £50,000 is to be wholly removed, the figure of £75,000 must not be increased. On the Crown's argument, as appears above, the figure would be increased to £112,500. If, therefore, the capital producing the £500,000 had originally been held by the company in the form of investments taxed by deduction, and those investments had been sold, and the proceeds re-invested in exempted securities, the result would have been that the tax liability of the company under r. 3 would have gone up from the tax on £75,000 to the tax on £112,500 merely by reason of the change to exempted securities. This, as it seems to us, would deprive the company of the greater part of the benefit of the exemption.

For these reasons, we think the appeal should be allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Bell, Brodrick & Gray* (for the appellants): *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

W. S. TRY, LTD. *v.* JOHNSON (INSPECTOR OF TAXES).

[Court of Appeal (Lord Greene, M.R., Somervell and Cohen, L.JJ.), February 26, 27, 28, 1946.]

Income Tax—Trade receipt—Company engaged in ribbon development—Compensation paid to company—Appropriate year of assessment—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I—Restriction of Ribbon Development Act,* 1935 (*c.* 47), *ss.* 1, 2, 7, 9.

Income Tax—Appeal—Point of law not raised before Commissioners—Right to raise on appeal.

Under a contract of sale dated Nov. 10, 1937, the appellant company took over the business of building contractors and estate developers carried on by one T. In 1936, T.'s application to build houses on land acquired for that purpose had been refused. After the transfer of the business to the appellant company an application was again made and refused. The appellant company then agreed to a proposal to sell the land to the local county council. By an agreement dated Jan. 9, 1940, T., on behalf of the appellant company, agreed to sell the land to the local county council, the purchase price being specified in the agreement as £5,350, of which £4,800 was stated as being in full settlement of the claim for compensation lodged by T. under the Restriction of Ribbon Development Act, 1935, s. 9. The sum of £5,350 was duly paid to the appellant company, credited in their trading account for their financial year ending on Dec. 31, 1940, and included in the assessment made upon the company for the year 1941-42. The General Commissioners found that the sum of £4,800 was not a trading receipt and should not be taken into account in computing the profits of the company assessable to income tax under Sched. D. On appeal, by way of case stated, to the King's Bench Division, which reversed the decision of the Commissioners, counsel for the appellant company, for the first time, attempted to raise the question of the appropriate year of assessment to which the payment should be referred, but the judge refused to allow the point to be argued. In the Court of Appeal counsel for the appellant company conceded that the payment to the company was in the nature of a trading receipt and confined his argument to the question of the appropriate year of assessment. He contended that the proper date to be taken was not the date of receipt of the money nor the date when the money became payable, but the date when the right to it arose, which he gave alternatively as the date of refusal of consent or the date of the putting in of the claim:—

HELD: (i) the appellants were entitled to raise a fresh point of law on the facts as found by the Commissioners.

(ii) under the Restriction of Ribbon Development Act, 1935, a claim by a frontager who was affected by, or claimed to be affected by a restriction, was so hedged round with uncertainty and speculation, that the date on which he could be said to be entitled to compensation, and *a fortiori* to any fixed quantum of compensation, could not be put earlier than the date of the final award, if the matter went to arbitration, or the date of the final agreement, if it was settled by agreement, in this case Jan. 9, 1940.

(iii) on the facts as found by the Commissioners the appropriate year of assessment was fixed, as a matter of law, as the year 1941-42.

Decision of MACNAGHTEN, J., ([1946] 1 All E.R. 165) *affirmed on other grounds.*

[**EDITORIAL NOTE.** The decision in the court below turned upon the question whether compensation payable for refusal to permit development was to be treated as a trade receipt. This point is not taken in the Court of Appeal, where the question argued is the appropriate year of assessment, a question which, although not argued before MACNAGHTEN, J., is held to be open on the facts as found by the Commissioners.

An examination of the provisions of the Ribbon Development Act shows that the right of a frontager to compensation contains so many elements of uncertainty, both as to the right itself, and as to the quantum, that it cannot be regarded as a trade receipt for the purpose of ascertaining the year in which it falls to be assessed, until it is finally fixed by arbitration award, or by agreement.

AS TO COMPENSATION AS TRADE RECEIPT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 125-128, paras. 235-240; and FOR CASES, see DIGEST, Vol. 28, pp. 17-20, Nos. 87-99.]

Cases referred to:

*(1) *Inland Revenue Comrs.* v. *Newcastle Breweries, Ltd.* (1926), 95 L.J.K.B. 936; Digest Supp.; 135 L.T. 618, C.A.; *affd. sub nom. Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927, H.L.

(2) *A.-G.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508; 11 Digest 546, *499*; 89 L.J.Ch. 417; 122 L.T. 691; H.L., *affg.* S.C. *sub nom. Re De Keyser's Royal Hotel, Ltd., De Keyser's Royal Hotel, Ltd.* v. *R.*, [1919] 2 Ch. 197, C.A.

*(3) *Ensign Shipping Co., Ltd.* v. *Inland Revenue Comrs.* (1928), 139 L.T. 111; Digest Supp.; 12 Tax Cas. 1169.

*(4) *Lambert Bros., Ltd.* v. *Inland Revenue Comrs.* (1927), 12 Tax Cas. 1053; Digest Supp.

*(5) *Holden (Isaac) & Sons, Ltd.* v. *Inland Revenue Comrs.* (1924), 12 Tax Cas. 768; Digest Supp.

*(6) *Hall (J.P.) & Co., Ltd.* v. *Inland Revenue Comrs.*, [1921] 3 K.B. 152; Digest Supp.; 90 L.J.K.B. 1229; 125 L.T. 720; 12 Tax Cas. 382.

APPEAL by the taxpayer from an order of MACNAGHTEN, J., dated Nov. 30, 1945, and reported ([1946] 1 All E.R. 165), where the facts are fully set out.

J. Millard Tucker, K.C., and *John Clements* for the appellants.

Sir Patrick Hastings, K.C., and *Reginald P. Hills* for the respondent.

LORD GREENE, M.R.: This appeal relates to two sums of money received by the appellants, who are an estate development company, by way of compensation under the Restriction of Ribbon Development Act, 1935. Those sums were included in an estimated assessment for the year ended Apr. 5, 1942.

On the appeal by the appellant company to the General Commissioners for the Uxbridge Division it was not suggested, as we are told, that this was not the correct year. In fact, nobody said anything about the year. The company itself had brought these sums into its trading account for its financial year ending Dec. 31, 1940, and on that basis they would be taken into account in the assessment for the year ending Apr. 5, 1942. The Commissioners, not having had argued before them, or indeed, raised by either of the parties, the question of the appropriate year, in their decision merely found that the sums in question were not trading receipts, and should not be taken into account in computing the profits of the company assessable to income tax under Sched. D. What the Commissioners were doing there seems to me to be quite clear, particularly when the contentions of the parties are looked at. They were deciding the question of principle whether or not these receipts were in their nature trading receipts. Having decided that they were not, no question of the appropriate year would, of course, arise. They appear, however, to have been conscious that there might be a question, because in para. 1 of the case they say this :

> The appropriate year of assessment has not been discussed, and is only material should the High Court decide that the finding of the Commissioners in the matter is erroneous in point of law.

On appeal to the King's Bench Division by the Crown, the company, for the first time, attempted to raise the question as to the appropriate year of assessment. Macnaghten, J., declined to allow that point to be argued. He expressed no opinion as to whether the point which he thought counsel for the company wished to argue was good or bad. But it is fair to say that before us counsel for the company complained that the judgment of the judge does not accurately represent its nature. But the judge decided the case on the facts found by the Commissioners ; and he ended up as follows :

> But as far as the sum of £5,350 is concerned, namely, the price paid for the land, including the compensation due under the Restriction of Ribbon Development Act, 1935, s. 9, the General Commissioners must include that sum in the assessment.

He appears to have come to that conclusion on the footing that, although the Commissioners did not find that the year of assessment was the appropriate year, nevertheless, on the facts as found, they could not have come to a different conclusion. I cannot agree with the action of Macnaghten, J., in refusing to hear argument on the question of the appropriate year. It was a question which, as counsel for the company strongly urged before us, was susceptible of being answered on the facts as found. Counsel before us made two alternative suggestions. The first was that we should decide the question on the facts as found ; and the other was that we should send the case back to the Commissioners to find any further facts should the finding of such facts be necessary. I express no opinion as to the view I would have taken of counsel's submission if it had been necessary to send the matter back to the Commissioners to find further facts. I have come to the conclusion that the question is open to counsel to argue on the facts as found. I am of opinion that on the facts as found the view taken by Macnaghten, J., was right.

The question that was argued before the Commissioners, namely, whether these payments were in their nature trading receipts, was not argued before us. The view taken by Macnaghten, J., that the Commissioners were wrong on that matter was accepted in this court by counsel for the company, and he confined his argument to the question of the appropriate year to which the payments should be referred.

The importance of the matter is due to the repercussions that this income tax question will have on the excess profits tax of the company. I think it is true to say, as counsel on both sides suggested to us, that the importance of questions similar to that which we have to decide really arose for the first time to any serious extent when the excess profits duty was introduced during the last war. For income tax purposes it used not to be of any great importance whether or not a payment was related to one year rather than another. But, in dealing with a temporary tax like excess profits duty or excess profits tax, obviously the year to which a receipt is to be attributed may have great importance. Accordingly, counsel for the company was anxious to get the receipts out of the company's year 1940, saying that whatever year they are to be attributed to, it cannot in law be the year 1940.

To understand his argument it is necessary to look more closely at one or two of the facts, and to examine in some detail the Restriction of Ribbon Development Act, and a certain number of authorities which were quoted. The pieces of land in respect of which this compensation was paid were acquired by the company from one Try, who carried on a business of estate development which was acquired by the company under a contract of sale dated Nov. 18, 1937. On July 3, 1936, at a time when Try was in the saddle, the highway authority, the Buckinghamshire County Council, refused its consent to the construction of works on one of these pieces of land in accordance with the powers given to it under the Act. That was the date of refusal.

The main argument of counsel for the company, in opening the appeal, was that the dates of refusal were the dates to which these receipts should be dated back. He said in the case of the first piece of land the receipt must be attributed to the year 1936, and therefore should have come into Try's profits for that year. In the case of the second piece of land the notice of refusal of consent was dated Oct. 11, 1938, some 11 months after the company had taken over the business from Try. There could be no question that the company was the proper person to be assessed in respect of that receipt.

In 1938 a claim for compensation was lodged in respect of both pieces of land. In his reply counsel for the company said that the payments should be attributed to the date of the claim instead of the dates of refusal. Therefore, so far, there were two suggested dates of refusal.

The next date to which I need refer is Jan. 9, 1940. On that date a written agreement was entered into between Try on behalf of the company, and the Buckinghamshire County Council, the highway authority, for the sale of the land in question, for the sum of £5,350, of which the sum of £4,800 was stated to be in full settlement of the claim under the Restriction of Ribbon Development Act, 1935. The balance of £550 was left as the residual value of the property subject to the restrictions. There is no question that this £550 is an item of receipt by the company to be taken into account for the year of its receipt, namely, 1940. The reason why receipts on account of the sale of land come into the trading accounts of this company is because the land is the company's stock in trade, its business being to buy and sell and develop land.

I may mention one point in connection with that agreement just to get it out of the way. It was suggested in argument (and it was, indeed, the Crown's case and it was what Macnaghten, J., thought) that the date to which the receipt of this compensation must be attributed is the date of that agreement because it was on that date, and not before, that the compensation became payable. Counsel for the company, while not himself putting forward the date of agreement as the correct date, said that if the date of agreement is to be taken as the correct date he would still be entitled to succeed, because, on the facts as found, there was an agreement to pay compensation before the written agreement of Jan. 9, 1940, and that would have been sufficient for his purpose, since the antecedent agreement, which he submitted had been made, would have been outside the year 1940.

In my opinion there is nothing in that argument. On the true construction of this case, it seems to be clear as anything can be that no agreement was reached before Jan. 9, 1940. The incident on which counsel for the company relies appears in the case under date July 31, 1939, when the district valuer advised the company's solicitor that he was reporting to the county surveyor that compensation had been provisionally agreed at a sum of £4,800. In the next paragraph under date Sept. 5, 1939, appears this passage:

> More than a month after the agreement had been reached as to the amount of compensation the district valuer opened negotiations on behalf of the county council for the purchase of the freehold.

Those were the negotiations which ultimately led to the agreement of Jan. 9, 1940. Counsel for the company wishes to extract from those two statements in the case an agreement come to in the year 1939. In my opinion, it is quite impossible to extract anything of the kind. The agreement to pay compensation necessitated the agreement of the highway authority itself. Neither the district valuer nor the county surveyor would have power to make any such agreement. What they did is referred to as a "provisional agreement," and that clearly means subject to the sanction of the highway authority. When, in the next paragraph, reference is made to "more than a month after the agreement had been reached as to the amount of compensation," it is quite clearly referring to the provisional agreement which had been come to by the district valuer. There is nothing there which in any way could bind the highway authority to the payment of anything. It was only when the actual agreement, to which the highway authority, by its clerk, was a party, of Jan. 9, 1940, was made that any compensation became payable at all. Counsel for the company suggested that the matter of the proper date of the agreement should go back to the Commissioners. To that suggestion I certainly am not prepared to accede. It would not be right to give the company a second chance of getting a more favourable finding of fact, which would be contradictory to the facts as already found. The case must be taken as it stands. On its true construction the date of the agreement was Jan. 9, 1940, and not one penny of compensation became payable before that date.

It is now necessary to examine the Act itself, which is a very complicated piece of legislation. Its object was to impose restrictions upon development along the frontages of roads.

In the first *fasciculus* of sections, which is headed "Restriction of Ribbon Development," by sect. 1, the highway authority is empowered by resolution to adopt a standard width for any road, and, if the Minister approves that resolution, a restriction comes immediately into force, subject to exemptions contained in the Act. "Restriction" is thus defined :

> . . . it shall not be lawful without the consent of the highway authority—(*a*) to construct, form or lay out any means of access to or from the road ; or (*b*) to erect or make any building or permanent excavation, or to construct, form, or lay out, any works upon land nearer to the middle of the road than a distance equal to one-half of the standard width adopted.

"Restriction," therefore, comes into force when the resolution is approved by the Minister and the approval is advertised in accordance with the Act. The restriction, however, can be lifted by a consent given by the highway authority. If the argument of counsel for the company be right—and I shall refer to it more in detail later—it would appear that immediately a restriction came into force an inchoate right to compensation would have arisen. He, however, put the date when the right to compensation arises as at the date of the refusal by the highway authority to give its consent under the section. I do not think for the present purposes it matters very much. Under sect. 1 (3) power is given by resolution passed and approved in the same manner to adopt a different standard width. Of course the adoption of a different standard width may affect one way or the other the frontagers on the roads because the restrictions imposed by sect. 1 are related to the access to the road and the distance from the middle of the road which is to be the new building line. Accordingly, whenever the highway authority adopt a different standard width—there is nothing to prevent it doing that, as far as I can see, at any time—the position will be altered. There, therefore, is one matter of uncertainty with regard to the position of the frontager which may affect his right to compensation.

In sect. 2 provision is made for the imposition of restrictions as from the date of the passing of the Act in respect of what are called classified roads. The restrictions are of the same nature, namely, restrictions on the making of access to or from the road, and restrictions on what I may call for convenience the building line. The restrictions come into force automatically, but in their case again the highway authority has power to give its consent to the lifting of them. Both under sect. 1 and under sect. 2, of course, the consent can be partial, or qualified, or it can be a total consent. There is nothing in the Act to prevent the highway authority giving its consent at any moment right down to the hearing before the arbitrator. I can find nothing that would prevent the highway authority changing its mind right down to the very last minute. In so far as it modifies or withdraws its refusal, the position of the frontager will be affected because his right to compensation may be diminished, or taken away altogether. There, again, is a matter which shows how completely uncertain it is down to the very last minute whether or not the frontager will be entitled to compensation, and, if so, to what amount and on what basis.

The next section that I need refer to, I think, is sect. 7. Sect. 7 (1) provides :

> Subject to the provisions of this Act, any consent which a highway authority have power to give under section one or section two of this Act may be given subject to such conditions as the authority think fit to impose.

Then there is a proviso that :

> (*a*) consent under either of the said sections to the construction, formation, or laying out of means of access reasonably required for any purpose shall neither be unreasonably withheld nor made subject to unreasonable conditions . . .

In the case of access required for agricultural purposes the only condition that can be imposed is "that the means of access shall be used for agricultural purposes only."

I need read no more of the section until I come to sub-sect. (4), which empowers any applicant for consent who is aggrieved by any decision of the highway authority withholding consent or imposing conditions to appeal to the Minister, and the Minister can cause a local inquiry to be held and give his decision accordingly. It is manifest, therefore, that no refusal by itself has any finality about it, because the refusal may be followed by a reversal by the Minister of the highway authority's decision, or a modification of it.

Passing to sect. 9, sub-sect. (1) is as follows:

> Subject to the provisions of this section, if any person having any estate or interest in land, which includes any piece of land subject to restrictions in force under section one or section two of this Act, proves that his estate or interest is injuriously affected by the restrictions, he shall be entitled to recover from the highway authority compensation for the injury to that estate or interest; and any question whether compensation is payable under this section or as to the amount of any compensation so payable shall, in default of agreement, be determined by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919: Provided that, without prejudice to the power of a highway authority to agree with any claimant as to the payment of compensation, no claim for compensation under this section in respect of injurious affection to any estate or interest, shall be entertained by an arbitrator —(*a*) unless the claimant satisfies the arbitrator—(i) that proposals for the development of that land which at the date of the claim to compensation are immediately practicable or would have been so if this Act had not been passed, are prevented or injuriously affected by the restrictions; and (ii) that there is a demand for such development.

Pausing there for a moment, the position of the claimant when he comes before the arbitrator is this. Before the arbitrator can entertain the claim at all, the claimant has to satisfy him that practicable proposals for development as at the date of the claim were prevented or injuriously affected by the restriction, and that there was a demand for such development. If he fails on either of those heads the arbitration is abortive because the arbitrator is prohibited from entertaining the claim at all. In that connection I think it is important to bear one thing in mind. Nowhere in this Act is there any limitation on the time within which a claim for compensation must be made. Indeed, when one realises the object of the Act and its effect, that is quite natural and right. The Legislature is imposing on the land of private individuals restrictions affecting its user and value. At the moment when these restrictions first come into force it may very well be that their effect on a particular piece of land will be negligible. But the existence of those restrictions may seriously affect the frontager in years to come. It may be that 10 years after the restriction has been imposed a demand for building on that particular frontage springs up. I can find nothing in the Act, and nothing has been suggested, which would prevent such a frontager then putting in a claim for compensation and satisfying the preliminary requirements of the arbitration by proving the demand for development and so forth. The fact that it had arisen some years after the restrictions were imposed would seem to me to be quite irrelevant for this reason. At whatever time the frontager is injuriously affected that injurious affection is due to the restriction imposed by the Act. The Legislature has not thought proper to impose any kind of time limit on the right to claim compensation if and when that injurious affection occurs. The consequence is, therefore, this. If we look at the date which counsel for the company first said was the date to which the ultimate payment should be referred, *viz.*, the date of refusal of consent by the local authority, we may find that at that date the conditions necessary for an effective claim for compensation have not yet arisen. But they may arise at a much later date. It seems to me, therefore, quite impossible to say that the refusal is the date to which the ultimate payment should be attributed, because it is only through the happening of some much later event in the case I have been speaking of that any right to compensation could be said to exist. The whole matter is entirely fluid, at any rate down to the date of the claim.

But now comes a further qualification under para. (b) of the proviso. The arbitrator under that proviso is prohibited from entertaining a claim for compensation:

> . . . if within two months after the claim to compensation has been delivered to the highway authority notice is served on the claimant that proceedings are being taken under this or any other Act for an order authorising the compulsory purchase of the piece of land and notice to treat with respect thereto is, within twelve months after the claim, served by the highway authority in pursuance of such an order . . .

It follows therefore, that the highway authority has 2 months after the delivery of the claim in which it can make abortive any claim to compensation by applying for a compulsory purchase order and serving a notice to treat. That, again, makes the date of claim an inappropriate date.

Sect. 9 (4) says this :

> In awarding compensation under this section in respect of any estate or interest in land, the compensation shall, subject to the provisions of this section, be a sum equal to the difference between the market value of the estate or interest when the piece of land is subject to the restrictions and what would have been the market value of that estate or interest if the piece of land had not been so subject.

Then proviso (a) says :

> In assessing the market value of the estate or interest when the piece of land is subject to the restrictions, there shall be taken into account any modification of those restrictions by reason of any consent given by the highway authority and any conditions attached to such consent, or by reason of any undertaking given or proposed to be given by the highway authority and any such consent, conditions, or undertaking, shall be embodied in the award.

That does not say that those modifications or those consents must necessarily be given at some time antecedent to the arbitration. It seems to me quite clear that before the arbitrator in the arbitrator's court the highway authority could make modifications, concessions, and so forth. It is, therefore, quite impossible until the award has actually been given to say what, if anything, the claimant is going to be entitled to. Then proviso (b) says :

> . . . there shall be taken into account any benefit which may accrue to any land in which the claimant has an estate or interest by reason of the construction or improvement, by any other person at any time after the coming into force of restrictions under this Act, upon land adjacent to the land in respect of which compensation is claimed, of any road or of any carriageway or other way subsidiary to such a road, or by reason of the coming into force of the restrictions.

There, again, by reason of an act done by some third party the amount of compensation is liable to be affected. If a third party by constructing a road has effected an improvement of some kind in land in which the claimant has an estate or interest, that has to be taken into account. In other words, he is getting a betterment, and that has to be taken into account in assessing his detriment. There, again, that is a matter which at the date of the claim, and certainly at the date of the refusal, must be quite uncertain. It is only when the matter comes to arbitration and all the facts existing at that time are looked at that it is possible to express an opinion as to what the amount to be awarded, if anything, is going to be.

I have examined in some detail these provisions in order to call attention to the elements of uncertainty, both as to the right to compensation and as to the quantum which those provisions import.

Looking at the effect of the Act quite broadly it seems to me that the claimant, the frontager, who is affected by, or who claims to be affected by, the restriction has his claim hedged round with uncertainty and speculation. It is quite impossible for him, as a matter of business, or for his accountants as accountants, to put any sort of value or estimate on what he is likely to get if in the end he presses his claim to compensation. He may find that the whole claim to compensation is rendered entirely abortive because, not only is there power to apply for a compulsory order, but there is nothing to prevent the local authority saying "We will not go on with our refusal, but we will negotiate with you voluntarily for the acquisition of your land." Curiously enough, that is nearly what they did in the present case. If it had not been for the fact that in the agreement they purported to apportion the purchase price between compensation and the residual value of the land the result would have been that the question of compensation would have dropped out of the picture altogether. It would have been simply a clean purchase of the land without regard to the existence of restrictions.

But I do not think we can so regard this transaction, having regard to the fact that the parties, on the face of the agreement, have effected that apportionment. It merely illustrates the uncertainties which attend the course of the frontager from the date when restrictions are imposed under the Act down to the date when he ultimately goes away from the arbitration, if there is an arbitration, or from the office of the highway authority, if there is no arbitration but an agreement, with money in his pocket. Until he has got that money in his pocket it is quite impossible for him to say what is going to happen, whether he is going to get anything by way of compensation or how much it is likely to be. Those observations apply to each of the two dates for which counsel for the company argues, although no doubt they apply more strongly to the date of refusal.

That being the nature of the frontager's right under the Act, the question A arises whether there is justification for the contention of counsel for the company that the proper date to be taken is not the date of the receipt of the money or the date when the money becomes payable, but the date when the right to it, as he says, arose. In his opening address he fixed that date as the date of the refusal, but he resiled from that in his reply when attention was called to the various uncertainties and various contingencies which might happen between the date of the refusal and the date of the putting in of the B claim. Therefore, in his reply, he pinned himself to the date of the claim as being the appropriate date. He said: "That is the date when the right to this money must be taken as having arisen."

He referred to several cases arising out of the excess profits duty of the last war. I may, perhaps, make one general observation with regard to those matters. I think it is generally true to say that the scheme of income tax legislation is C based on the idea that the tax is assessed and paid year by year. The taxpayer makes his return for the year, he is taxed, and there is an end of it. It is perfectly true that there are powers in the Act, when the surveyor makes a discovery, by which he may make an additional assessment, and in appropriate cases that is undoubtedly a proper way of proceeding. But that does not alter the fact that that is what one may call an exception on the general scheme by which a year is taken, finished and done with, and the taxpayer knows where he is. D His profits are ascertained in general on what I may call sound and normal commercial principles. He knows exactly where he is. But, in the cases to which counsel for the company referred, the principles adopted are, in a sense, re-opening a previous assessment in circumstances which will appear when I come to examine these cases. It should be noted that, in general, tax is calculated on the basis of the receipts of a business. There is one notable exception to that, and that is the case of trade debts. I had occasion a few days ago E [see *Bristow* v. *William Dickinson & Co.*, p. 448, *ante*] to refer to the rather peculiar language of the rule relating to permissible deductions in arriving at the profits of a business, and I pointed out that one of the things it is not permissible to deduct is a debt to the trader. All the other matters, the deduction of which are disallowed, are expenditure, liabilities and disbursements. It occurred to me to wonder what debts, which are not disbursements and not F expenditure, have got to do in this particular context. The reason, I ventured to suggest, was this. A trader is not to be entitled to say: "You must not tax me on these debts because I have not yet received payment. You can only tax me when I have received payment." The Legislature says: "No, it is ordinary commercial practice in calculating your profits to bring in debts which are owing to you in connection with the business. Therefore, you are bound to bring in debts which are owed to you on the same basis as if they were receipts, G subject, of course, to the allowance for bad or doubtful debts for which the rule provides." But I venture to think in one sense that is an anomaly, because it is a departure from what I have always understood to be the fundamental conception of income tax legislation—that you ascertain your profits in reference to your receipts. The reason why that exception is brought in is that it is in accordance with ordinary commercial practice to treat debts in that way.

In the cases on which counsel for the company relies the receipts in question H were receipts in respect of what I think can fairly be said to be something analogous to payment of a debt. They were not debts in the sense of ordinary trade debts, but they were analogous to debts in the sense that an obligation had, or was treated as having, arisen by virtue of something which had happened in a year. It required, no doubt, to be quantified, but it was regarded as just as much tied up with the original transaction as the payment of a debt is tied up with the contract which gives rise to it. Counsel for the company wishes to extract from these cases a general proposition to this effect: You must always look at the facts which give rise to a claim irrespective of whether the claim is a legal claim, and you must always refer the eventual receipt back to these facts. It seems to me that these cases do not warrant the laying down of any such broad principle. As I see it, the facts of each individual case must be looked at. If, on the facts, the receipt can be described as truly analogous to the case of the receipt of a trade debt, then it will be treated in the same way, but if it is of such a nature that it cannot be fairly brought under such a description, I think the ordinary rule that you tax receipts as and when they are received should apply.

Some reference has been made to accountancy and commercial practice. In the case of ordinary trade debts there is no dispute. In the case of items which are broadly analogous to debts it, no doubt, would be better finance not to bring them into the account as if they were trade debts, but I can see nothing to prevent a board of directors making a fair estimate of what they are going to receive under an undoubted right which has accrued. That could be brought in as an estimate, though I do not suppose wise directors would bring it into account unless there was some compelling reason. But I ask myself in the present case, what director, what accountant, could possibly in any circumstances in the case of this compensation, hedged round as it is with every kind of contingency and speculation, bring into the account any figure whatsoever as representing what they hoped they would get by way of compensation in the future. In some cases it might be easier to make some sort of estimate than in other cases. But the principle, if it is to apply, must apply to all cases under the Act. It seems to me that, in the majority of cases, it would be quite impossible and quite misleading for anyone to insert an estimated figure into any accounts. After all, misleading accounts are bad accounts. If such a thing were included in the accounts it would be gravely misleading and contrary not merely to ordinary prudent commercial practice, but contrary to good accounting practice. I do not think you would find a single accountant in the country who knew his business who would agree to bringing into the company's accounts an item of this kind before the money was obtained. That is exactly what has happened in the present case, and it seems to me to be in accordance not merely with good commercial practice, but proper accountancy practice.

I will now look at the cases relied on by counsel for the company. The first one was *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.* (1). That was a case in which the Crown had requisitioned some rum. There could be no question (and it was so held by SALTER, J., I suppose, though I have not looked at his judgment) following the same principle as was established in the *De Keyser Hotel* case (3), that a requisitioning of that kind imported an obligation to make compensation in the fair market value of the rum requisitioned. The Admiralty paid something on account, and eventually the War Compensation Court was called upon to adjudicate and fixed a further amount. It was in relation to that further amount that the question arose. The main point was whether it was a receipt of the trade, but the question of the year was also important, and it is interesting to see how ROWLATT, J., dealt with the case. He said (12 Tax Cas. 927, at p. 937):

> The brewery company bought the rum to keep it for a bit, to deal with it a little and then to sell it again at a profit. Before they had finished dealing with it, before its maturity was complete and before it was blended and so on, the Admiralty took it and paid, as I have said, a price for it in the end—something calculated upon what it cost and what a fair profit on the cost ought to be. Now what is that except a compulsory sale of the rum? It seems to me, when you really look at the substance of the thing, it is in a very small compass. That is all it is, a compulsory sale of the rum. Under those circumstances, what is the position? The mere fact of compulsion I cannot think makes any difference.

Therefore, he is regarding the matter in that case as an ordinary case of the sale by a trader of part of his trading stock, and he treats the price ultimately recovered as being in effect the purchase price payable by the purchaser for goods sold and delivered. The fact that it was a compulsory sale made no difference at all. He thought the remedy was for the Crown to re-open the accounts for the year of requisition.

I need only refer to one short passage in the judgment of VISCOUNT CAVE, L.C., in the House of Lords. He said this (12 Tax Cas. 927, at p. 953):

> Secondly, it is said that if the £5,300 was a business profit [as here, the £5,350] at all events it was not profit which arose in the accounting year 1917-18. I think it did,

> and I cannot see in what other year it can be said to have arisen. The rum was taken in 1918, and the right to some payment arose at once, though there was delay in ascertaining the amount to be paid. It is true that the Indemnity Act, 1920, entrusted the duty of ascertaining the amount to a new tribunal, namely, the War Compensation Court, but on the principle of the regulation as it stood in the year 1918. The change of the tribunal which was to ascertain the amount and enforce payment did not create the right to payment, or alter the date when the right to payment in fact arose.

Then he concludes by saying (*ibid*, at p. 954):

> . . . the sum in question was a profit arising in the accounting year 1917-18; and as it was not then either included in the appellants' return or valued, and consequently was not then the subject of assessment to excess profits duty, I think that it could be assessed to that duty in the year 1923 at its actual amount as then ascertained.

The same view was taken by the other members of the House. Therefore, you were there dealing with something which at the moment of the requisition gave the brewery company a right to have compensation. There was no question about it. It was simply a matter of fixing the quantum. It was analogous, as it seems to me, to the case of an ordinary trade debt.

The next case was *Ensign Shipping Co., Ltd.* v. *The Commissioners of Inland Revenue* (3). That was a case which arose during the coal strike in 1920 when two ships belonging to the appellant company were detained in port by order of the Government for a certain period of days. That took place after the coming into force of the Indemnity Act referred to in the *Newcastle Breweries*' case (1) which conferred, even if it did not exist before, a right to compensation. The result, therefore, was that at the moment when the order of detention was imposed upon these ships, automatically there arose a right to compensation. It was really like the compulsory chartering of a vessel for a period of time with a consequential right to compensation, the only question being the amount at which it should be fixed. There again ROWLATT, J., affirmed by the Court of Appeal, took the view that the receipt was a trading receipt and was attributable to that period. I do not think I need go into the judgments in that case. It is what I have ventured to describe as a case which was clearly and fairly analogous to the case of an ordinary trade debt by reason of the fact that the amount was immediately owing, though it could only be ascertained in future. Nothing further remained to be done in order to obtain it. There were no contingencies which could affect, or destroy, or cut down, the right to recover it.

The next case is *Lambert Bros., Ltd.* v. *Commissioners of Inland Revenue* (4). That was a curious case in which the Gibraltar coal merchants were running a pooling agreement on behalf of the Government under which the merchants administered the coal supplies as a pool, and their remuneration was to cover profit, hulkage, labour, establishment, and all other charges. When the pool was closed it was found that they had a stock of coal on hand considerably greater than they ought to have had, according to the figures in the books of their receipts, and the outgoings from the pool. That could only have been arrived at by mistakes or short shipments, or something of the sort. I should have imagined the question who was entitled to it might have given rise to some doubt. However, it was regarded by the Government and the merchants as something which they could share out, and in fact they did so, and the appellant company, Lambert Brothers, received their share. The company appealed against the assessments, contending that neither its share of the surplus stock fund nor the accrued interest thereon, nor its share of the address commission —that was a different item—were profits arising from the company's trade or business and assessable to excess profits duty, and that in any event they were not profits arising in the accounting periods under appeal. It was held that the sums received by the appellant company in respect of the surplus stock fund and address commission were trading profits arising to the company in the period during which the pool was in existence, and that they were assessable to excess profits duty accordingly. Here was a company carrying on this business of managing, or helping to manage, the pool, and, as a result of the management and its operations, it obtained a profit which was only ascertained at the conclusion of the business, but which was piling up from day to day. In the long run it was held that the assessment must be related to the period during which the pool was in existence. It was a case which was exceptional on its facts. There again it is not, I think, beyond the fair analogy of an ordinary trading profit. It was perhaps a rather more extreme case than the others, but nothing like, in its features, the present case in the matter of uncertainty and speculation as to the results.

The last case I need refer to is *Isaac Holden & Sons, Ltd.* v. *Commissioners of Inland Revenue* (5). That is what is known as the woolcombers' case. The appellants were members of the Woolcombers' Federation, and they were combing wool for the Government during the war on the basis of a tariff fixed in 1917. In 1918, as a result of negotiations, there was a provisional increase of the tariff to operate as from Jan. 1, and to be subject to adjustment either up or down on completion of the accounts at Dec. 31, 1918. Then in July, 1919, a total increase of 20 per cent., including the first increase, was awarded as a final settlement. The headnote says :

> In its accounts for the year ended June 30, 1918, the company charged the full costs for work done in the period, but it included for that work only the amount of commission which had been received under the tariff as increased by the agreement of July 1918 :—*Held :* the total amount of commission received for the year ended June 30, 1918, under the terms of the final settlement, arose from the company's trade in that year, and must be included in arriving at the profits of that period for the purpose of computing the company's liability to excess profits duty.

That was a case where money was payable under a contract. The actual amount payable for the work done under the contract in respect of a particular year was only finally settled some time after that year had expired. But there again it was something which was quite clearly referable to a trading contract. All that had happened was that the original amount was not left untouched, but was subsequently increased by agreement. It seems to me that this again is a case which can fairly be regarded as analogous to a trade debt. The circumstance that the amount of remuneration was only fixed at a later date does not alter the fact that the remuneration was in respect of trading operations of the earlier year. ROWLATT, J., distinguished *Hall's* case (6) to which I will refer in a moment, and says this (12 Tax Cas. 768, at p. 772) :

> But when one looks at what the Court of Appeal said in *Hall's* case (6), I think they wished to lay stress upon the fact that they were dealing with a case where the contracts had not been executed at all, because the goods had not been received from the sellers, nor, of course, had they been delivered to the buyers. That is what they were dealing with : the whole thing was *in futuro*. That is what LORD STERNDALE, M.R., is referring to when he says that it would be wrong to carry into the accounts the figure in question ; that is what ATKIN, L.J., is referring to when he mentions that the goods had not actually been delivered ; and that is what YOUNGER, L.J., is referring to when he points out that the profits have not yet been realised—it is not that they have not been paid, but that they have not been realised—by the completion of the transaction, the execution of the contract.

In the case of the woolcombers those considerations, of course, were not present. ROWLATT, J., concludes by saying (*ibid*, at p. 773) :

> I cannot see any sensible way of looking at the facts other than that which leads me to say that these profits arose from the business in the accounting period, . . .

That case seems to me to be miles away from the present case. Those are the cases on which reliance was placed by counsel for the company.

Junior counsel for the Crown referred to two other cases, in particular *Hall's* case (6), which he relied upon as showing that the date of receipt should be taken as an appropriate date. The headnote says :

> In Mar., 1914, the appellant company entered into a contract to supply certain electric motors complete with control gear, to be delivered between July, 1, 1914, and Sept. 30, 1915, payment to be made one month after delivery.

Then they made a sub-contract, but deliveries were not effected until dates between Aug., 1914, and July, 1916. It was held :

> . . . for the purposes of excess profits duty, the profits from the contracts for the purchase and sale of the control gear arose to the appellant company in the accounting period in which the gear was actually delivered and not in the pre-war period ending the June 30, 1914, in which the contracts were made.

That merely enunciates the proposition that money must not be taken as being, so to speak, in hand until all the conditions necessary to earn it have been fulfilled. Delivery was a necessary condition for the appellant company to be entitled to be paid. It was not until the gear was delivered by the subcontractors that the right to payment became fixed, and, therefore, a matter which could be treated in the ordinary way as a trade book debt. But if one looks for an analogy between the delivery of the goods and what happened in the present case, it seems to me that delivery of goods can only be said to be effected at the moment when, applying the analogy to the present case, all possibility of the restrictions being lifted or modified by some change of mind, or some action, on behalf of the highway authority had exhausted itself, and that until that moment arrived the conditions necessary to entitle the frontager to compensation, and *a fortiori* the conditions necessary to entitle him to any fixed quantum of compensation were not fulfilled. I cannot see how that date can be put earlier than the date of the final award if the matter goes to arbitration, or final agreement, if it is settled by agreement.

That leads me to the conclusion that the argument of counsel for the company that 1940 is not the year must fail. On the facts as found by the Commissioners, the appropriate year seems to be fixed, in my opinion, as a matter of law, as the company's year 1940, and no other year.

At one stage in his reply counsel for the company appeared to protest against our right to come to any such conclusion. But it does not lie in his mouth to say that, as it seems to me, because it was he who put in the forefront of his argument the proposition that, on the facts as found, we were bound, as a matter of law, to find that the year was not the company's year 1940. Having argued that, it is quite impossible for him to turn round and say that it is not open to the court to find on the facts as found that it was 1940.

In my opinion, MACNAGHTEN, J., though I do not think he ought to have excluded the argument of counsel for the company, came to the right conclusion, and the appeal must be dismissed with costs.

SOMERVELL and COHEN, L.JJ., agreed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Collyer-Bristow & Co.*, agents for *Bird & Lovibond*, Uxbridge (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

KRAUSS *v.* BOYNE.

[KING'S BENCH DIVISION (Sellers, J.), March 21, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—Sole use of three unfurnished rooms and joint use of other rooms—"Part of a house let as a separate dwelling."

By an oral agreement the defendant had exclusive use of two unfurnished bedrooms and an unfurnished reception room in the plaintiff's house and shared with the plaintiff the use of the kitchen, bathroom and w.c., the agreement further providing that the defendant should share the garden produce and the heating and lighting expenses. The wives of the parties took turns in cleaning the part of the house which was shared. The plaintiff made an entry in a rent book that the weekly rent of £2 was arrived at as follows: Rent for three unfurnished rooms 17*s.* 6*d.*; use of kitchen bathroom and usual offices, garden (including fruit and vegetables), gas, etc., 22*s.* 6*d.* In an action by the plaintiff for possession of the rooms occupied by the defendant it was contended, on behalf of the defendant, that there was a separate letting of the three unfurnished rooms and a separate agreement with regard to the use of the kitchen, etc., and the other advantages or facilities, and that, therefore, the case fell within the Rent Restrictions Acts:—

HELD: there was not a separate letting but merely a sharing of the house; the case did not, therefore, fall within the Rent Restrictions Acts and the plaintiff was entitled to possession.

Neale v. *Del Soto* (1) *followed.*

Cole v. *Harris* (3) *distinguished.*

[**EDITORIAL NOTE.** It was held in *Neale* v. *Del Soto* (1) that the question whether there is a separate letting of part of a house, or a sharing of the whole house, is one of degree, dependent on the particular agreement. In *Cole* v. *Harris* (3), however, it was held that the true test is whether "living rooms" are shared. If they are, there is no separate letting. In this case one living room, the kitchen, was shared, and upon a consideration of all the circumstances the court came to the conclusion that there was no separate letting. The distinction made in the rent book between the rent applicable to the rooms let unfurnished and that applicable to those shared is explained by the desire of the landlord to show how the rent was made up in view of the family relationship of the parties. It is not, therefore, evidence of a separate letting.

AS TO LETTING AS A SEPARATE DWELLING, see HALSBURY, Hailsham Edn., Vol. 20, p. 312, para. 369; and FOR CASES, see DIGEST, Vol. 31, p. 557, Nos. 7044-7047.]

Cases referred to:

*(1) *Neale* v. *Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65.

(2) *Sharpe* v. *Nicholls*, [1945] 2 All E.R. 55; [1945] K.B. 382; 114 L.J.K.B. 409; 172 L.T. 363.

*(3) *Cole* v. *Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50.

ACTION for the recovery of possession of part of a dwelling-house. The facts are fully set out in the judgment.

S. Chapman for the plaintiff.

J. Amphlett for the defendant.

SELLERS, J.: The plaintiff claims possession of a portion of a house, 50 Richmond Crescent, Highams Park, E., from the defendant, and the defendant claims that he is entitled to be protected from eviction by the Rent and Mortgage Restrictions Acts, 1920 to 1939.

The facts I find to be as follows. In May, 1945, the plaintiff acquired this house, which was a small house, with two normal or main bedrooms and one small room, which could be used as a bedroom or as a boxroom. Also on the same floor as the bedrooms there was a bathroom and separate water closet. On the ground floor there were two reception rooms and a kitchen. Shortly after acquiring the house, the plaintiff came into contact with the defendant, who is his brother-in-law, and an agreement was come to whereby the defendant should come and take over, on a weekly tenancy, at a rent of £2 a week, a portion of the plaintiff's house. The agreement was to this effect, that the defendant should occupy and have possession of one of the main bedrooms and the small bedroom and one of the reception rooms, and should have a joint use of and share the use of the kitchen, the bathroom and the water closet, and also, I suppose, that involved joint use of the hall and the staircase and the garden. The agreement went further than that. It was an agreement to let the defendant have a share of the products of the garden and also to cover the expenses of heating and lighting, gas, electricity and coal. At the outset the coal agreement referred only to the boiler nuts for the boiler, but the plaintiff shortly after agreed to provide coal for the fire in the defendant's sitting room. The wives of the parties took it in turn, day by day, to clean that substantial part of the house which was shared.

After this oral agreement, and after the defendant had come in, the plaintiff got hold of a common type of rent book, and, stating on the outside the tenant's name, *i.e.*, the defendant, he put the rent as £2 a week. Then on p. 1 the plaintiff had written:

> The amount of rent is arrived at as follows: Rent for three unfurnished rooms per week, 17*s.* 6*d.*; use of kitchen, bathroom and usual offices, also garden, including fruit and vegetables, gas, electricity, coal and boiler nuts, 22*s.* 6*d.*; total weekly, £2.

An argument has been forcibly advanced on behalf of the defendant that that amounted to a separate letting to the defendant of the three unfurnished rooms and a wholly separate agreement with regard to the use of the kitchen and those other advantages or facilities which were granted within the sum of 22*s.* 6*d.*; and that gave rise to the defence in this case.

I was referred by counsel for the plaintiff, to three recent cases in the Court of Appeal, which it is said cover this case if the facts are properly found and the law applied.

The first case is *Neale* v. *Del Soto* (1), where there was a letting closely comparable to the facts of this case. The tenant was let two unfurnished rooms in a seven-roomed house, together with the use, jointly with the landlord, of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory, and it was held by the Court of Appeal that there was really a sharing of the house, each party having the exclusive use of some rooms and the two parties together having the use in common of other rooms, and it was, therefore, not a letting of the two rooms as a separate dwelling within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2).

MORTON, L.J., puts the problem ([1945] 1 All E.R. 191, at p. 193):

> In the present case were the two rooms in question "a part of a house let as a separate dwelling"? In my view, they were not. What was let was the two rooms together with the use in common with the owner of the house of the garage, kitchen, bathroom, lavatory, coalhouse, and conservatory . . . and it would be a misuse of language, to my mind, to say that the two rooms, and nothing more, were let as a separate dwelling. The real substance of the matter is that there was a sharing of this house; each party had the exclusive use of some rooms and the two parties together had the use in common of certain other rooms.

I was next referred to *Sharpe* v. *Nicholls* (2). I do not need to refer more specifically to that.

Thirdly, I was referred to *Cole* v. *Harris* (3). There, there is the contrasting position, because the facts in that case were:

> . . . the defendant let to the plaintiff three rooms, consisting of bedroom, living-room and kitchen, on the first floor of a dwelling-house, together with the joint use, with the plaintiff and the tenant of the second floor, of a bathroom and w.c. . . . :—*Held*: there was a demise of the three rooms as a separate dwelling and not a mere sharing of the whole house. It was difficult to define, as a matter of legal principle, the dividing line between the two classes of case, but the most satisfactory formula seemed to be to say that if there was a sharing of essential *living* rooms (which would include the kitchen) there would not be a demise of the premises as a separate dwelling-house. Sharing of other than living accommodation, though such accommodation may be of a kind essential according to modern standards, would not necessarily prevent the letting being a demise of the premises as a separate dwelling, and it must be decided as a question of fact in each case.

I have read from the headnote ([1945] 1 K.B. 474), but that is a true reflection of the judgments, and particularly of what is said by MORTON, L.J., on p. 485.

The facts in this case, except for the argument of counsel for the defendant on the rent book, would seem to fall very clearly within the earlier decision of *Neale* v. *Del Soto* (1), and as this letting here includes a kitchen which is a living room, would also fall under the principle laid down in *Cole* v. *Harris* (3). But the question arises as to whether the submission is right and should be accepted that this was in fact, quite apart from the application of those provisions, a separate letting. In my view that is not the position. The rent book does not establish that at all. This was a letting at £2 a week of these three unfurnished rooms, together with, as an essential part of the letting, the use of the kitchen, the bathroom and the other facilities which were granted. It seems to me that neither of these provisions, the use of part of the premises in one case or the sole use of unfurnished rooms, would separately be of any value from a practical point of view to the defendant. It was essentially one bargain entered into beforehand, and I am inclined to think that the only reason for the analysis in the rent book was that, having regard to the nature of the house and the relationship of the parties, the plaintiff thought that it would be well to show that a sum of £2 would not be unreasonable; and he shows how it is made up.

My conclusion of fact is that this was a letting comparable in every way in principle with that in *Neale* v. *Del Soto* (1) and that there was no independant letting but that there was here a sharing of the house. *Cole* v. *Harris* (3) was, on its facts, very different. There one gets a picture of two separate lettings with just an incidental use of the lavatory accommodation.

In those circumstances the defence fails, and there must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors: *A. E. Wyeth & Co.* (for the plaintiff); *Arram, Fairfield & Co.* (for the defendant).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

NORTHERN ALUMINIUM CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), November 7, 8, 1945].

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Cohen, L.JJ.), March 4, 5, 6, 1946.]

Revenue—Excess profits tax—Capital employed in business during chargeable accounting period—Sum paid in respect of accruing liability—Liability must be legal obligation existing during accounting period—Finance (No. 2), Act, 1939 (*c.* 109), *Sched. VII, Pt. II, para.* 2 (1)—*Finance Act,* 1940 (*c.* 29), *s.* 34 (4).

In 1939 the appellant company was supplying aluminium products at fixed prices to various firms engaged in the production of aircraft for the Air Ministry, whose functions with regard to the production of aircraft were taken over by the Ministry of Aircraft Production in 1940. On Dec. 16, 1939, an agreement was entered into between the Air Ministry and an association acting for the appellant company whereby it was provided that the prices which the company was then charging to its customers should be reduced for the period July 1, 1939, to June 30, 1940, and that the amount by which the prices paid to the company were in excess of the reduced prices should be paid by the company to the Ministry. The agreement went on to provide that negotiations should be entered into not later than June 30, 1940, with regard to the prices to be charged after that date. No negotiations in fact took place before that date, but subsequently negotiations did take place which resulted in an agreement dated Oct. 12, 1942, whereby the prices to be charged by the company were fixed for the years 1941, 1942, and 1943. That agreement provided that the excess prices which had been charged during 1941 by the company to its customers, subsequently ascertained to be £2,743,469, should be repaid by the company to the Ministry of Aircraft Production. That sum was eventually paid by the company to the Ministry in 1943. The question for determination was whether that sum which was allowed as a deduction in computing the profits of the company for the purposes of excess profits tax for the year 1941 was a sum paid in respect of an accruing liability and should be deducted in computing the capital of the company for the chargeable accounting period Jan. 1, to Dec. 31, 1941:—

HELD: (i) the words "any such sums in respect of accruing liabilities" in the Finance Act, 1940, s. 34 (4) required that the liability in question should be a legal obligation existing during the accounting period.

(ii) the agreement dated Dec. 16, 1939, did not impose a legal obligation on the appellant company.

(iii) even if it were possible to imply in that agreement an obligation to make a payment, if negotiations successfully reached a conclusion, to be introduced in some schedule of prices, such purely conditional liability, which might or might not mature, would not be an "accruing liability" within the section.

(iv) the liability to pay the sum in question had its origin in the agreement dated Oct. 12, 1942, and until that agreement was reached there was no legal liability on the appellant company to pay that or any other sum.

(v) the sum in question should not, therefore, be deducted in computing the capital of the company for the chargeable accounting period Jan. 1, to Dec. 31, 1941.

[**EDITORIAL NOTE.** LORD GREENE, M.R., examines in detail the capital provisions of the excess profits tax legislation. He finds that their object is to ascertain the actual capital employed during an accounting period in respect of which a statutory allowance is to be given or imposed. This must refer to something which is actually earning profits, and is ascertained by bringing in on one side of the account actual debts, which are truly assets, and deducting on the other side of the account actual debts, including "accruing liabilities," which are proper deductions in order to ascertain the net assets. Such accruing liabilities, however, must be payments which the debtor is in law bound to make, and it is held, therefore that as the negotiations here in issue did not result in any binding legal obligation, they did not result in a debt deductible in computing capital for the purposes of excess profits tax.

Reference may be made to *Inland Revenue Comrs.* v. *Bagnall, Ltd.* ([1944] 1 All E.R. 204), where it was held that "debt" in this connection does not include a mere admission of liability, until that liability has been quantified.

For the Finance (No. 2) Act, 1939 (c. 109), Sched. VII, Pt. II, para. 2 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1222, and for the Finance Act, 1940 s. 34 (4), see, *ibid*, Vol. 33, p. 188.]

Case referred to:

(1) *Holden* (*Isaac*) *& Sons, Ltd.* v. *Inland Revenue Comrs.* (1924), 12 Tax Cas. 768; Digest Supp.

Case Stated under the Finance (No. 2) Act, 1939, s. 21 (2), the Finance Act, 1937, Sched. V, Pt. II, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The sole question for determination was whether a sum of £2,743,469, being the agreed amount of a rebate for 1941 on the price of goods payable and subsequently paid to the Ministry of Aircraft Production, by the appellant company, under a certain agreement, was an "accruing liability" within the Finance Act, 1940, s. 34 (4), and should accordingly be deducted in computing the capital of the company for excess profits tax for the chargeable accounting period from Jan. 1 to Dec. 31, 1941. The decision of the Commissioners was that it was an accruing liability within the Finance Act, s. 34 (4). The company appealed against this decision. The facts are sufficiently set out in the judgment of Macnaghten, J.

Frederick Grant, K.C., and *J. S. Scrimgeour, K.C.*, for the appellants.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *Reginald P. Hills* for the respondents.

Macnaghten, J.: Sched. VII, Pt. II, of the Finance (No. 2) Act, 1939, which imposes the excess profits tax, contains the provisions for computing the capital employed in a trade subject to that tax; and by Sched. VII, Pt. II, para. 2 (1), it is provided:

> Any borrowed money and debts shall be deducted;

That is to say, shall be deducted in computing the capital employed in the trade. By the Finance Act, 1940, s. 34 (4), it is provided that the debts to be deducted under that sub-paragraph include:

> . . . (a) any such sums in respect of accruing liabilities as are allowable as a deduction in computing profits for the purposes of excess profits tax, or would have been so allowable if the period for which the amount of capital is being computed had been a chargeable accounting period.

The question at issue on this appeal is whether the sum of £2,743,469, which was paid by the appellant, the Northern Aluminium Co., Ltd., to the Ministry of Aircraft Production in 1943, and was allowed as a deduction in computing the profits of the company for the purposes of excess profits tax for the year 1941, was a sum paid in respect of an accruing liability and should be deducted in computing the capital of the company for the chargeable accounting period, Jan. 1 to Dec. 31, 1941.

The circumstances in which that sum became payable by the company are as follows: in 1939 the company was supplying aluminium products at fixed prices to various firms engaged in the production of aircraft for the Air Ministry. In 1940 the Ministry of Aircraft Production was constituted and took over the functions of the Air Ministry with regard to the production of aircraft. The Air Ministry, and the Ministry of Aircraft Production as its successor in that respect, were concerned with the prices which the company charged for its aluminium products, because those prices were included in the prices which the Ministry had to pay for the aircraft. Any increase in the prices charged by the appellant company for its aluminium products meant an increase in the prices the Air Ministry had to pay for the aircraft; and any reduction in the prices of the aluminium products meant a corresponding reduction in the prices payable by the Ministry.

It was in these circumstances that a meeting took place at Harrogate on Dec. 1, 1939, between the representatives of the Ministry of the one part and the representatives of a body called the Wrought Light Alloys Association of the other part. At this meeting the Wrought Light Alloys Association (of which the company was a member) was acting for the appellant company as well as the other members of the association: and an agreement was made which was embodied in a letter dated Dec. 16, 1939. The agreement provided that the prices which the company were then charging to its customers should be reduced for the period July 1, 1939, to June 30, 1940, and that the amount of the excess prices, that is to say, so far as the prices paid to the company were in excess of the reduced prices, should be paid by the company to the Ministry. The agreement went on to provide that negotiations should be entered into not later than June 30, 1940, by the Air Ministry and the association with regard to the prices to be charged for supplies of aluminium products after June 30, 1940 . . .

No negotiations with regard to the matter took place before June 30, 1940, or for a long time afterwards. Subsequently, however, negotiations did take place which resulted in an agreement dated Oct. 12, 1942, whereby the prices to be charged by the company were fixed for the years 1941, 1942 and 1943. This case is only concerned with the prices fixed for 1941.

The agreement provided that the excess prices (which had been charged during 1941 by the appellant company to its customers) when ascertained should be repaid by the company to the Ministry. The excess prices for 1941 amounted to the sum already mentioned, £2,743,469: and about a year later the company paid that sum to the Ministry of Aircraft Production.

The question is: Was that a sum paid in respect of an accruing liability for the year 1941? The Special Commissioners answered that question in the affirmative. From that decision the company appeals.

Counsel for the appellants put forward this view: True it was that the company had agreed to enter into negotiations before June 30, 1940, as to what the prices for 1941 should be; but the Ministry had let that opportunity slip by. Therefore, there was no liability on the part of the company to refund any part of the sums received by it in 1941 from its customers. When the company was good enough to make the agreement of Oct. 12, 1942, it was under no obligation to do so; the refund was really, if you look at it in its true light, a gift by the company to the Ministry. As I understand it, that was the argument. I do not think it can be maintained . . . In my opinion, if they had taken that position, they would not have got away with it. If the Air Ministry had been met with that contention and litigation had ensued, and if the company had set up the plea which counsel for the appellants has maintained here, I think it would have been met with the answer. The agreement between the Ministry and the company was that prices should be fixed by agreement arrived at after negotiations and if for any reason negotiations did not take place, or if the negotiations did not result in agreement, the question of the prices to be paid by its customers to the company must be determined by the court. It would be the ordinary case where a manufacturer had supplied goods and the price to be paid for them had not been fixed. In such a case the law provides that the price to be paid should be a reasonable price, and if the parties could not agree on what was the reasonable price, then the court will decide, either with or without the assistance of a jury, what the reasonable price of the goods should be.

Therefore, I think that the argument put forward by counsel for the appellants cannot be sustained. The agreement between the Ministry and the company made at Harrogate in Dec., 1939, was an agreement to the effect that the prices which the company charged to its customers after June 30, 1940, were provisional prices subject to adjustment either up or down. It follows that this sum of £2,743,469, which, under the agreement of Oct. 12, 1942, was paid by the company to the Ministry of Aircraft Production in 1943, for the year 1941, was a sum paid in respect of a liability accruing during that year. Therefore, in pursuance of, and in accordance with, the provisions of the Finance Act, 1940, s. 34, it must be deducted in the computation of the capital for the chargeable accounting period Jan. 1 to Dec. 31, 1941.

In my opinion, the appeal must be dismissed with costs.

Appeal dismissed with costs.

From this decision the appellants appealed.

Frederick Grant, K.C., and *J. S. Scrimgeour, K.C.*, for the appellants.

The Attorney-General (*Sir Hartley Shawcross, K.C.*,) *Sir Patrick Hastings, K.C.*, and *Reginald P. Hills* for the respondents.

Lord Greene, M.R.: The facts which give rise to the present appeal are set out in the stated case, and are well summarised in the judgment of the judge. He accurately formulates the question at issue in these words :

> The question at issue on this appeal is whether the sum of £2,743,469, which was paid by the appellant company, the Northern Aluminium Co., Ltd., to the Ministry of Aircraft Production in 1943, and was allowed as a deduction in computing the profits of the company for the purposes of excess profits tax for the year 1941, was a sum paid in respect of an accruing liability, and should be deducted in computing the capital of the company for the chargeable accounting period, Jan. 1 to Dec. 31, 1941.
>
> The appellant company maintains that the sum involved in this case ought not to be deducted in computing their capital for the chargeable accounting period in question on the ground that in that chargeable accounting period no legal liability existed to pay that sum, or any other similar sum. They say that there was no "accruing liability" within the meaning of the statutory provision in that behalf.
>
> On the other hand, the Crown argues that there was a legal liability which was an "accruing liability" within the meaning of the relevant provisions, and that that accruing liability existed during the chargeable accounting period.

Alternatively, they say that, if there was no legal liability in the period in question nevertheless, the language of the provision in question does not require a legal liability ; it is sufficient if the payment in question is referable to a transaction which took place, or had its origin, in the accounting period in question. They say that this payment originated from what took place in that accounting period. It is convenient to deal first with the alternative argument of the Crown. The consideration of it requires an examination of the capital provisions relating to excess profits tax. That examination will be found to throw light on the general question whether there was an accruing liability in the sense of the statute. The Crown, in support of that alternative argument, relies on certain well known excess profits duty cases which arose in the last war in relation to the ascertainment of profits. The present question does not relate to the ascertainment of profits, but relates to the ascertainment and adjustment of the capital employed in the undertaking, a totally different question. In my opinion, counsel for the appellants was perfectly right when he said that the treatment of this sum, for the purpose of ascertaining profits, was a different question altogether to its treatment for the purpose of the capital account.

In the present case, the company and the Crown have agreed to treat the sum in question as a deduction for the purpose of calculating profits for the accounting period of 1941. We are not concerned here with the question whether that arrangement was in accordance with the strict rights of the parties under the relevant provisions of the Act. The reason why the payment was for the purpose of profits attributed to the year 1941 was that it was considered—and I will assume, for the purposes of the argument, rightly considered—that, although the sum was not paid until the year 1943, yet, as it had its origin in what took place in 1941, it must be ascribed to that year.

There are well known cases under the legislation in the last war which dealt with the question of the period to which amounts received at a later date should be attributed. The cases were cases in which, for example, some time after the expiration of an accounting period increases of price were granted, sometimes voluntarily, in respect of goods sold, or services rendered during the accounting period. The *Woolcombers'* case (1) is a well known example. Broadly speaking, it was held in those cases that the subsequent receipt of an addition to the price was referable to the transaction under which the goods were sold. The price for which the goods were sold in the accounting period was so much, and that price later on was increased by virtue of some understanding, or something which might fall short of a contractual obligation. There the increased price was held to be referable to the original transaction, and, therefore, the accounts must be re-opened in order to bring that increase into the profits of the company in the accounting period.

On the analogy of those cases, the Crown maintains that a corresponding operation should be performed for the purposes of ascertaining the capital. It was said : Even if this payment was not a payment made pursuant to some legal obligation, yet it must be referred to the 1941 transactions out of which it arose, with the result that the capital account for that year, for the purpose of ascertaining the standard capital, must be adjusted *ex post facto*. In my opinion, that argument is completely fallacious for a reason which I will now endeavour to explain.

The excess profits tax was imposed by the Finance (No. 2) Act, 1939, Pt. III. Its general structure is well known, and I need not go into it. For present purposes, it is sufficient to say that a standard period was taken. The profits of that standard period were ascertained. Where the profits in a chargeable accounting period exceeded those standard profits, tax was imposed upon the excess. The standard profits were ascertained by reference to a standard period during which the undertaking, of course, earned those profits by means of the capital which, during that period, it had available in its business. It was obviously just that, whenever the capital of the undertaking was increased or decreased during a subsequent period, some adjustment should be made in the level of profits above which the tax was to be imposed. If a company during the standard period was earning profits on a capital of £100,000, and its standard profits were fixed by reference to that period, and if, in a later period, it was employing a capital of £200,000, obviously justice required that the level of its standard profits should be adjusted upwards by reference to the increase of capital. Similarly, if the company had during the standard period employed a capital of £100,000 to earn the standard profits, and subsequently, for some reason, withdrew or lost part of its capital, so that the capital in the subsequent period was only £50,000, an adjustment downwards would have to be made.

The provisions by which those adjustments are to be made are to be found in the proviso to sect. 13 (3) of the Act, which says this :

> . . . Provided that if the average amount of the capital employed in the trade or business in any chargeable accounting period is greater or less than the average amount of the capital employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased, or, as the case may be, decreased by the statutory percentage of the increase or decrease in the average amount of the capital employed in the trade or business.

The statutory percentage is set out in sect. 13 (9).

There are one or two things about that language which are worth noting. First of all, it refers to the "capital employed." That seems to me quite clearly to refer to capital actually employed, not to some item which is artificially going to be written back into the capital in some future year, but capital which is in fact being employed for the purpose of earning profits. You earn profits with real capital, not with something which, on a subsequent re-opening of the accounts, is going artificially to be attributed to a particular period. It is to be noticed that what the proviso refers to is the amount of the capital employed in a chargeable accounting period ; that is to say, you must find a state of facts in which you can say that the company is employing the capital in an accounting period. If the capital it is employing in that period is greater, it is entitled to a revision upwards of the level of its profits. On the other hand, if it is employing less than it did during the standard period, the net profit level must be scaled down. That is obvious, and in accordance with common sense.

By sect. 14 (2), it is provided :

> The average amount of the capital employed in a trade or business in the standard period or any chargeable accounting period shall be computed in accordance with Part II of the Seventh Schedule to this Act.

Then provisions are set out for the computing of the capital. They appear to me to confirm, beyond possibility of doubt, what I said a moment ago, namely, that the capital employed in a trade is capital really and actually employed and existing as capital during the accounting period.

Sched. VII, Pt. II, para. 1 (1), says :

> . . . the amount of the capital employed in a trade or business (so far as it does not consist of money) shall be taken to be [I call attention to the significance of this language] (*a*) so far as it consists of assets acquired by purchase . . . the price at which those assets were acquired . . . (*b*) so far as it consists of assets being debts due to the person carrying on the trade or business, the nominal amount of those debts . . . (*c*) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the trade or business . . .

Therefore, the capital employed in a trade is divided into these three categories of assets ; that is to say, real assets which are employed in the trade or business.

Pausing there for a moment, it is worth considering what these provisions mean which relate to the "debts due to the person carrying on the trade or business." In my opinion, that phrase means real debts existing at the time. The reason why they are regarded as capital employed in the business is pretty clear. They are balance sheet assets. They are part of the means by which a company can carry on its trade. It has its sundry debtors, which form an asset by the assistance of which it is enabled to carry on its business and earn profits. But they must be real debts. You cannot earn profits on a notional debt—it is not an asset. It is not an asset which would ever appear in a balance sheet. It must be in the balance sheet for the year as an existing asset, not something which is written back by a re-opening of the balance sheet in some subsequent year so as to let in something which in that year was not an asset at all. That is what would happen if you applied, under the Crown's alternative argument, the cases which relate to the ascertainment of profits. The reason why those profits are written back is not that in the four corners of the year in question they had any existence, because they had not; it is merely because, though received in a subsequent year, they are artificially attributed to the year in question, the accounts for which, as between the taxpayer and the Revenue, are re-opened for the purpose. It is quite impossible to treat a receipt, which, under that principle, is to be written back into a previous year for the purpose of ascertaining the profits, as being an asset in the shape of a debt within the meaning of these capital provisions. So to treat the debt would be to violate the language and the whole object and purpose of these capital provisions, the nature of which I have endeavoured to describe.

I have no doubt myself that the word "debt" in that paragraph means a real existing debt which is due to the undertaking in the accounting period in question, a debt of that kind being an asset in the real sense.

Then there are certain provisions about deductions which I need not trouble with, but in para. 2 (1), there is this provision:

> Any borrowed money and debts shall be deducted . . .

There is the same word. If I am right in thinking that, in ascertaining the assets of the undertaking, the word "debts" means real debts, then in the paragraph dealing with the liabilities of an undertaking which are to be deducted from those assets in order to find the capital employed in the business, the word "debts" must have precisely the same meaning. It must be a real debt existing during the period in question, and forming a proper deductible liability when the assets of the undertaking are being ascertained.

There is only one other paragraph in this Schedule which I think I had better read, and that is para. 4:

> For the purpose of ascertaining the average amount of capital employed in a trade or business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed (*a*) to have accrued at an even rate throughout the period, and (*b*) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the trade or business.

The object of that provision is pretty clear. If the company during the accounting period has earned profits, those profits remain in the business, and, not being yet distributed, are available to enable the company to earn profits, and, therefore, are properly treated as being an accretion to capital for the period, and the rate at which they are deemed to accrue is an even rate, except so far as the contrary is shown.

Bearing in mind that, so far as the assets are concerned, a debt due to the company must, for the purposes of these capital provisions, be a real debt and that a debt owing by the company must be a real debt, I come now to the provisions in the Finance Act, 1940. By sect. 34 (4) of that Act these words are to be inserted at the end of Sched. VII, Pt. II, para. 2 (1), of the Act of 1939. That is the paragraph which says that debts are to be deducted. The words to be inserted are as follows:

> The debts to be deducted under this sub-paragraph shall include.

That is rather unusual language. It does not say "shall be deemed to include," but "the debts to be deducted shall include." That language appears to me to indicate not that these new words are bringing into the computation something which is not a debt during the accounting period, but that a particular class of debt is to be brought in which it might have been thought was not included in the debts mentioned in the original paragraph of the Schedule. " The debts to be included under this sub-paragraph shall include " —that seems to me to be the clear meaning of it. Then it goes on :

> (*a*) any such sums in respect of accruing liabilities as are allowable as a deduction in computing profits for the purposes of excess profits tax, or would have been so allowable if the period for which the amount of capital is being computed had been a chargeable accounting period.

I need not read the next paragraph, but the sub-section concludes :

> . . . and all the said sums shall be deducted, notwithstanding that they have not become payable.

As I have said, that appears to me, not to introduce under the heading of " Debts " something which is not, strictly speaking, a debt, but to introduce a category of debt which otherwise would have been excluded. That category is described as a sum " in respect of accruing liabilities," and that sum is to be deductible, notwithstanding that it has not become payable. What it is contemplating is something which, during the accounting period, is not actually payable, but something which is an accruing, ripening debt under some legal obligation. Unless it is accruing under a legal obligation, it is not a balance sheet deduction. In my opinion, therefore, the phrase " any such sums in respect of accruing liabilities " requires that the liability in question shall be a legal obligation existing during the accounting period. The other qualification is that it must be " allowable as a deduction in computing profits for the purposes of excess profits tax." But the fact that, for the purposes of computing profits, some artificial writing back must take place, does not destroy the necessity of its being an accruing liability, and a true legal obligation in the accounting period in question.

That examination of the relevant provisions really comes to this : The object of the capital provisions is to ascertain the actual capital employed during an accounting period in respect of which a statutory allowance of so much per cent, less or more, is to be given or imposed. That must refer to something which, during the period, is actually earning profits, namely, capital actually employed in the business. That is to be ascertained by bringing in, on the one side of the account, actual debts which are really and truly assets, and deducting, on the other side of the account, actual debts which are proper deductions in order to ascertain the net assets. In those debts are to be included accruing liabilities, notwithstanding that they have not become payable. Therefore, you cannot treat as an accruing liability a payment which, in the accounting period in question, the undertaking was not in law bound to make, but which is only treated as having been allowable for in that year under the rather artificial rules I have mentioned of attributing the payment to something that happened in that year ; you cannot say that because you write it back for profit purposes, you must therefore treat the capital as having been increased. You cannot make profits on a notional and artificial capital which had no real existence during the period when you are supposed to be making greater or lesser profits for the purposes of the statutory adjustment of the standard profits.

Having got rid of that argument, I turn to consider whether or not there was in the present case a legal liability which can be described as an accruing liability within the true meaning of the amending words in the Act of 1940. The liability is said by the Crown to have come into existence by virtue of an agreement, the terms of which are set out in a letter from the Air Ministry of Dec. 16, 1939. That letter provides, in para. (i) for a reduction of the charges for aluminium goods in respect of the period July 1, 1939, to June 30, 1940. The prices were to be reduced in accordance with a schedule. By para. (ii), in so far as higher prices had been charged, the Air Ministry had to be paid the difference. That section of the arrangement, therefore, dealt, in part, with the future, and, in part, with the past. It was retrospective to July 1, 1939. As regards overcharges during that period, the agreement was to be carried out by means of the payment of a rebate to the Air Ministry by the aluminium manufacturers. As regards the period subsequent to Dec. 16, 1939, the prices to be charged to the aircraft manufacturers were to be reduced in accordance with the list. The reason why the aircraft manufacturers were not brought into this scheme of rebate, as stated in para. 5 of the case, was as follows :

> The customers of the company were mainly aircraft manufacturers who would sell to the Ministry of Aircraft Production, and if any payment was made to them in respect

of a reduction in price it would have to be passed on by those manufacturers to the Ministry. Therefore, if the payment was made direct to the Ministry, the same result was achieved, and a considerable amount of correspondence and bookkeeping avoided, and this was the reason for the method adopted.

The list was to be in force down to June 30, 1940. What was to happen in the future was not defined in this document, but reference was made to it in para. (iii) in the following words:

> Negotiations shall be entered into not later than June 30, 1940, by representatives of the Air Ministry and of the association in regard to prices to be charged for supplies of wrought light aluminium alloys after that date.

The parties, therefore, were contemplating that, just as in the period between July, 1939, and June, 1940, the prices to be charged to aircraft manufacturers were to be adjusted in accordance with a scale set out in the list, so, in future, the aluminium manufacturers should not be allowed to charge the aircraft manufacturers such prices as they thought fit, but that those too would be subject to the same sort of adjustment. The prices to be charged under the contemplated adjustment were to be prices operating as from June 30, 1940. It is important, for a reason which will appear presently, to notice that they were expected to operate as from that date.

It was held by MACNAGHTEN, J., that that provision in para. (iii) imposed a contractual obligation upon the company which subsequently matured into the sum of £2,743,469 in question in this case. I cannot find in this language any legal liability at all. It contemplates that negotiations shall be entered into. They might or might not be entered into. They might or might not result in agreement. Supposing they did not result in agreement, I cannot find that these words would impose upon this company, or its associates, any obligation to adjust prices by reference to some schedule imposed by the Aircraft Ministry, or imposed by an arbitrator, or imposed by a court, or a jury. That was not what was contemplated at all. The circumstances in which these matters were being dealt with were circumstances in which the Air Ministry was in a very strong position, and was in practice no doubt able to bring any recalcitrant company to heel. But that is not, as it seems to me, as counsel for the respondents [Sir Patrick Hastings] said, a consideration which makes it easier to spell out of these words some contractual obligation. On the contrary, it points rather in the other direction, and explains why it was that this matter was left to future negotiations instead of being tied up under some legal contract. The necessity of tying it up under a legal contract in practice may very well not have existed at all, and the Ministry may very well have preferred to do what it is common knowledge was always done wherever possible—to try and get an agreement on such matters as these, and not to impose a solution except as a last resort. There is no ground at all for straining these words beyond their plain and *prima facie* meaning.

I thought at one time in the course of the argument that it might be proper to extract from the language some sort of implied obligation to pay a reasonable sum, or to submit to the imposition of some schedule. On careful consideration, I have come to the clear conclusion that that would not be legitimate, and that the only effect of this was to state a pious intention for the future. What would have happened if negotiations had taken place and had broken down, or if the company had refused to negotiate, it is not necessary to inquire. There were means no doubt by which they could be brought to heel. That this involved a legal obligation to pay a sum subsequently to be quantified appears to require a forced construction of the language which the words will not bear.

The actual agreement which was ultimately entered into was dated Oct. 12, 1942. The negotiations contemplated by the 1939 letter did not take place, as there expected, not later than June 30, 1940, but took place at a much later date, and eventually led to the agreement of Oct. 12, 1942. Here comes what is a significant matter. When the 1942 agreement was made, it omitted to deal altogether with the period between June 30, 1940, and the beginning of the calendar year 1941. In other words, the prices which the aluminium manufacturers had actually charged to the aircraft manufacturers in respect of goods delivered during that period were allowed to stand, and no reduction or rebate was provided for in respect of that period. The operative part of the 1942 agreement began with the calendar year 1941. The agreement says:

2. The object of the agreement is the regulation of the prices of included products as hereinafter defined so as to secure that the profits derived from the manufacture and sale of these products are limited in a manner compatible with war conditions having regard to efficient and rapid production and the circumstances of the industry. 3. The most practicable method of securing this object is by means of a rebate on the prices charged for included products such rebate being payable by the member firms to the Minister. 4. The rebate will be separately ascertained for each member firm and will be expressed as a rate per £ sterling of sales of included products and will be determined as follows: (*a*) For the calendar year 1941 [which is the year we are concerned with] such an amount as will be designed so to reduce the prices of included products as to render the profits derived from the manufacture and sale of these products equivalent to a sum [which is described in the formula—I need not read it].

Accordingly, this agreement, as from Jan. 1, 1941, is providing for a rebate in respect of goods supplied to aircraft manufacturers in the year 1941, that rebate to be paid to the Minister. It is under that provision that the sum here in question was paid.

The liability to pay that sum began and had its origin in the agreement of 1942, and, until that agreement was reached, there was no legal liability to pay that, or any other sum.

Here I may refer to the period which was not covered by that agreement, namely, the 6 months between June 30, 1940, and Jan. 1, 1941. The Crown's argument, be it observed, is that the letter of Dec. 16, 1939, gave rise to a liability on the company. If it gave rise to a liability on the company to make a refund, it must have given rise to a liability to make a refund in respect of those 6 months. We are dealing with the capital employed in the business in 1941. Therefore, according to the argument, there was a liability on this company, under the 1939 agreement, to make a refund, or to charge a lower price in respect of its deliveries during the 6 months, and that was a liability which ought to be deducted in ascertaining the capital employed in the business. The fact that it was omitted in the 1942 agreement, on the Crown's argument, could not make it any less a liability under the 1939 agreement. What figure could be taken in ascertaining the liability in respect of that 6 months period? It turned out to be nil. Would it be right, therefore, in ascertaining the assets employed in the business in 1941 to say that those assets must be diminished by some sum referable to that 6 months period? I need not explain further the significance of that contention.

If I am wrong in thinking that no legal obligation to make lower charges, or to pay a rebate, is to be extracted from para. (iii) of the letter of Dec. 16, 1939, it would be necessary to consider what liability, if any, is to be extracted from these words. I cannot see on any argument how any legal obligation could be spelt out of these words. When I say this, I am not for a moment wishing to suggest that I have any doubts as to the correctness of my view that there is no legal obligation; but supposing I am wrong in that, I do not see how it could be possible to extract anything more than this; "We, the company, agree that, if in the future, as a result of negotiations, we can agree upon a schedule, we will make a rebate so as to bring what we have previously charged into line with the schedule." Be it observed that any such agreement as that would be purely conditional. It would only give rise to an obligation to make a payment, if negotiations successfully reached a conclusion, to be embodied in some schedule of prices. Could such a liability be an accruing liability within the meaning of the statute? A purely conditional liability, which may or may not mature, is not one which falls within that language, for this reason: Quite apart from the actual words, it would be contrary to the whole conception underlying these capital provisions because a purely conditional liability, which may or may not eventuate, is not a thing which affects a company's capital position, any more than a conditional receipt can affect its capital position. A receipt which may or may not be received, according as some event does or does not happen, is not a thing with which you can earn profits. It is the possibility of earning profits on your real capital that these capital provisions are concerned with. Therefore, in my opinion, even if one could spell such a hypothetical and conditional contract out of these words, the result would not give rise to an accruing liability within the meaning of the section. The correctness of that view can be seen by taking the converse case. Supposing in the agreement of 1942 some provision had been arrived at, the result of which was to entitle the company to receive a higher price in respect of some class of products for which it had undercharged in the past, could the additional chance of obtaining such a receipt, which would arise from the agreement of 1939, if it were construed in the way I am now assuming, be included as a debt owing to the company in the relevant accounting period ? It could not possibly be included as a debt because whether or not the company would receive it would be quite uncertain. It might or might not. Nobody can tell whether it would be received, or would not be received, in the year 1941. How could profits be earned on such a purely conditional and hypothetical asset as a right of that kind ? The company cannot earn anything by a hypothetical right of that nature. It could form no part of the company's assets. To repeat what I said earlier when I was considering the language of the Schedule, the capital of the company is treated as consisting of assets of three classes, that is to say, real assets, and assets which, in my view, are to be regarded as capable of earning profits, and, therefore, entitling the undertaking to receive the statutory allowance. "The amount of capital employed in a trade or business shall be taken to be"—and then come the three classes of assets, one of which is "debts due to the person carrying on the trade or business." How could one possibly include as a debt due to the company a sum, the right to which was left under the agreement of 1939 entirely in the air, and subject to conditions which might or might not be fulfilled, which would only have resulted in some receipt in the year 1942 ? It would be completely wrong to treat such a conditional claim as being a debt which must be regarded as part of the capital employed in the trade or business in the accounting period 1941. If it would be impossible to bring in an increase in price in the year 1941 for the purpose of increasing the company's capital for that year, it would be manifestly unfair if a liability of precisely the same character could be brought in for the purpose of decreasing its capital. The two things appear to me to be pendants to one another. Nothing can be treated as being a liability, unless its converse can properly be treated as a debt. The fact that the class of deductible debts was extended by the Act of 1940, and no corresponding extension of the class of debts to be included among assets was made, does not affect this argument.

That really covers the whole of the case, but the key to all the problems seems to me to be a proper appreciation of the fact that the capital provisions of this Act are dealing with realities, things which are really assets and really liabilities, and not with something which is for profit purposes (which is quite a different conception) to be artificially regarded as a liability to be written back into the accounting period.

In my opinion, the appeal should be allowed with costs here and below.

SOMERVELL, L.J. : In this appeal we are disagreeing with the judge, but the part of his judgment which led him to the conclusion to which he came is based on the construction of the letter of Dec. 16, 1939. The reasons which have led me to disagree with the construction which he put on that document have already been expressed by LORD GREENE, M.R., and I do not propose to repeat them. I content myself with saying that I agree with the judgment which has just been delivered.

COHEN, L.J. : I also agree. I will only add one word. I think that, if we were to adopt the construction which LORD GREENE, M.R., suggested merely in order to destroy the argument that might have been founded on it, we should be violating the elementary rule of construction that you must not make an agreement for the parties, but you must construe the agreement which they have made.

I agree so entirely with the construction LORD GREENE, M.R., has placed on the letter of Dec. 16, 1939, that I do not desire to add anything further.

Appeal allowed with costs. Case remitted to the Commissioners to deal with in accordance with the judgment of the court. Leave to appeal to the House of Lords.

Solicitors : *Kenneth Wright & Johnson* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *and* F. GUTTMAN, ESQ., *Barristers-at-Law.*]

Re F. de JONG & CO. LTD.

[Court of Appeal (Lord Greene, M.R., Morton and Somervell, L.JJ.), March 13, 14, 1946.]

Companies—Winding up—Voluntary winding up—Cumulative preferential dividends in arrears—Surplus assets after payment of debts and repayment of preference capital—Rights of preference and ordinary shareholders—Construction of articles of association.

The nominal capital of a private company was £25,000 divided into 10,000 preference shares and 15,000 ordinary shares of £1 each, of which 5,006 of the preference shares and all the ordinary shares had been issued and were credited as fully paid. By the company's articles, the preference shares carried the right to a fixed cumulative preferential dividend of 6 per cent. per annum on the capital paid up thereon and should " have priority as to dividend and capital over the other shares in the capital for the time being," but should not carry any further right to participate in the profits or assets. No dividend had been paid on the preference shares since 1940. In 1944, the company went into voluntary liquidation. After the creditors had been paid in full and the capital in respect of the 5,006 preference shares had been returned, the liquidator had in hand a balance of £3,000. The question to be determined was whether the preference shareholders were entitled to receive out of the surplus assets the arrears of the cumulative preferential dividend :—

Held : upon the true construction of the company's articles, on a distribution of the assets in a winding up the preference shareholders were entitled to priority in respect of the arrears of the cumulative preferential dividend.

Re Walter Symons, Ltd. (2) *applied.*

Re Wood, Skinner & Co., Ltd. (3) *distinguished.*

[**EDITORIAL NOTE.** The rights of preference shareholders to arrears of cumulative preferential dividends out of surplus assets on a winding up depend entirely on the construction of the particular article governing such rights. " Dividend " *prima facie* refers to a payment made to shareholders while the company is a going concern, but a construction of the article governing rights on winding up may lead to an opposite conclusion, and since in the earlier part of the article under consideration priority as to dividend is expressly dealt with, the reference later to " shall have priority as to dividend " is construed as referring to rights in a winding up.

As to Arrears of Preferential Dividend, see HALSBURY, Hailsham Edn., Vol. 5, p. 701, para. 1168, and pp. 702, 703, para. 1172 ; and for Cases, see DIGEST, Vol. 10, pp. 1007, 1008, Nos. 6987-6989.]

Cases referred to :

(1) *Re Crichton's Oil Co.*, [1902] 2 Ch. 86 ; 10 Digest 1006, *6980* ; 71 L.J.Ch. 531 ; 86 L.T. 787.

*(2) *Re Walter Symons, Ltd.*, [1934] Ch. 308 ; Digest Supp. ; 103 L.J.Ch. 136 ; 150 L.T. 349.

*(3) *Re Wood, Skinner & Co., Ltd.*, [1944] Ch. 323 ; 113 L.J.Ch. 215 ; 171 L.T. 37.

Appeal by an ordinary shareholder from an order of Cohen, J., dated Nov. 5, 1945. The facts are fully set out in the judgment of Morton, L.J.

Maurice Berkeley for the appellant.

John Pennycuick for the liquidator.

T. D. D. Divine for a preference shareholder.

Lord Greene, M.R. : Morton, L.J., will deliver the first judgment.

Morton, L.J. : The Company in this case, F. de Jong & Co., Ltd., was incorporated as a public company on Dec. 6, 1905, and was converted into a private company in 1908. The nominal capital of the company is £25,000, divided into 10,000 preference shares of £1 each, and 15,000 ordinary shares of £1 each. 5,006 preference shares and all the ordinary shares have been issued, and are credited as fully paid.

By art. 15 of the company's articles, it is provided as follows :—

> Of the 25,000 shares of £1 each into which the initial capital of the company is divided, 10,000 shares shall be preference shares, and 15,000 shares shall be ordinary shares. The said preference shares shall carry the right to a fixed cumulative preferential dividend at the rate of 6 per cent. per annum on the capital for the time being paid up

> thereon respectively, and shall have priority as to dividend and capital over the other shares in the capital for the time being, but shall not carry any further right to participate in the profits or assets.

We have also been referred to art. 121, 122 and 123 as bearing upon the matter which we have to consider, but, for my part, I do not find them of any assistance. They are:

> 121. The company in general meeting may declare the dividend to be paid to members according to their rights and interests in the profits. 122. No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend. 123. No dividend shall be payable except out of the profits of the company, and no dividend shall carry interest as against the company.

The dividend on the preference shares was duly paid in respect of the period up to June 30, 1940. No dividend has been declared upon the preference shares in respect of the period since that date.

By a special resolution of the company passed on May 30, 1944, it was resolved that the company be wound up voluntarily by way of a creditors' voluntary winding up. The liquidator has paid all the creditors of the company in full, he has returned the capital sum in respect of the 5,006 preference shares, and he has in hand a balance of over £3,000.

The question which we have to determine is stated in the summons accurately as follows:

> Whether upon the true construction of the articles of association of the company the holders of the preference shares are entitled to receive out of the net surplus assets of the company a sum equivalent to the amount of the arrears of the cumulative preferential dividend thereon accrued since June 30, 1940.

Prima facie, and in the absence of words making provision for it in the memorandum and articles of association, cumulative preference dividends are not ordinarily payable out of the assets in a winding up. It is a question of construction in each case whether the memorandum or articles provide that such arrears of dividend shall be payable in a winding up.

I turn again to art. 15. I think the vital sentence in that article falls into three parts, and I shall consider each part separately, and then their combined effect. The first part is this:

> The said preference shares shall carry a right to a fixed cumulative preferential dividend at the rate of 6 per cent. per annum, on the capital for the time being paid up thereon respectively.

That part of the sentence is perfectly clear. It is dealing with dividends payable out of the profits of the company, *i.e.*, dividends in the true and ordinary sense while the company is a going concern. It is to be noted that the word "preferential" clearly shows that the dividend on those preference shares is to have priority over the dividend on the ordinary shares.

The next part of the sentence is:

> . . . and shall have priority as to dividend and capital over the other shares in the capital for the time being.

To what does that portion of the sentence refer? To my mind it refers to the rights in a winding up. I say that for three reasons. First, the provision as to having priority as to dividend must, I think, refer to a winding up because the word "preferential" has already established the priority of the preference shareholders as to dividend, while the company is a going concern. Secondly, the words "priority as to capital" refer naturally to a distribution of the assets in the winding up.

It was suggested by counsel for the appellant that those words might refer to a return of capital, or a reduction of capital, while the company was a going concern. But I cannot think it is a natural construction to refer those words to that event. I think the natural construction is that they refer to the time when it is contemplated that the assets will be distributed, *i.e.*, a winding up.

The third reason is that one would expect to find, somewhere in the articles, provisions dealing, not only with the rights of the preference shareholders as to dividends while the company is a going concern, but also provisions as to what are to be the rights of the preference shareholders in a winding up. Unless the passage which I have just read deals with those rights in a winding up, there is no provision at all informing the preference shareholders what their rights in a winding up are to be.

Counsel for the appellant placed some reliance on the words "for the time being," but I do not think that they really assist his argument. The words "in the capital for the time being" refer merely, I think, to the capital at the time when it becomes relevant to consider what are the respective rights of the shareholders *inter se*. If that passage refers to a winding up, I think the word "dividend" must mean "arrears of dividend."

The *prima facie* meaning of dividend was thus stated by Stirling, L.J. ([1902] 2 ch. 86, at p. 95) in *Re Crichton's Oil Co.* (1):

> A dividend means *prima facie* a payment made to the shareholders while the company is a going concern . . .

But, in the present case, finding, as I do, this word in a passage which refers to a winding up, it seems to me that one must give the meaning of "arrears of dividend" to it; the priority as to dividend in the true sense having been already provided for by the first of the three passages.

I now come to the third passage:

> . . . but shall not carry any further right to participate in the profits or assets.

This passage to my mind rounds off the description of the rights of the preference shareholders, and prevents them from having (i) any more than their fixed cumulative preferential dividend out of the profits of the company, and (ii) any more than the arrears of dividend and return of capital in a winding up. In other words, it provides that the preference shareholders are to have no right to share in the surplus profits while the company is a going concern, or in the surplus assets in a winding up. So read, I think that the whole sentence is given a coherent and sensible meaning, and the whole of its provisions are well balanced and result in a comprehensive definition of the rights of the preference shareholders. That was the conclusion at which Cohen, J., arrived, and I entirely agree with his decision.

We were referred to two recent cases where the wording of the articles in question bore some resemblance to the article in the present case. I shall refer to them briefly because, as a rule, little assistance is gained from considering articles of different language when the court is dealing with a question of construction. In *Re Walter Symons, Ltd.* (2) which was a decision of Maugham, J., the relevant clause provided that the preference shares:

> . . . shall confer the right to a fixed cumulative preferential dividend at the rate of 12 per cent. per annum on the capital for the time being paid up thereon, and to half the distributable surplus profits which in respect of each year shall remain after paying or providing for the payment of a dividend for such year at the rate of 10 per cent. per annum on the capital for the time being paid up on the ordinary shares, and shall rank both as regards dividends and capital in priority to the ordinary shares, but shall not confer the right to any further participation in profits or assets . . .

Maugham, J., came to the conclusion that the word "dividends" in the phrase "shall rank both as regards dividends and capital in priority to the ordinary shares" was intended to refer to the arrears of dividend in a winding up. It is true that he placed some reliance upon the appearance of the word "rank" in that article, but his reasoning is, I think, of assistance in the present case. It is to be noted that he found no difficulty in deciding that the word "dividends" in that case meant arrears of dividend.

The other case is a decision of Cohen, J., in *Re Wood, Skinner & Co., Ltd.* (3). In that case Cohen, J., on the wording of the article before him, came to the conclusion that the preference shareholders were not entitled to have priority as to arrears of their dividends in a winding up. For my part, I see no reason to differ from either of these decisions. In *Re Wood, Skinner & Co., Ltd.* (3) the article was as follows:

> Such preference shares shall confer the right to a fixed cumulative dividend [not, it is to be noted, preferential dividend or preference dividend] of £6 per cent. per annum on the capital paid up thereon and shall rank both as regards dividends and capital in priority to the ordinary shares with power to increase the capital.

In that case it was not necessary for Cohen, J., to treat the words "shall rank both as regards dividends and capital" as conferring priority in respect of the arrears of the cumulative preferential dividend in a winding up, because, up to that point in the articles, there had been no statement that the preference shareholders were to have a preference dividend. I think that is a point which distinguishes *Re Wood, Skinner & Co., Ltd.* (3) from the present case, in which I think the court is almost driven to the conclusion that the words " shall have priority as to dividend " must refer to a winding up, since priority as to dividend while the company is a going concern has already been provided for.

In my view, this appeal should be dismissed.

LORD GREENE, M. R. : I entirely agree, and I cannot add anything.

SOMERVELL, L. J., : I agree.

Appeal dismissed. The costs of the liquidator to be paid out of the assets ; the appellant to pay the costs of the preference shareholder.

Solicitors : *Leonard Tubbs & Co* (for the appellant and the liquidator) ; *Gerrish & Foster* (for the preference shareholder).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-law.*]

R. *v.* MARIAN GRONDKOWSKI AND HENRYK MALINOWSKI.

[COURT OF CRIMINAL APPEAL (Lord Goddard, L.C.J., Hilbery and Sellers, JJ.), March 25, 1946.]

Criminal Law—Separate trial—Common enterprise—Discretion of judge—Judicial exercise—Matters for consideration—Attack by one accused on another—Prejudice—Test applied on appeal—Whether exercise of discretion resulted in miscarriage of justice.

The appellants had been tried and convicted jointly of murder. At the trial an application was made, on behalf of one of the accused, for a separate trial, but this was refused. It was clear from the material at the disposal of the trial judge that the case to be presented by the prosecution was that the two accused set out together to rob the dead man, and that the jury would be invited to find a common intention, not only to rob, but to overcome resistance if offered. It further appeared that both accused admitted that they were present at the killing, which was effected by shooting with a revolver ; that they afterwards stripped the dead body of the deceased's property ; that they went off with the booty, which they shared, and stayed together in the same lodging where the weapon was afterwards found in the room in which they were living. Each accused sought to put the blame for the actual shooting on the other and each denied that he intended to offer violence or even to rob. There was ample evidence from which the jury could infer a common intention to rob and to use such violence or other means as was necessary to effect that purpose :—

HELD : (i) *prima facie* where the essence of the case was that the accused were engaged on a common enterprise, it was proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be.

(ii) there was no rule of law that where it appeared that the essential part or an essential part of one accused's defence was or amounted to an attack upon another accused a separate trial should take place. The law was, and always had been, that this was a matter for the discretion of the judge at the trial, such discretion to be exercised judicially and not capriciously, both the interest of justice and the interests of the accused to be considered.

(iii) an attack by one accused on another was a matter which the judge should take into account in considering whether to grant a separate trial, but he was not, in those circumstances, bound to grant a separate trial.

(iv) the real test which must be applied by the Court of Criminal Appeal on a matter which was essentially one of discretion was, had the exercise of the discretion resulted in a miscarriage of justice ; if improper prejudice had been created, whether by a separate or by a joint trial, the court would interfere, but not otherwise ; in this case the court was satisfied that there had been no miscarriage of justice and the appeal, therefore, failed.

R. v. *Barnes, R.* v. *Richards* (1) *explained.*

[**EDITORIAL NOTE.** It has been said, in view of the decision in *R.* v. *Barnes, R.* v. *Richards* (1) that there is now a rule of law that there must be separate trials when an essential part of one prisoner's defence is an attack upon the other. The Court of Criminal Appeal now hold that this is merely an element which should be taken into account by the court in exercising what is entirely a matter of judicial discretion, to be exercised in the interests of justice as well as the interests of the prisoners.

For Separate Trials, see HALSBURY, Hailsham Edn., Vol. 9, pp. 161, 162, para. 229 ; and for Cases, see DIGEST, Vol. 14, pp. 225, 226, Nos. 2100-2110.]

Cases referred to :
*(1) *R.* v. *Barnes, R.* v. *Richards,* [1940] 2 All E.R. 229 ; 27 Cr. App. Rep. 154.
(2) *Youth* v. *R.,* [1945] W.N. 27.
*(3) *R.* v. *Gibbins & Proctor* (1918), 13 Cr. App. Rep. 134 ; 14 Digest 226, *2102.*
*(4) *R.* v. *Ahearne* (1852), 6 Cox C.C. 6 ; 14 Digest 330, *r.*
*(5) *R.* v. *Bradlaugh* (1883), 15 Cox C.C. 217 ; 14 Digest 226, *2106.*

Appeal against convictions for murder, before Croom-Johnson, J., One ground of appeal only is reported, *viz.*, the ground raised on behalf of one of the accused that he ought to have been granted a separate trial, which was asked for at the trial but refused. The facts are sufficiently set out in the judgment of the court delivered by Lord Goddard, L.C.J.

Melford Stevenson, K.C., and *Lewis Langdon* for the appellant Grondkowski.
J. D. Casswell, K.C., and *V. Durand* for the appellant Malinowski.
Anthony Hawke for the Crown.

Lord Goddard, L.C.J. [delivering the judgment of the court] : In dismissing this appeal the court intimated that they would put into writing their judgment with regard to the ground of appeal raised by counsel on behalf of the prisoner Malinowski that he ought to have been granted a separate trial. This was asked for at the trial but refused by Croom-Johnson, J.

When an application is made by a prisoner indicted jointly with another that he should be tried separately it must be made at the outset of the trial though not necessarily before the plea and the judge can only act upon the material then before him, which ordinarily will be the depositions and exhibits. In the present case, which was one of murder, it was clear from this material that the case to be presented by the prosecution was that the two prisoners set out together to rob the dead man and that the jury would be invited to find a common intention not only to rob but to overcome resistance if offered. It further appeared that both prisoners admitted that they were present at the killing which was effected by shooting with a revolver ; that they afterwards stripped the dead body of the deceased's property, that they then went off with the booty, which they shared, and stayed together in the same lodging where the weapon was afterwards found in the room in which they were living. Each prisoner sought to put the blame for the actual shooting on the other and each denied that he intended to offer violence or even to rob. There was ample evidence from which the jury could infer a common intention to rob and to use such violence or other means as was necessary to effect that purpose. Which of the two actually fired the fatal shot was therefore, immaterial, but of course the jury might have found that one or other was present with no intention of robbing the deceased but merely as a peaceful passenger in the car.

Prima facie it appears to the court that where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be. Suppose, for instance, that the defence of one was that he or she was acting under the positive duress of the other. It would be obviously right that they should be tried by the same jury, who might see in one prisoner a harmless or nervous-looking little man or woman, and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime. Another instance would be the case of a indictment against husband and wife ; the latter is no longer presumed in law to be acting under the coercion of her husband, but may nevertheless prove that she was. It would be very desirable, not only in the interest of the prisoners, but of justice, that the same jury should try them both, and it is by no means beyond the bounds of possibility that so far from finding that the wife acted under the coercion of her husband, it might be found that the husband was coerced by the wife, and if the same jury ought to try them, it would be absurd to say that they should be tried separately.

It is said that there is now a rule of law that where it appears that the essential part or an essential part of one prisoner's defence is or amounts to an attack upon another prisoner a separate trial should take place. This is said to be the result of *R.* v. *Barnes and Richards* (1), ([1940] 2 All E.R. 229, at p. 231) where Lord Hewart, L.C.J., in a judgment, which had not been reserved, used the words we have just quoted in giving the judgment of the court. In our opinion, that case is not to be read as laying it down that wherever it appears that one prisoner is going to lay the blame on the other, or another, there must be separate trials. The law is, and always has been, that this is a matter of discretion for the judge at the trial. The court so stated the law in this very case, and quite recently in *Youth* v. *R.* (2), the Judicial Committee said that the question of joint or several trials had always been left to the discretion of the presiding judge. The discretion, no doubt, must be exercised judicially, that is, not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners. If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. There is no case in which this has ever been laid down, and in the opinion of the court it would be most unfortunate and contrary to the true interests of justice if it were. The matter was well and, as we think, quite correctly dealt with in *R.* v. *Gibbins and Proctor* (3), where Darling, J. delivering the opinion of the court, said (13 Cr. App. Rep. 134 at p. 136):

> The rule is, that it is a matter for the discretion of the judge at the trial whether two people jointly indicted should be tried together or separately. But the judge must exercise his discretion judicially. If he has done so this court will not interfere, but that is subject to this qualification. If it appeared to this court that a miscarriage of justice had resulted from the prisoners being tried together it would quash the conviction. Here it is clear that Roche, J., exercised his discretion; he separated the defences carefully, pointing out what was evidence against one prisoner and not against the other. It is not enough to say that counsel could have defended them more easily if they had been tried separately. There is no ground for thinking that there was any miscarriage of justice. There may have been many things made clear to the jury which would not have been made clear if the prosecution had been embarrassed by having to deal with the two cases separately. The whole story was before the jury of what went on in the house where the two appellants lived together. There is no ground for thinking that either of them was improperly prejudiced by their being tried together.

In our opinion, the court in *Barnes and Richards*' case (1) are not to be taken as meaning more than that an attack by one prisoner on another is a matter which the court should take into account in considering whether to grant a separate trial, not that in those circumstances it is bound to. The dearth of authority on the subject in former days is probably due to the fact that the granting or withholding of a separate trial has always been treated as discretionary. In a passage in Sir John Kelyng's Reports, Crown Cases, para. 8, under the heading "High Treason," it is stated that where prisoners sever their challenges the panel may be severed, which means that the court could try them separately. So from that it appears that if the court of its own motion and not on the motion of the prisoners orders a separate trial, it is no ground for arresting judgment.

The case of *R.* v. *Ahearne* (4), a case in the former Irish Court of Criminal Appeal, shows that the court has a discretion to allow a case to proceed against one of several conspirators although the others, who have appeared and pleaded, have not been tried. The court refused to arrest the judgment, holding apparently that it was within the discretion of the judge to allow the case to proceed against one prisoner only. We may also refer to *R.* v. *Bradlaugh* (5). There, the defendant, who was indicted along with two others for publishing a blasphemous libel, applied for a separate trial on the ground that his co-defendants had already been convicted and were serving a sentence for publishing a similar libel in another number of the same newspaper, and that this would prejudice him in his defence, especially as he desired to call them as witnesses. LORD COLERIDGE, L.C.J., granted a separate trial because he thought there was a possibility of prejudice resulting to the defendant if he were tried along with two persons already convicted for substantially the same offence. We mention this only as illustrating another ground which a judge may properly take into account when dealing with such an application. The real test, after all, which must be applied by a Court of Criminal Appeal on a matter which is essentially one of discretion is, has the exercise of the discretion resulted in a miscarriage of justice. If improper prejudice has been created whether by a separate or by a joint trial, for as we showed at an earlier stage of this judgment prejudice might be caused to one prisoner by ordering a separate trial on the application of the other, this court will interfere but not otherwise. In this case we are satisfied that there has been no miscarriage, and this ground of appeal therefore fails.

Appeals dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellants); *Treasury Solicitor* (for the Crown).

(*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

C. *v.* C.

[BIRMINGHAM WINTER ASSIZES (Lewis, J.), April 1, 1946.]

Divorce—Nullity—Venereal disease—Doctor requested by patient to disclose confidential information to named person before presentation of petition—Duty of doctor—Matrimonial Causes Act, 1937 (c. 57), *s.* 7 (1) (*c*).

Medicine—Doctor and patient—Disclosure of confidential information—Patient suffering from venereal disease—Proceedings for decree of nullity contemplated—Request by patient for disclosure of confidential information to named person—Duty of doctor.

Where proceedings are contemplated for a decree of nullity under the Matrimonial Causes Act, 1937, s. 7 (1) (*c*), secrecy in connection with venereal disease clinics and a desire to avoid doing anything to diminish their efficiency or to infringe the confidential relationship between doctor and patient, though important considerations, do not justify a doctor in refusing to divulge confidential information to any named person or persons when asked by the patient so to do; and a doctor is not guilty of any breach of confidence in giving the information asked for in those circumstances.

[**EDITORIAL NOTE.** It is in the public interest that justice should be done, and for this purpose it may be necessary at times to override the confidential relationship existing between doctor and patient. This commonly arises when a doctor is called on *subpoena*, but the direction reported relates to disclosure of information before presentation of a divorce petition. The information in question had reference to venereal disease, as to which it is of public importance that medical secrecy should be observed, but the direction may be compared with *Garner* v. *Garner* (1920) 36 T.L.R. 196, where it was held that a doctor might be compelled to give evidence that a patient was suffering from venereal disease, although the statutory regulations enjoined absolute secrecy upon the medical man. It should be noted that the privilege of the patient may be waived, and it is not then open to the doctor to refuse disclosure.

AS TO OBLIGATION OF MEDICAL PRACTITIONERS TO GIVE EVIDENCE IN COURTS OF LAW, see HALSBURY, Hailsham Edn., Vol. 22, p. 321, para. 610; and FOR CASES, see DIGEST, Vol. 34, pp. 552, 553, Nos. 107, 108.]

DIRECTION, with the approval of LORD MERRIMAN, P., arising out of the hearing of a petition for a decree of nullity under the Matrimonial Causes Act, 1937, s. 7 (1) (*c*).

The circumstances which led up to the direction are fully set out by LEWIS, J.

Max Holdsworth for the petitioner.

Norman A. Carr for the respondent.

LEWIS, J.: In the course of the hearing of a petition for a decree of nullity on the grounds set out in the Matrimonial Causes Act, 1937, s. 7 (1) (*c*), a question arose upon which the parties requested me to give a direction in order that in similar cases in the future the difficulties, trouble and expense which they had incurred could be avoided. I was reluctant to give any direction in a matter which might concern the practice of the Divorce Court and, indeed, might have wide repercussions, but as LORD MERRIMAN, the PRESIDENT of the PROBATE, DIVORCE and ADMIRALTY DIVISION, was available, the parties, at my suggestion, agreed that I should consult him to obtain his views. This I have done, and he has authorised me to say that the view I am about to express has his approval.

The circumstances which gave rise to this application are as follows: The respondent, a short time after marriage, exhibited symptoms which caused her to go to a venereal disease clinic where, on Feb. 28, 1945, it was found she was suffering from a venereal disease in a communicable state. On this being discovered the petitioner went to the clinic and was examined, observed and treated by the same doctor who had examined and was treating the respondent. After some time it was found that there was no evidence whatever that the petitioner was suffering from this disease in any form. The respondent was not told that the disease from which she was in fact suffering was in a communicable form or, if it was, on Feb. 28, in a communicable form, how long it had been in that form. On Aug. 3, 1945, divorce proceedings having been instituted, the doctor was asked, *inter alia*, by the respondent to state particulars of her illness and if it was possible to say the approximate date of the commencement of that illness. Except to say that secondary syphilis was the disease, the doctor did not answer the respondent's request for the further information, which was vital to her and her advisers for the purpose of the defence of the proceedings. On or about Feb. 27, 1946, a questionnaire consisting of six questions was sent to the doctor signed personally by the petitioner and the respondent, with the approval of the solicitors for both parties, asking for information as to the condition of the respondent, information which was vital to the parties to have for the proposed presentation of their respective cases. If those questions had been answered in one way the petitioner would have failed in proving what it was necessary to prove, if he was to succeed, and the respondent would have been able successfully to defend the case. To put it in another way, the petitioner would have been unable to prove his case and the success of the respondent would have been a foregone conclusion. The doctor refused to give the information, stating that he would, if subpoenaed, give his evidence in court. He appeared in court and gave evidence and answered all questions put to him, and no sort of suggestion was made or could be made as to his good faith.

The question which arises out of these circumstances is: Is a doctor, when asked by his patient to give him or her particulars of his or her condition and illness to be used in a court of law, when those particulars are vital to the success or failure of the case, entitled to refuse and in effect to say: "Go on with your case in the dark and I will tell you in court when I am subpoenaed what my conclusions are"? In the present case the patient asked the doctor to give her this information and asked him also to give the petitioner that same information, with the object of their being placed in a position which would enable them to know whether or not the petitioner had a case against the respondent; in other words, to assist the course of justice. It is, of course, of the greatest importance from every point of view that proper secrecy should be observed in connection with venereal disease clinics, and that nothing should be done to diminish their efficiency or to infringe the confidential relationship existing between doctor and patient. But, in my opinion, those considerations do not justify a doctor in refusing to divulge confidential information to a patient or to any named person or persons when asked by the patient so to do. In the circumstances of this case the information should have been given, and in all cases where the circumstances are similar the doctor is not guilty of any breach of confidence in giving the information asked for.

This view, as I have said, has the approval of the PRESIDENT.

Solicitors: *O. L. Bergendorff*, Dudley (for the petitioner); *Turner, Bayley & Co.*, Dudley (for the respondent).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

TWENEY *v.* TWENEY

Applied. *Re* PEETE (*decd.*), [1 All E.R. 599.

[PROBATE DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), February 19, 1946.]

Divorce—Validity of marriage—Second marriage contracted ten years after disappearance of first husband—Exhaustive inquiries—No evidence that first husband dead at date of second marriage—Desertion by second husband.

The wife petitioned for dissolution of a second marriage, contracted in 1932, on the ground of desertion. Her husband by the previous marriage, contracted in 1920, had disappeared six months after that marriage and nothing had been heard of him again notwithstanding exhaustive inquiries. The question for determination was whether, in the absence of evidence that the previous husband was dead at the date of the second marriage, the court had jurisdiction to dissolve it as a valid marriage :—

HELD : (i) the second marriage, being unexceptionable in form and duly consummated remained a valid marriage until evidence was adduced that it was in fact a nullity.

(ii) the court ought to regard the petitioner as a married woman by that marriage until some evidence was given which led the court to doubt that fact.

(iii) desertion for three years and upwards before the presentation of the petition having been established, the petitioner was entitled to a decree.

[**EDITORIAL NOTE.** Two courses are open to a married woman whose husband has disappeared, and who desires to marry again. She may proceed under the Matrimonial Causes Act, 1937, s. 8, for a decree of presumption of death and dissolution of marriage, or she may, after making all possible inquiries, remarry, since the court, in any future proceedings, will regard a marriage contracted with proper formality as binding in the absence of evidence to the contrary. Dissolution of such a second marriage was granted by BATESON, J., in *Spurgeon* v. *Spurgeon* (2) and on similar facts PILCHER, J., now grants a decree.

AS TO PRESUMPTION OF DEATH GENERALLY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 629-634, para. 701 ; and FOR CASES, see DIGEST, Vol. 22, pp. 165-170, Nos. 1408-1460 ; and FOR PRESUMPTION OF DEATH IN DIVORCE PROCEEDINGS, see the Matrimonial Causes Act, 1937, s. 8, HALSBURY'S STATUTES, Vol. 30, p. 340.]

Cases referred to :

(1) *Parkinson* v. *Parkinson*, [1939] 3 All E.R. 108 ; [1939] P. 346 ; Digest Supp. ; 161 L.T. 251.

*(2) *Spurgeon* v. *Spurgeon* (1930), 46 T.L.R. 396 ; Digest Supp.

PETITION by the wife for divorce on the ground of desertion. The facts are fully set out in the judgment.

F. C. Wynn Werninck for the petitioner.

F. H. Lawton held a watching brief for the respondent.

PILCHER, J. : The petitioner was originally married on Dec. 26, 1920, to a man named Austin, who, after six months of married life, left her and he and his entire family disappeared and she never saw him again. The petitioner asks for a dissolution of a second marriage contracted by her on Mar. 19, 1932, with the respondent. Between 1922 and 1932 the petitioner heard nothing at all of her first husband, Austin, and nobody knows whether he is alive or dead. In the marriage certificate which records the second marriage she describes herself as a widow. I am perfectly satisfied, having heard the petitioner, that she made her situation abundantly clear, not only to the respondent before she married him, but also to the authorities, that she informed the Registrar of Marriages that she had been married before, that her husband had deserted her ten years ago, and that in spite of exhaustive inquiries she had never been able to find any trace of him.

Having listened to the facts the petitioner has been able to give me I am quite satisfied that she was deserted by her second husband and that the desertion took place round about Feb., 1941, *i.e.*, more than three years before the presentation of the petition. She is, therefore, entitled to a decree, on the facts which she has proved with regard to the present respondent's conduct, subject to the following point. I felt at one moment some doubt as to whether it was proper, in a case where the petitioner frankly gets into the witness box and says "I do not know whether my first husband is alive or dead, and not knowing that I contracted a second marriage which I now ask you to dissolve," to grant a decree. I had some doubts as to whether her proper course would not have been now to present a petition under the Matrimonial Causes Act, 1937, s. 8, asking for a decree against her first husband on the ground that his death was to be presumed as from the date of such decree. The effect of such a decree would be that the second marriage contracted as it was in 1932 would have been a nullity and there would have been no necessity for these proceedings. However, having had the advantage of hearing the arguments which have been addressed to me and having looked at such rather meagre authority as there appears to be on the subject, I am quite satisfied that on the facts of the present case the petitioner is entitled to the decree she asks for against the present respondent. The way in which the matter should be regarded is in my view this. The petitioner's marriage to the respondent being unexceptionable in form and duly consummated remains a good marriage until some evidence is adduced that the marriage was, in fact, a nullity. The position with regard to the evidence is that I am quite satisfied that the petitioner herself, during the years which intervened between the time when she was deserted by her first husband and the time she married her second husband, made every reasonable effort to ascertain the whereabouts of her first husband. I am satisfied that those efforts were all unsuccessful. I am also satisfied that for his own purposes the respondent, being anxious to free himself from the bonds of matrimony in the year 1941 on his own account, employed an inquiry agent, and that that inquiry agent made the most exhaustive enquiries in order to ascertain whether or not any news good or bad could be obtained in regard to the first husband Austin. He seems to have conducted his task with great diligence and considerable intelligence but all the efforts made proved abortive. It is a case in which both sides have done their best to get news of the first deserting spouse and have failed to do so.

Austin, if alive, would now be aged about 48 and it is quite possible that, being a seaman, he may now be dead. The only point which I have to decide is whether this was a good marriage. There is no question that the marriage between the petitioner and respondent was attended by all proper formalities. This court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman, until some evidence is given which leads the court to doubt that fact. In this connection I refer to *Parkinson* v. *Parkinson* (1), and to the summary of the argument in that case advanced by counsel. I have less hesitation in arriving at the conclusion at which I do because in *Spurgeon* v. *Spurgeon* (2) on very much the same facts BATESON, J., came to the same conclusion though without giving any reasons for his decision.

That, therefore, concludes the matter and the petitioner is entitled to the decree *nisi* which she seeks with an order for costs.

Decree nisi with costs.

Solicitors: *F. W. Perkins* (for the petitioner); *H. Bawden* (for the respondent).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Re NORTHERN GARAGE, LTD., *Re* NEWTON AND CATTERMOLES (TRANSPORT), LTD.'S CONTRACT.

[Chancery Division (Vaisey, J.), February 12, 13, 22, 1946.]

Emergency Legislation — Company — Debenture — Winding-up order — Receiver appointed by debenture-holder with leave of court after winding-up order — Status of receiver — Whether application by receiver for leave to sell necessary — Courts (Emergency Powers) Act, 1943 (*c.* 19), *s.* 1 (2) (*a*) (*v*).

In 1935, a company created a debenture under which the principal moneys were to become payable if (*inter alia*) an order was made for the winding up of the company, and the registered holder was empowered, after the principal moneys had become payable, to appoint a receiver with power of sale, the receiver to be the agent of the company. On Jan. 20, 1941, an order was made for the winding up of the company. The debenture-holder thereupon took out a summons under the Courts (Emergency Powers) Act, 1939, asking for leave to appoint a receiver of the property charged. The company and its provisional liquidator were respondents to the summons. On Feb. 5, 1941, an order was made giving the debenture-holder leave to appoint a receiver, and on Feb. 14, 1941, a receiver was appointed by him under the terms of the debenture. A question arose as to the status of the receiver and whether an order under the Courts (Emergency Powers) Act, 1943, was necessary to enable him to sell the property subject to the charge created by the debenture :—

Held : (i) under the order of Feb. 5, 1941, the debenture-holder was empowered to appoint a receiver on the terms of the debenture. The receiver was, therefore, validly appointed and he became on appointment, and continued to be, the agent of the company, notwithstanding the fact that the company was in liquidation.

(ii) since the receiver was the agent of the company, no further leave of the court was required under the Courts (Emergency Powers) Act, 1943, to enable the liquidator to sell the property subject to the charge.

Re Wood (5) *applied.*

(iii) in an assignment of leasehold property subject to the charge, the concurrence of the company by its liquidator was necessary.

[**EDITORIAL NOTE.** The authority of a receiver for debenture-holders to act as agent for a company ceases on winding up, but he does not thereby cease to be a receiver. The appointment of a receiver, therefore, which, following the terms of the debenture, makes him expressly the agent of the company, is valid, notwithstanding the existence of a liquidator for the company. It is held that the agency for the company conferred by the appointment is valid, since the order made under the Courts (Emergency Powers) Act, 1939, referred to the instruments of charge under which there was power to appoint a receiver to be agent of the company, and no objection was made by the company or liquidator, who were represented at the hearing.

As to Position of Receiver Appointed by Debenture-Holder, see HALSBURY, Hailsham Edn., Vol. 5, pp. 515, 516, para. 835 ; and for Cases, see DIGEST, Vol. 10, pp. 792, 793, Nos. 4974-4980.]

Cases referred to :

*(1) *Gosling* v. *Gaskell*, [1897] A.C. 575 ; 10 Digest 792, *4975* ; 66 L.J.Q.B. 848 ; 77 L.T. 314.

*(2) *Thomas* v. *Todd*, [1926] 2 K.B. 511 ; Digest Supp. ; 95 L.J.K.B. 808 ; 135 L.T. 377.

(3) *Re S. Brown & Son (General Warehousemen), Ltd.*, [1940] 3 All E.R. 638 ; [1940] Ch. 961.

(4) *Re Pound (Henry), Son, & Hutchins* (1889), 42 Ch.D. 402 ; 10 Digest 811, *5184* ; 58 L.J.Ch. 792 ; 62 L.T. 137.

(5) *Re Wood*, [1940] 4 All E.R. 306 ; *sub nom. Re Wood's Application*, [1941] Ch. 112.

(6) *Bennett* v. *Stone*, [1903] 1 Ch. 509 ; 40 Digest 122, *965* ; 72 L.J.Ch. 240 ; 88 L.T. 35.

(7) *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648 ; 40 Digest 120, *950* ; 78 L.J.Ch. 351 ; 100 L.T. 650.

Adjourned Summons by the purchaser of certain leasehold property charged by a debenture asking for a declaration that the vendor, being the receiver appointed by the debenture-holder after a winding-up order, in order to perform his part of the agreement for sale, was bound to obtain (*a*) the concurrence of the company acting by its liquidator in the assignment of the property to the purchaser, and (*b*) an order under the Courts (Emergency Powers) Act, 1943, authorising the receiver to realise the security constituted by the debenture under which he sold. The facts are fully set out in the judgment.

Michael Bowles for the applicant.

M. G. Hewins for the respondent.

Cur. adv. vult.

VAISEY, J.: This is a vendor and purchaser summons. A company called Cattermoles (Transport), Ltd., to which I will refer as "Cattermoles," is the applicant, and Arthur Freeman Newton is the respondent, the applicant being the purchaser and Newton the vendor.

The facts giving rise to the question now to be decided are as follows. On Jan. 22, 1935, a company called Northern Garage (King's Cross), Ltd., to which I will refer as "the company", created a debenture in favour of one Cecil Graham Keith for £1,250, charging with the payment of that sum its undertaking and all its property both present and future. Conditions indorsed on the debenture were to be deemed part of it, and these are for the most part in common form. I need refer only to two of them. Cl. 8 provides that the principal moneys should become payable in a number of specified events, one of which is the making of an order for the winding up of the company. Cl. 9 reads thus:

> At any time after the principal moneys hereby secured become payable the registered holders of this debenture may by writing appoint any person to be a receiver of the property charged by this debenture . . . A receiver so appointed shall be the agent of the company (who alone. . . . shall be responsible for his acts and defaults and liable upon all contracts and engagements made or entered into by him) and shall have power . . . (iii) to sell or concur in selling any of the property charged . . . and this condition shall take effect as and by way of extension of the provisions of [The Law of Property Act, 1925,] ss. 104-107 . . . which provisions so varied and extended shall be regarded as incorporated herein . . .

In 1938, one Walter Fedden became, and he still is, the registered holder of that debenture. There was another debenture of even date with, and similar in terms to the debenture which I have mentioned, and along with it issued to Keith and transferred to Fedden; but I can for the purposes of this present judgment ignore the existence of this other debenture, and also the existence of a legal charge executed by the company in favour of Fedden when he took over the two debentures in 1938, and a further charge executed in 1939, both in respect of the leasehold property which is the subject-matter of these proceedings, as I will presently explain.

On Jan. 20, 1941, an order was made for the winding up of the company, which thereupon became, and thereafter continued to be in liquidation. On Jan. 29, 1941, an application was made by summons in the Companies court intituled "*Re* [the company] and *Re* the Companies Act, 1929," and "*Re* the Courts (Emergency Powers) Act, 1939," whereby Fedden asked for leave to proceed to exercise all or any of the remedies which were available to him by way of (i) the appointment of a receiver of the property charged by way of (*a*) the legal charge of 1938, (*b*) the two debentures of Jan. 22, 1935, and (*c*) the further charge of 1939, (ii) the realisation of the said security and (iii) the institution of proceedings for foreclosure of sale. To that summons the company and the official receiver, as provisional liquidator of the company, were respondents, and on Feb. 5, 1941, the registrar, upon hearing the solicitors for the applicant and the respondents respectively, ordered that the applicant should be at liberty to proceed to exercise any remedy which was available to him by way of the appointment of a receiver of the property charged by the said legal charge, debentures, and further charge. I have it in evidence from the managing clerk of Fedden's solicitors, who attended when the order was made, that the registrar refused to make any order as regards the realisation of the security on the ground that it was unnecessary and that a receiver, when appointed, would have the requisite power to sell. On Feb. 14, 1941, Fedden, by writing under his hand, appointed Newton (the respondent to the present summons) to be receiver of the premises charged by the debentures upon the terms, and with and subject to the powers and provisions contained in the conditions indorsed thereon.

The company at all material times owned some premises known as the Great Northern Garage in the Pentonville Road, Clerkenwell, which it held under a certain underlease dated Dec. 31, 1932, for a term of 21 years, expiring at Christmas, 1953, at a yearly rental (after the first two years) of £1,500. These premises had in 1937 been sub-underleased at an enhanced rental to Cattermoles, the applicant in the present proceedings, but the fact that Cattermoles is sub-underlessee of the said premises would seem to have no direct bearing on the question which I have to decide. These premises were covered by the general charge created by the debentures, and the legal charge of 1938 and further charge of 1939 expressly relate to them, as I have said.

By an agreement dated Sept. 21, 1945, and made between Newton, as vendor of the one part and Cattermoles, as purchasers, of the other part, the vendor agreed to sell to Cattermoles the premises comprised in the underlease (together with certain fixtures) at the price of £3,285. Cl. 2 of the said agreement states that the vendor was selling "as receiver on behalf of the debenture-holder." Under cl. 9, the purchase was to be completed on Oct. 15, 1945, when the balance of the purchase money—*i.e.*, the balance after allowing for a prepaid deposit—was to be paid. Other provisions of cl. 9 are:

> (2) Upon such payment the vendor and all other necessary parties (if any) shall execute a proper assignment of the property to the purchasers or as they shall direct . . . (3) The purchasers paying the balance of their purchase money shall as from that day be let into possession and shall pay all outgoings . . . and up to that day all rents rates taxes and other outgoings shall if necessary be apportioned . . . and the balance shall be paid by or allowed to the purchasers on completion; (4) If from any cause whatever (other than the wilful default of the vendor) the purchase shall not be completed on that day, that is on Oct. 15, 1945, the purchasers shall pay to the vendor interest on the balance of the purchase money . . . at the rate of £5 per cent. per annum from that day until the actual completion of the purchase but the vendor shall have the option of taking the rents and profits of the property (less outgoings) up to the date of actual completion instead of the said interest and the purchasers shall not be entitled to any compensation for the vendor's delay or otherwise.

The sale was subject to, and with the benefit of, the sub-underlease to Cattermoles.

The parties to the agreement, namely, Newton, the receiver, as vendor and Cattermoles as purchasers, are at variance on three points, which are raised in this summons by Cattermoles asking for (i) a declaration that the respondent in order to perform his part of the said agreement is bound to obtain (*a*) the concurrence of the company (acting by its liquidator) in the assignment of the property to Cattermoles, and (*b*) an order under the Courts (Emergency Powers) Act, 1943, authorising the respondent to realise the security constituted by the debenture under which he sells, and (ii) a declaration that, as from one of two alternative specified dates, the respondent ceased to be entitled under cl. 9 (4) of the agreement to claim interest on the purchase money or to take the rents and profits of the property in lieu of interest, and that on completion the rents and profits ought to be credited and the outgoings debited to Cattermoles as from that date.

The receiver's counsel, at the hearing, withdrew for the first time the contention of his client that the concurrence of the company in the assignment was unnecessary, and he was, in my judgment, right in doing so, for I think that the receiver's powers do not, in any view of the matter, extend to the effective assigning of the property for the residue of the term created by the underlease. But the substantial point in the case is as to the status of Newton as receiver, and it seems to me to be not without difficulty. Four propositions may be suggested for consideration, as follows: (i) that he was never validly appointed to be receiver; (ii) that he was validly appointed, and became on appointment, and continued to be, the agent of the company; (iii) that he was validly appointed and became on appointment and continued to be the agent of Fedden, who appointed him; and (iv) that he was validly appointed, without becoming the agent of anybody. It seems to me that one of these propositions must be right. They are mutually exclusive, and I think that I have to choose between them.

As regards proposition (i), the case for the total invalidity of Newton's appointment rests upon the view that, upon the order for the winding up of the company being made, it ceased to be possible for Fedden or anyone else to appoint a person to act as agent for the company, and that the debenture in the present case (both in its express terms and according to the statutory provisions which it incorporates) confers no power of appointing a receiver except upon the footing that such an agency will be created and arise. But in *Gosling* v. *Gaskell* (1) and *Thomas* v. *Todd* (2), where the sequence of events was reversed, the appointment of the receiver coming first and the winding-up order or resolution second, though it was held that the receiver ceased to be the agent of the company on the winding up, it was not held that he ceased to be receiver. See also *Re S. Brown & Son* (*General Warehousemen*), *Ltd.* (3). It seems to me that if a receiver can continue to be receiver after the loss of the prescribed agency, he could equally well become receiver without ever obtaining such agency. I suppose that the receiver's contemplated position as agent of the mortgagor must be regarded as not of the essence of his position and status as receiver. However that may be, I am certainly not prepared to hold that a power to appoint a receiver is destroyed by, and cannot be exercised after, a winding-up order, though its efficacy is, of course, much impaired thereby, seeing that a receiver must obtain the leave of the court if he wishes to interfere in any way with the progress of the liquidation or the possession of the liquidator : see *Re Henry Pound, Son & Hutchins* (4).

I have thus to choose between propositions (ii), (iii) and (iv), and in making that choice I must plainly have regard to the particular circumstances of the present case. The order of Feb. 5, 1941, under the Courts (Emergency Powers) Act, 1939, was made in the presence of the representatives of the company and the liquidator, and referred in terms to all the four instruments of charge under the express or implied terms of each one of which Fedden as applicant, had and was expressed to have power to appoint a receiver, such receiver to be the agent not of Fedden but of the company. No objection was made to the order on the part of the company or the liquidator, and I must assume that they were fully acquainted with the contents of the documents, and were aware of their legal effect. What conclusion am I to draw from this state of facts ? I think that, on the whole, I must read the order as empowering Fedden to appoint a receiver according to the tenor of the documents, *i.e.*, a receiver who was to be the agent of the company notwithstanding the fact that it was in liquidation. In coming to that conclusion, adopting proposition (ii) and rejecting propositions (iii) and (iv), I have had to consider whether I ought to do so without having the company and the liquidator before the court. They are not, however, to my mind, really concerned, because the only result of my decision will be to enable the receiver as agent of the mortgagor company to realise the security without any further leave from the court under the Courts (Emergency Powers) Act, 1943, being required : see *Re Woods' Application* (5). There is no doubt, I think, that if he were agent of the mortgagee (*i.e.*, Fedden) or if he were in the anomalous position of being the agent of neither party, as indicated in *Gosling* v. *Gaskell* (1) and in *Thomas* v. *Todd* (2), such leave would have been necessary ; see the observations in *Re S. Brown & Son* (*General Warehousemen*) *Ltd.* (3) and *Re Wood's Application* (5). Had it not been for the order of Feb. 5, 1941, and the particular circumstances in which it was made, I should have come to the opposite conclusion and held that the receiver became on his appointment the agent of Fedden, or, at any rate, that he did not become the agent of the company; see *Thomas* v. *Todd* (2). Those circumstances, however, to my mind, make all the difference.

I shall therefore deal with the first paragraph of the summons by ordering as follows :

> The respondent by his counsel admitting that he is bound to obtain the concurrence of Northern Garage (King's Cross) Ltd. acting by its liquidator in the assignment of the property to the applicant Declare that the respondent was not and is not bound to obtain any further order under the Courts (Emergency Powers) Act, 1943, to enable him to sell and with such concurrence to assign the said property to the applicant.

I should like to add that the point which I have decided may well have been regarded as a doubtful one, and that it would in my judgment have been better if the order of Feb. 5, 1941, had expressed what was the admitted intention of all parties, namely, that the mortgagee (Fedden) was to be at liberty to realise the security either by himself, or by the receiver whom he was thereby given leave to appoint.

The answer to the second paragraph of the summons depends upon whether the delay in completion is or is not due to the wilful default of the vendor—a question which must, according to the reported cases, be solved by a consideration of the particular facts of the case: see *Bennett* v. *Stone* (6), and *Re Bayley Worthington & Cohen's Contract* (7). It is true that the joinder of the company in the assignment was refused, wrongfully, and the applicant's right to it not admitted until the hearing of the summons, but on the other point the applicant's contention was (as I have held) not well-founded. The cause of the delay was, therefore, contributed to in some measure by each of the parties, though it was really due to a kind of latent uncertainty in the respondent's title, and I shall declare that the respondent has not so far ceased to be entitled to the benefits of cl. 9 (4) of the agreement by any wilful default on his part within the meaning of that clause. I realise, of course, that the existence of the sub-underlease makes the operation of the clause somewhat onerous to the applicant in the event of the respondent electing to take the rents and profits in lieu of interest—as he almost certainly will. But that cannot affect the rights of the parties. A B

I think, however, that the respondent ought, in the circumstances, to pay the applicant's taxed costs of the summons, and I so order.

Declaration accordingly.

Solicitors: *Robbins, Olivey & Lake* (for the applicant); *Ridsdale & Son*, agents for *William Addiscott*, Berkhamsted (for the respondent.)

[*Reported by* B. Ashkenazi, Esq., *Barrister-at-Law.*] C

PARGETER *v.* PARGETER

[Court of Appeal (Tucker and Cohen, L.JJ., and Wynn-Parry, J.), March 14, 15, 1946.] D

Husband and Wife—Legal proceedings—Claim for possession of house, the matrimonial home—No relationship of landlord and tenant—Proceedings not properly constituted—Married Women's Property Act, 1882 (c. 75), *s.* 17—*County Court Rules, Ord. VI, r.* 7 (1).

Landlord and Tenant—Husband and wife—Claim for possession of house, the matrimonial home—No relationship of landlord and tenant.

The appellant husband and the respondent wife were living apart, the respondent and two children occupying a house owned by the appellant. In a county court action originated by means of a plaint the appellant sought to recover possession of the house under the Rent and Mortgage Interest Restriction (Amendment) Act, 1933, Sched. I, para. (*b*), or, alternatively, on the ground that the respondent occupied the premises under a tenancy at will which had been terminated by notice to quit. The county court judge held that there was no evidence to support the claim under para. (*b*) of the 1933 Act; that there was no relationship of landlord and tenant between the parties; that the action was in effect one of trespass by husband against wife and entered judgment for the respondent:— E F

Held: (i) there was no evidence to justify the claim in the form in which it was brought and the county court judge was correct in coming to the conclusion that there was no relationship of landlord and tenant between the parties and that the basis upon which the claim had been put before him was misconceived. G

(ii) in a properly constituted proceeding by originating application under the Married Women's Property Act, 1882, s. 17, evidence of an entirely different nature would have had to be adduced before him for consideration.

(iii) it was not possible for the court to take the course adopted in *Bramwell* v. *Bramwell* (1), because it was by no means certain, on the evidence adduced before the county court judge, that an order for possession of the premises was the only proper order which could have been made in proceedings properly constituted. H

(iv) the proper order for the court to make, therefore, was an order that the appeal should be dismissed, because, on the materials before him and having regard to the nature of the action brought, the county court judge came to a proper determination.

[**EDITORIAL NOTE.** It was held by LORD DENMAN, C.J., in *Doe d. Merigan* v. *Daly* ((1846) 8 Q.B. 934), that there is no abstract rule of law prohibiting a husband from maintaining an action of ejectment against his wife. It was suggested, however, by GODDARD, L.J., in *Bramwell* v. *Bramwell* (1) that an action in a county court by a husband against a wife for recovery of land does not lie, since this, being equivalent to the old action of trespass, is an action of tort. The powers of amendment given by the C.C.R. Ord. VI, r. 7, appear to make this a question of academic interest, but there seems to be no doubt that the matter could be raised in the county court by means
A of an originating application under the Married Women's Property Act, 1882, s. 17.

AS TO THE MARRIED WOMEN'S PROPERTY ACT, 1882, s. 17, see HALSBURY'S STATUTES, Vol. 9, p. 381.

Cases referred to :

*(1) *Bramwell* v. *Bramwell*, [1942] 1 All E.R. 137 ; [1942] 1 K.B. 370 ; 111 L.J.K.B. 430.

B APPEAL by the plaintiff from an order of His Honour JUDGE COLLINGWOOD, made at Epsom County Court, and dated Dec. 12, 1945. The facts are sufficiently set out in the judgment of TUCKER, L.J.

W. Summerfield for the appellant.

W. R. Lawrence for the respondent.

TUCKER, L.J. : This is an appeal by the plaintiff from a decision of His
C Honour JUDGE COLLINGWOOD, given at the Epsom County Court, whereby he made an order adjudging that the plaintiff was not entitled to recover possession of the land mentioned in the particulars annexed to the summons in the action, *i.e.*, 10, Woodcroft Avenue, Sutton.

The action was an ordinary county court action originated by means of a plaint, and a summons was served on the defendant in which the plaintiff, who is the husband of the defendant, was seeking to recover possession of the
D premises under the procedure authorised by the County Courts Act, 1934, s. 48. By his particulars of claim the plaintiff claimed possession on the ground that there had been a tenancy between himself and his wife, that she was there as a tenant at will, and that that tenancy had been put an end to by notice to quit, dated Aug. 27, 1945. Therefore, on the face of it, it was an ordinary county court action, and it was claiming recovery of the possession of land on the basis of a relationship of landlord and tenant which had been
E determined.

The county court judge heard the evidence of the plaintiff and of the defendant, and, no question having been raised as to the receipt of the notice which was relied upon as a notice to quit, he gave a judgment, the notes of which are as follows :

> The grounds on which it was contended that the plaintiff was entitled to possession
> F were (1) that the tenant (the wife) and the lodger had been guilty of conduct which brought the case within para. (*b*) of the 1st Schedule to the Rent and Mortgage Interest Restriction (Amendment) Act, 1933.

The judge rejected this contention on the facts, and no complaint is made with regard to his finding thereon. The notes continue :

> Alternatively that she was a tenant at will . . . I further hold that there was no relationship of landlord and tenant between the parties and that the action was in
> G effect one of trespass by husband against wife.

And on that he entered judgment for the defendant.

Now the case has come to appeal, and counsel in appealing says he concedes or he is inclined to concede, that these proceedings before the county court were not framed as they should have been. At any rate, he very properly draws our attention to *Bramwell* v. *Bramwell* (1), in which GODDARD, L.J.,
H indicated that he was inclined to take the view, but he did not consider it necessary to decide it, in the circumstances of that case, that an action for the recovery of land is one which is equivalent to the old action of ejectment, that it is a species of action of trespass, and, as such, an action of tort which cannot be brought by a husband against his wife, and that the proper procedure in such cases is by way of originating summons in the High Court, or, as it is called, originating application in the county court under the Married Women's Property Act, 1882, s. 17. But it is to be observed in that particular case, although GODDARD, L.J., adumbrated his doubts with regard to that during the course

of the argument of counsel, the other members of the court expressed no view about the matter and, in fact, they overruled the decision of the county court judge and made an order for possession of the premises in favour of the husband against the wife despite the fact that the proceedings in the county court had been framed by way of an ordinary action and not as an originating application. They did not express any view with regard to the doubts raised by GODDARD, L.J., and it is to be observed that, although he expressed those doubts, GODDARD, L.J., agreed in terms with the order that the other members of the court made in that particular case. What their view was with regard to the doubts that he expressed we do not know, but it may well be that they did not deal with that matter because it had not been raised by counsel in arguing the case, and it had not been raised in the county court proceedings nor had it been raised by the county court judge himself. However that may be, they did, in that particular case, make an order for possession of those premises on the basis that, on the facts before them and the uncontradicted evidence before them, that was the proper order and the only order which could have been made on the merits. In considering the course taken by the court in that case, although I do not think this particular rule was brought to their notice, it is to be observed that the County Court Rules, Ord. VI, r. 7 (1), provides:

> Where proceedings are commenced by action which ought to have been commenced by originating application, the judge may allow the proceedings to be continued in accordance with the procedure prescribed for an action, or may order that the proceedings shall be continued in accordance with the procedure prescribed for an application, and that any amendments which he thinks necessary or desirable for that purpose shall be made.

It may well be that the Court of Appeal in that case were merely dealing with that matter under that rule in a way in which the judge could have dealt with it himself if the matter had been raised before him. However that may be, the order made in that case was made on the basis that on the admitted facts that was the only proper order which could have been made.

When we turn to the facts of the present case, it is apparent that there was no evidence to justify the claim in the form in which it was brought before the county court judge and, in my view, he was quite correct in coming to the conclusion that there was no relationship of landlord and tenant between the parties at all and that the basis upon which the claim had been put before him was misconceived; but, in my view, it is not possible for us in this case to take the course which was taken by the Court of Appeal in *Bramwell* v. *Bramwell* (1) because it is by no means certain on the evidence which was adduced before the county court judge that an order for possession of these premises was the only proper order which could have been made on that evidence in proceedings properly constituted, for this reason, that in this case matrimonial differences had arisen between the husband and wife, the husband had left his wife in the matrimonial home with his two children, and, according to his evidence, he bargained or arranged with her that she might remain in the house on condition that she looked after the children, and in fact he allowed her a certain sum of money which was paid by the week. So that in any proceedings by him to recover possession of the premises on some basis other than that of landlord and tenant, it required consideration of the nature of the original bargain made between them—whether it was a bare licence or whether it was a licence coupled with a condition—and whether it had been properly revoked. None of those matters have been dealt with or considered by the county court judge here. I am by no means to be taken as criticising him for not considering those matters, because they were not within the scope of the claim that had been brought before him, but they are obviously matters which may require consideration in a properly constituted proceeding. Therefore, in my view, the proper order for us to make in this case is simply an order that the appeal should be dismissed, because on the materials before him and having regard to the nature of the action brought the judge came to a proper determination.

Counsel for the wife concedes that in a properly constituted proceeding, under the Married Women's Property Act, 1882, s. 17, it would be open to the husband to rely upon the matters which I have indicated and to invite the decision of the county court judge thereon. In view of that statement on his part, it is not necessary, I think, for us to express any view as to the nature of the proceedings before the county court judge which would be the proper means of bringing this matter before him.

I express no view with regard to the point raised by GODDARD, L.J., save to say this, that whether or not these matters can be raised in the county court by way of summons in an action for the recovery of possession appears to me rather an academic question having regard to the wide powers of amendment A possessed by the county court under Ord. VI, r. 7; but, however that may be, there can in my view be no question that these matters can be raised by means of an originating application in the county court under the Married Women's Property Act, s. 17.

In my view for these reasons this appeal fails and must be dismissed.

COHEN, L.J.: I agree, and I only wish to add one word. I observe that at B the end of his judgment the county court judge said:

> I further hold that there was no relationship of landlord and tenant between the parties and that the action was in effect one of trespass against the wife.

I do not think that the county court judge was intending to say or to decide that there could be no cause of action by the husband against the wife either by direct proceedings, or, if they were competent, under the Married Women's Property Act, s. 17. I think that what he meant by those words was that that C was the only possible action and that the action as framed must necessarily fail. I do not think he was intending to decide anything except that which was raised before him by the pleadings in the suit. Therefore the matter will come before the county court judge if the husband brings some such proceeding as my Lord has indicated, free and unfettered by what has been said here, and I do not desire to say anything which may prejudice the conclusion which the D judge may reach on the subject when it does come before him.

WYNN-PARRY, J.: I agree.

Appeal dismissed.

Solicitors: *Bateman & Co.* (for the appellant); *Jacques, Asquith & Jacques* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

E

JOHNSON *v.* JOHNSON.

F [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Willmer, J.), February 25, 26, 1946.]

Husband and Wife—Separation agreement—Provision for payment of specific sum weekly—Payments without deduction of income tax—Stopping of weekly payments—Wife's action for wilful neglect to maintain—Order for maintenance—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 19.

G Under a separation agreement, dated Feb. 4, 1935, the wife was to receive from her husband 30*s.* a week. In 1940 this sum was, by consent of the wife, reduced to 25*s.* a week. The husband, although he had received a married allowance for income tax purposes, had failed to deduct and retain the tax due on the weekly payments made to his wife until Aug., 1945. On Aug. 2, 1945, the wife received a letter from the husband's accountant stating that, as payments had been made to her without tax deductions, H the husband was being advised to withhold any further payments for four months. No payments having been made since, the wife took out a summons for wilful neglect to maintain and the husband was ordered to pay 40*s.* a week. From this order the husband appealed on the ground that, in discontinuing the payments under the separation agreement, he was acting strictly within his legal rights:—

HELD: (i) the husband's liability to maintain his wife was a continuing liability; he was, therefore, not entitled to withhold the weekly payments under the separation agreement.

(ii) the order for maintenance was rightly made though the amount awarded to the wife ought to be reduced to 30*s*. a week in view of the husband's income tax liabilities.

Taylor v. *Taylor* (1) *distinguished.*

[**EDITORIAL NOTE.** In this case a husband claims that, having made weekly payments under a separation agreement without deduction of tax, he is entitled to deduct this tax from subsequent payments in the same financial year, and so, in effect, to pay nothing under the deed until the arrears of tax for that year are accounted for. His claim is held to be based on a misunderstanding of *Taylor* v. *Taylor* (1) and the court further holds that even if he had a legal right to make the deduction, it would afford him no answer to proceedings for wilfully neglecting to maintain his wife.

As to Deduction of Tax, see HALSBURY, Hailsham Edn., Vol. 17, p. 237, para. 477 ; and for Cases, see DIGEST, Vol. 28, pp. 72, 73, Nos. 381-391.]

Case referred to :

*(1) *Taylor* v. *Taylor*, [1937] 3 All E.R. 571 ; [1938] 1 K.B. 320 ; Digest Supp. ; 107 L.J.K.B. 340.

Appeal by the husband from an order made by a metropolitan magistrate on the wife's summons for wilful neglect to maintain. The facts are fully stated in the judgment of Lord Merriman, P.

B. B. Gillis and *H. V. Lloyd-Jones* for the appellant.

G. R. King Anningson for the respondent.

Lord Merriman, P. : This is an appeal from the metropolitan magistrate, sitting at North London. On Nov. 2, 1945, he made an order upon a wife's summons, based upon wilful neglect to maintain in her favour, for the sum of 40*s*. a week. The appeal has been well argued on both sides upon the basis, so far as the husband's case is concerned, that that order was made without any evidence upon which a finding of wilful neglect could be based. It was common ground that from July 28, 1945, the husband had not paid any maintenance at all to the wife, but it was said that he refrained from doing so (in circumstances to which I will more particularly allude in a moment) by virtue of the law relating to income tax, and that as he was acting strictly in accordance with his legal rights there could be no element of wilfulness in his admitted failure to pay maintenance. There arose, also, apart from this argument upon the merits, the question whether the amount of 40*s*. was not, in any view, excessive.

I think it would be convenient now to say that counsel for the respondent wife has submitted to a reduction to 30*s*. (assuming that any award is possible) with reference solely to certain income liabilities which have accumulated from the husband's neglect, as will be seen from the necessary recital of the facts. I do not propose, therefore, to say anything more on the question of amount, particularly as counsel for the appellant husband has expressed his willingness that the question of amount should be dealt with upon that basis.

Upon the much more important question of the merits, the facts are these. By an agreement of separation dated Feb. 4, 1935, it was mutually agreed that these spouses should for the future live apart from each other, and that the husband should pay the wife the weekly sum of 30*s*. The husband punctually paid this sum weekly, until, in 1940, upon the plea that his financial circumstances had worsened (he was a master builder, and one can well understand that in 1940 that statement may have been true) the wife consented to a reduction of the weekly sum to 25*s*. But, according to her evidence, which the magistrate must be taken to have accepted in this respect, the husband promised that if things improved he would increase her money, and, I suppose, we may take it (particularly in view of the amount selected by the magistrate) that he was satisfied that the affairs of master builders in general and of this master builder in particular had improved by Aug., 1945. Although this agreement is for the payment of a weekly sum, it is common ground, and, indeed it could not possibly be disputed, that for income tax purposes it comes within the words " annuity or other annual payment " which occur in the Income Tax Act, 1918, All Schedules Rules, r. 19. Accordingly, on payment of any sum under the agreement on account of this annual payment, the husband is by that rule entitled to deduct and retain the income tax payable thereon, on the basis that the annual payment is to be made out of profits or gains brought into charge to tax ; and the person receiving the annual payment, namely, the wife, is not liable to assessment, but, in turn, she is entitled to recover the tax or so much of the tax as her own personal circumstances admit, and, to put it shortly, the husband is obliged to assist her in so doing.

Nothing was said in this agreement at all about tax; there was no provision that the sum should be paid tax free; and, therefore, the ordinary rules, including that to which I have referred, applied. But whatever might be said about the application of that rule before Feb. 4, 1935, this is certain, that as from that
A date the husband ceased to be entitled to any allowance in respect of the fact that he was a married man living with his wife; nevertheless, from that date until, apparently, somewhere about the end of July or the beginning of Aug., 1935, he had uninterruptedly been claiming the married allowance and had been allowed it in his computation of income tax. This circumstance had come to the notice of the Inland Revenue Authorities, who at or about that time brought him to book for it. And another thing is clear, too—nothing having been said
B about tax, the husband, content, no doubt, with the fact that he was receiving £60 a year by way of married allowance, had not deducted and retained the tax on the 30*s.* or the 25*s.* as the case might be which he was paying week by week to his wife. Having been pulled up short by the Inland Revenue in connection with this unfounded claim which he had been making for about 10 years, he not unnaturally consulted an accountant versed in these matters, and it was no doubt the accountant who pointed out to him that although on the one hand
C he had been obtaining an allowance from the Revenue to which he was not entitled, on the other hand he had failed, as against his wife, to deduct and retain the tax as he was entitled to do.

That brings me to the point at which it is said that the husband began wilfully to neglect to maintain his wife. The payment of 25*s.* was made as usual, and accepted as usual without protest, on July 28, 1945, but on Aug. 2 the
D accountant for the husband wrote to the wife and explained what had occurred. I need not read the letter, as I have already given the substance of the facts, but he claimed accordingly to make the appropriate adjustments to the beginning of the current financial year, commencing on Apr. 6, 1945, and added this:

> Accordingly, we have advised our client that he must [I emphasise the word "must"] withold any further payments to you in the present year until the sum paid to date represents the net figure of 12*s.* 6*d.* a week, that is to say, no further payments can be
> E made to you for four months, after which the weekly sum will be 12*s.* 6*d.*

Then they regretted the inconvenience that this would cause her, but (perhaps a little optimistically) felt sure that she would understand.

Before I go any further and deal with the point of law which arises, I wish to make this observation, taking the case at the very highest at which it is put by the husband, and, indeed, on the basis on which alone the husband can wholly succeed in this appeal. But, perhaps, I had better say at once what
F the husband's contention is, that so long as one penny of the annual payment (that is, of the 25*s.* multiplied by 52 weeks) remains unpaid, he is entitled to deduct from any subsequent payment not merely the tax upon the outstanding payments, but also upon the payments which have already been made in full; that is to say, as the accountants' letter shows, what they were saying he was entitled to do and intended to do was, having overpaid by 12*s.* 6*d.* a week
G during the first four of the 12 months, the appellant was entitled to stop all payments for the next four months and then to resume them for the last four months of the financial year on the basis of 12*s.* 6*d.* a week; and that assertion is backed by the words "must" and "can only."

Speaking for myself, if there were no other answer to the husband's argument, I should hesitate long before I should be prepared to hold that, in the circumstances of this case, having regard to the fact that the whole thing was the
H husband's mistake, it was a reasonable thing to leave the wife without any maintenance at all for four months, and then to resume on the basis that he was entitled to deduct and retain tax. I should have thought, on any view of the matter, that the magistrate would at least be entitled to hold that, assuming him to be entitled to deduct and retain out of future payments the tax which had been deductible but had not been deducted upon payments made in full, the reasonable thing would have been to spread that as evenly as possible over the remaining two-thirds of the year, if, indeed, not to spread it further than that.

There is another thing which I should like to say, too, before I deal with what is really the husband's only argument in this case. The magistrate quite evidently thought that the time had come when the wife's conditional release of 5*s*. a week was no longer operative ; and that means this, that, confronted with a situation which at the very lowest must be one of great inconvenience, and might be of very great hardship to the wife, the husband himself could have volunteered to restore at least the 5*s*. which she had consented to forego upon his promise that when his affairs bettered themselves he would pay her more money ; and I say this, whether that promise meant that he would restore the former sum of 30*s*. or revise the 30*s*. itself (and I do not in the least mind which it is, for it does not affect my point one way or the other), because the husband admitted in the witness-box that his taxable income for the preceding year had amounted to £350. That means, quite clearly, that he was in a very much better position than he had been when the money was reduced in 1940 ; so, on any view of the matter, I should be inclined to the opinion that, assuming the husband's rights to be as high as they have been put, nevertheless, the magistrate was justified in saying that he was entitled to go not only behind the terms of the separation agreement (for that, in a proper case, is clearly permissible), but to go behind the income tax law which applies to the operation of a separation agreement. There can be no distinction, as a matter of law, between the right to go behind the terms of the bargain itself and the right to go behind the way in which, according to law, including tax law, that bargain is to be implemented.

That brings me to the argument in law upon which this appeal is based. The submission that the husband was entitled as between Aug. and Dec. to pay nothing to the wife because he had paid twice as much as he need have paid between Apr. and Aug., is based solely upon the decision of the Court of Appeal in *Taylor* v. *Taylor* (1) which was a case like the present, of payments made under a deed of separation, and of the right to deduct and retain tax. It differs from this case in that it was a clear-cut question upon the amount of payments which the wife could recover by action upon the deed itself. The elements to which I have already referred, which might give the magistrate jurisdiction to deal with the summons for wilful neglect to maintain, even if the husband's actions were strictly governed by his legal rights, did not arise ; but I must say that I differ from the submission made by counsel for the respondent wife that for that reason this case is wholly irrelevant. It seems to me, for the reason I have given just a moment ago, that if the existence of a deed of separation regulating the amount of maintenance to be paid to a wife by a husband is, to put it at its lowest, a relevant factor in considering the question of wilful neglect to maintain, the husband's legal rights in connection with the performance of the deed of separation must equally be relevant—relevant, but not, I agree, conclusive.

Taylor v. *Taylor* (1) was, so far as the facts are concerned, a great deal more complicated than the present case. It is sufficient to say, however, that the amount payable by the husband was a variable amount depending upon the amount of his earnings in any given month, and it fluctuated from £2 to £3 a week according to his circumstances. It is also complicated by the fact that in the early part of the period after the execution of the deed the husband had admittedly underpaid, on any view of the matter, and in the latter period, up to Aug., 1932, had overpaid, but it appears to have been treated as sufficiently accurate to say that by Aug., 1932, the total payments made up to that date were equivalent to the amount that he was obliged to pay. In other words, it was plainly treated, for the purposes of that case, that up to Aug. 1932, payments had been made in full. As from then to the date of the issue of the writ the husband made payments from which, it is equally clear, he had deliberately deducted sums which had been deductible from earlier payments but which had not been deducted at any time up to the point at which I have indicated the amount was held to be square, namely, Aug., 1932. That is a somewhat elaborate way of arriving at the identical considerations in this case.

In this case, week by week, without any fluctuation, but equally without deduction of tax, the husband had made his proper payment, and, therefore, on July 28, 1945, the parties were in the same case in this dispute as were the parties in Aug., 1932, in *Taylor* v. *Taylor* (1). The account was squared up to date; all payments in accordance with the deed of separation had been made.

What the Court of Appeal decided when the wife brought her action in May, 1935, was that she was entitled to recover everything that had been paid short, by way of deduction for tax, up to the end of the financial year ended on Apr. 5, 1932, but that for the financial years or parts of financial years between then and the issue of the writ, namely, the last eight months of the financial year 1932-33, the whole of the financial year 1933-34, the whole of the financial year 1934-35, and one month, or thereabouts, of the financial year 1935-36, the husband was entitled to deduct tax on making the payments. It was found as a fact that, taking his fluctuations of income into account, he had over-deducted £156 10*s.*, and it was held in favour of the husband that he was entitled to deduct and retain tax in respect of the whole of that sum, and judgment, therefore, was given for the balance. The whole of this appeal, reduced to its final analysis, is based upon one sentence and one sentence only in the judgment of Slesser, L.J., who said ([1938] 1 K.B. 320, at p. 336):

> Whenever, in such a case, the payment for the whole year in question has not been made, it is still open to the person liable to make the payment to deduct and retain thereout the income tax thereon, notwithstanding that for some weeks during that year the payments were made in full.

It is said to follow from that passage, applied to the facts of the present case, that, although the Court of Appeal held that nothing could be re-opened before that financial year, the whole of the annual payments not having been made for that financial year 1932-33, it was open to the husband, on making the balance of his payments, whenever he made it, not merely to deduct the tax thereon but to deduct the tax on payments already made in full. I agree that, taken by itself, it is possible to read that sentence in that way. I am quite convinced, however, that, read in conjunction with the rest of the judgment, it is not what Slesser, L.J., meant, nor is it what the court decided.

It may be desirable, first of all, to give my own view on the way in which it was decided that no payment had been made in full in respect of the first incomplete financial year. An argument had been addressed to the Court of Appeal upon the well known proposition that in the absence of anything said to the contrary payments on account of an outstanding debt should be appropriated to the earlier outstanding items. On that basis, if it had been applied to that case, it would have been apparent that the account for the financial year 1932-33 had long since been closed. I have not worked it out in detail, but I suspect, also, that it would turn out that the account for the next financial year had been closed, too; but the reason why the Court of Appeal held that this sum of £156 10*s.* was an under-payment in respect of all four years or parts of the four years must, I suspect, have been this—because no attention was paid to this argument about appropriation at all—the husband himself, in making his periodical payments during those years had deliberately and designedly intended to pay short, taking credit to himself, with each payment, for failure to deduct tax in respect of some earlier year. In those circumstances, when he meant all the time to be paying only in part, it would manifestly have been unreal to effect a notional payment of the whole. He meant deliberately to under-pay, payment by payment, during the whole of those years. Accordingly, this sum of £156 10*s.* represented a certain sum in respect of underpayment for the last eight months of 1932-33, a certain sum in respect of the next two financial years, and a certain sum in respect of the one month before the issue of the writ in May, 1935, and accordingly there had never been made a payment of whatever that sum was for each of those financial years, and the payment would not be made until it was made in accordance with the judgment. Upon making the payment in accordance with the judgment, the amount of the tax thereon (not on anything else, but " thereon "—*i.e.*, on £156 10*s.*) might be deducted, according to the judgment of the trial judge and of the Court of Appeal, and there is, upon that analysis of the facts, no warrant whatever, in my judgment, for the view that the Court of Appeal said that deduction might be made in respect of that part of the first of these financial years in respect of which the payment was made in full. On the contrary, every judge who gave judgment, including Slesser, L.J., said exactly the opposite. Slesser, L.J., (and his is the judgment vouched in support of this argument) said this ([1938] 1 K.B. 320, at p. 335):

> By the sub-rule already mentioned the defendant was entitled on making each of these payments to deduct thereout the income tax thereon, but he made no deduction of tax from any of these payments. By Aug., 1932, he had made payments equalling in amount the whole of the weekly sums that were due from him down to that time without making any deduction in respect of income tax, and, the right to deduct tax given by the sub-rule being a right to do so "on making such payment" and not otherwise, his right of deduction in respect of those payments was gone.

Substituting 1945 for 1932, every single word of that passage applies to the circumstances of this case, with the added force that, whereas somewhat laboured accountancy was necessary in order to square the account at Aug., 1932, in this case, as I have said, up to Aug., 1945, the account had squared itself week by week by exact and punctual payments. GREER, L.J., says this (*ibid.*, at p. 332):

> In the present case the defendant by Aug., 1932, had made in full the payments for which he was so far liable without deducting income tax, and he was, therefore [mark the word "therefore"] no longer entitled under the sub-rule to deduct tax in respect of those payments.

In my opinion the whole of this argument is based upon a complete misconception of the law applicable to deducting and retaining tax, and *Taylor* v. *Taylor* (1) on which the accountant's letter was expressly based, has been, in my opinion, completely misunderstood. Once it is rightly understood it affords no support whatever for the husband's failure to pay any sum at all, taking his rights at their extreme, during the four months following the discovery of the true position; and it is conceded, therefore, if that is so, that there can be no answer to the wife's claim for wilful neglect to maintain at the time when she issued her summons.

In my opinion this appeal must be allowed, but only for the purpose of varying the amount by consent, and the wife, having in substance succeeded on the real point of the case, should have the costs of the appeal.

WILLMER, J.: I agree. LORD MERRIMAN, P., has dealt very fully with the facts of this case and with the arguments which have been so well presented to us by counsel. It is, therefore, unnecessary for me to do more than state in a few words the reasons which impel me to the same conclusion.

The appeal, as I understand it, was brought on the basis that the husband, in discontinuing his payments under the separation agreement, was doing no more than he was legally entitled to do, and it is said that upon that view he cannot be held to be guilty of wilful neglect to maintain. *Taylor* v. *Taylor* (1) was cited, but, for the reasons already pointed out, that case is not an authority for the proposition contended for. Indeed, in my view, it is an express authority to the contrary. In that case the husband was seeking to deduct the tax on the whole amounts for the four financial years since 1932, and the unanimous decision of the court was that he was not entitled to do so; on the contrary, he was entitled to deduct only the tax on the remaining unpaid residue, and that is made quite clear in the judgment of GREER, L.J., and again in the judgment of SLESSER, L.J. If one reads the last sentence in the judgment of SLESSER, L.J., carefully, it is in exact accord with what he had said before and with what the court decided ([1938] 1 K.B. 320, at p. 336):

> Whenever, in such a case, the payment for the whole year in question has not been made, it is still open to the person liable to make the payment [and that is the payment which has not yet been made] to deduct and retain thereout the income tax thereon . . .

Which appears to me to be exactly what SLESSER, L.J., had said in the earlier part of his judgment, and the basis of the decision of the court.

It follows, therefore, that in the present case the husband, when he caused all payments under the separation agreement to be stopped as from the beginning of Aug., 1945, was not doing anything which he was legally entitled to do. I should like to add that even if he were doing what he was legally entitled to do under the separation agreement, that would not conclude this case. This is not an action on the agreement. If the argument for the appellant were successful it might afford a good defence to an action on the agreement; but we are here dealing with something quite different, namely, whether or not the husband has wilfully neglected to maintain his wife. Assuming the argument for the husband to be right, it might be that the situation had arisen in which, for the moment, there was nothing payable under the agreement; but the husband's liability to maintain his wife must continue. It could not on any view of the facts be right that a husband could cut off his wife from any weekly contributions at all for a period of four months—which is what would have been the result in this case—and then be heard to take shelter under the supposed rights conferred by a separation agreement.

For these reasons it is quite clear that from the beginning of Aug. there has been an undoubted failure to maintain on the part of the husband. The magistrate has held that the failure to maintain was a wilful failure to maintain within the statute, and, in my judgment, there was ample evidence to support that finding. There was certainly a failure to maintain, and it was a failure deliberately and knowingly made. It was based on a misapprehension of the law, and it may be that that misapprehension was a *bona fide* one.

A number of cases have been cited to us on the meaning of wilful failure to maintain. I do not think it is necessary to refer to any of them now, except to say that I see nothing in any of them to support the suggestion that the magistrate in this case was doing anything wrong in coming to the conclusion, on the facts before him, that this husband was guilty of a wilful failure to maintain.

The appeal fails so far as the main question is concerned; but I agree with LORD MERRIMAN, P., for the reasons stated by him, that it succeeds on the question of quantum and to the extent which he has pointed out, and I concur in the order proposed.

Appeal allowed for the purpose of varying the amount payable under the magistrate's order.

Solicitors: *W. R. Perkins*, agents for *Hamilton-Hill & Evershed*, Leyton (for the appellant); *C. V. Young & Cowper* (for the respondent).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

In the Estate of G——— (*deceased*).
M——— *v.* L——— AND OTHERS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 20, 1946.]

Pleading—Objection—Probate action—Plaintiff alleged in defence to have feloniously caused death of deceased testator—Relevance—Defendant entitled to make allegation though plaintiff not prosecuted.

The plaintiff claimed to be the sole residuary legatee and devisee named in the last will of the deceased. Para. 1 of the defence alleged that the plaintiff feloniously caused the death of the deceased and was, therefore, not entitled to take under the will nor entitled to propound the will.

Objection to this paragraph was taken by the plaintiff on two grounds: (i) that the allegations made therein were irrelevant in the sense that even if all the facts alleged were proved it would not affect the right of the plaintiff to prosecute the action and to have the will established; (ii) that the charges made were not maintainable in a civil action, having regard to the fact that no steps had been taken to prosecute the plaintiff in respect of the felony alleged:—

HELD: (i) if the allegations in para. 1 of the defence were proved, not only would the plaintiff be disentitled from taking under the will but the whole will must fail; the plaintiff could have no interest in asserting its validity, and the action would amount, in effect, to an abuse of the process of the court; in those circumstances para. 1 of the defence was not irrelevant; (ii) the rule that a plaintiff, who was injured by the felonious act of the defendant, was not allowed to maintain a civil action against the defendant, in respect of such injury, unless and until the defendant had been prosecuted for his felony, did not apply, since the defendants, who made the allegations complained of, were not the persons injured by the plaintiff's alleged felony; there was no rule of law which disentitled the defendants from alleging in their defence that the plaintiff had been guilty of felony; consequently, the order of the registrar striking out para. 1 of the defence and the substance of case thereunder must be set aside.

[**EDITORIAL NOTE.** This is a point of pleading. If the will in this case were established, the effect would be that the plaintiff, who was alleged to have feloniously caused the death of the testator, would be entitled to a grant of administration *cum testamento annexo*. This is contrary to the principle enunciated by LORD ATKIN, in *Beresford's* case (2), and the allegation in the defence setting up these facts is clearly relevant. The rule that the allegation cannot be maintained until after prosecution for the felony does not apply, since the defendants making the allegation are not the persons injured by the felony, following the principle applied in *Appleby* v. *Franklin* (8).

AS TO INCAPACITY OF DONEE KILLING TESTATOR TO BENEFIT UNDER A WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 45-47, para. 51; and FOR CASES, see DIGEST, Vol. 44, p. 226, Nos. 504-510.]

Cases referred to:

*(1) *R.* v. *Bonneyman* (1942) 28 Cr. App. Rep. 131.

*(2) *Beresford* v. *Royal Insurance Co., Ltd.*, [1938] 2 All E.R. 602; [1938] A.C. 586; Digest Supp.; 107 L.J.K.B. 464; 158 L.T. 459.

*(3) *Cleaver* v. *Mutual Reserve Fund Life Assocn.*, [1892] 1 Q.B. 147; 29 Digest 369, *2969*; 61 L.J.Q.B. 128; 66 L.T. 220.

*(4) *In the Estate of Crippen*, [1911] P. 108; 23 Digest 167, *1834*; 80 L.J.P. 47; 104 L.T. 224.

*(5) *In the Estate of Hall, Hall* v. *Knight & Baxter*, [1914] P. 1; 23 Digest 115, *1102*; 83 L.J.P. 1; 109 L.T. 587.

*(6) *Re Shepherd, Ex p. Ball* (1879), 10 Ch.D. 667; 1 Digest 65, *533*; 48 L.J.Bcy. 57; 40 L.T. 141.

*(7) *Osborn* v. *Gillett* (1873), L.R. 8 Exch. 88; 1 Digest 34, *263*; 42 L.J.Ex. 53; 28 L.T. 197.

*(8) *Appleby* v. *Franklin* (1885), 17 Q.B.D. 93; 1 Digest 64, *532*; 55 L.J.Q.B. 129; 54 L.T. 135.

*(9) *Smith* v. *Selwyn*, [1914] 3 K.B. 98; 1 Digest 63, *516*; 83 L.J.K.B. 1339; 111 L.T. 195.

APPEAL by the defendants from an order of the registrar striking out a paragraph in the defence and the substance of case thereof. The facts are fully set out in the judgment.

William Latey for the plaintiff.

B. M. Cloutman for the defendants.

WILLMER, J.: This is an appeal on behalf of the defendants against an order made by the registrar, whereby it was ordered that para. 1 of the defence and the substance of the case thereof be struck out. The action is one in which the plaintiff claims to be the sole residuary legatee and devisee named in the last will of the deceased, and to have the will established. The defence contains a number of allegations, but the particular allegation with which I am now concerned is that put forward in para. 1, wherein it is alleged that the plaintiff feloniously caused the death of the deceased and is, therefore, not entitled to take under the alleged will, nor entitled to propound the will.

Objection to this paragraph was taken by the plaintiff on two grounds. Firstly, it was said that the allegations made therein are irrelevant—in the sense that even if all the facts alleged are proved it would not affect the right of the plaintiff to prosecute this action or to have the will established. Secondly, it was said that the charges made in the paragraph, and in the substance of case thereunder, are not maintainable in a civil action, having regard to the fact that no steps have been taken to prosecute the plaintiff in respect of the felony alleged. I was informed by counsel for the plaintiff, although this does not appear from the terms of the order appealed from, that the registrar in fact decided in favour of the plaintiff on the first of these grounds, and it was mainly on this ground that it was sought to support the registrar's order before me.

I am relieved of the necessity of considering whether the allegations put forward in the substance of case would be sufficient to justify a charge of felony by the admission of counsel on behalf of the plaintiff, that assuming the allegations were proved there would at least be a case to go to a jury. I do not desire here to say anything which might in any way prejudice the fair trial of the action, but I think I should state that having regard to the decision of the Court of Criminal Appeal in *R.* v. *Bonneyman* (1) in which a number of previous decisions were exhaustively reviewed, the admission was in my view properly made.

In order to decide whether para. 1 of the defence discloses a relevant defence to the action, it is necessary to assume for the purpose of argument that the allegations made are true, and that the plaintiff did feloniously kill the deceased. Counsel for the plaintiff argues that, assuming he did, that would not in any way affect his right to bring the present action or his claim to have the will established. It is conceded that upon that view of the facts the plaintiff would not be entitled to take any benefit under the will—but that, it is said, is not relevant to the claim made in the present action. Even a convicted felon, it is urged, may act as executor: see the passage in MORTIMER ON PROBATE at p. 208, and the cases there cited.

In this case, however, the plaintiff does not claim as executor, and I think it is important to state exactly what is the plaintiff's interest under the alleged will. The will, in fact, appoints no executor, but merely purports to give the whole of the property of the deceased to the plaintiff. If the gift to the plaintiff is good, he would clearly be entitled to a grant of administration with the will annexed. But if the gift to the plaintiff fails he would have no such right, and the estate would have to be administered as on an intestacy.

In these circumstances how can it be irrelevant to allege by way of defence that the plaintiff, by reason of his felony, is disentitled from taking any benefit under the will? The principle was clearly stated by LORD ATKIN in *Beresford* v. *Royal Insurance Co.* (2) in the following words ([1938] 2 All E.R. 602, at p. 607):

> . . . a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime whether under a contract or a gift.

Earlier in the same case, at p. 605, LORD ATKIN expressely approved the dictum of FRY, L. J., in *Cleaver* v. *Mutual Reserve Fund Life Association* (3) as follows:

> It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.

On this principle, in *Crippen's* case (4), a grant of administration of the murdered wife's estate was refused to the personal representative of the husband, the murderer. In *Hall* v. *Knight & Baxter* (5) a party who claimed as legatee under a will was struck out, on proof that she had been guilty of the manslaughter of the deceased.

I do not see how it is possible to escape the conclusion that if the allegations made in para. 1 of the defence are proved not only will the plaintiff be disentitled from taking under the will, but the whole will must fail. The plaintiff could have no interest in asserting its validity, and the action would amount, in effect, to an abuse of the process of the court. In these circumstances I cannot accede to the argument that para. 1 of the defence is irrelevant.

It remains to consider whether the decision of the registrar can be supported on the alternative ground, namely that the allegations made in the paragraph complained of cannot be maintained in a civil action unless and until the plaintiff has been prosecuted in respect of the alleged felony. In spite of the critical comments of BRAMWELL, L.J., in *Re Shepherd, Ex p. Ball* (6) it has been long held to be a rule, founded on public policy, that a plaintiff who is injured by the felonious act of the defendant is not allowed to maintain a civil action against the defendant in respect of such injury unless and until the defendant has been prosecuted for his felony. But it is argued that this rule has no application to the present case, since the defendants who make the allegations complained of are not the persons injured by the plaintiff's alleged felony. In my judgment the argument of counsel for the defendants is well supported by authority. In *Osborn* v. *Gillett* (7) the action was brought by a master for injuries inflicted on his servant causing the death of the servant. It was pleaded on behalf of the defendant that the acts complained of amounted to a felony, and that the person committing it had not been prosecuted. It was held, on demurrer, that the plea was bad. BRAMWELL, B., said (L.R. 8 Exch. 88, at p. 93):

> . . . in this case I see no greater duty on the plaintiff than on anyone else to prosecute . . .

In *Appleby* v. *Franklin* (8) the action was brought by a father for seduction of his daughter, and the statement of claim alleged facts which, if proved, amounted to felony. It was held that the paragraph in the statement of claim could not be struck out, inasmuch as the plaintiff was not the person upon whom the felonious act was committed. The judgments of HUDDLESTON, B., and WILLS, J., were expressed to be based on the authority of *Osborn* v. *Gillett* (7). Both these decisions were expressly approved by the Court of Appeal in *Smith & Wife* v. *Selwyn* (9). That was a case in which damages were claimed by a husband and wife in respect of an alleged felonious assault on the wife, and an order was in fact made staying the proceedings unless the statement of claim were amended; but, as appears from the judgment of KENNEDY, L.J. ([1914] 3 K.B. 98, at p. 104) this was on the basis that the wife was the party injured by the alleged felony, and the husband's claim was so bound up with hers as to be inseparable from it. In view of the express approval in this case of the decisions in *Osborn* v. *Gillett* (7) and *Appleby* v. *Franklin* (8), I cannot take it as being in any way an authority against the proposition contended for by the defendants in this case.

I should perhaps add two further observations. One is that, whatever may be the principle which forbids a plaintiff founding a claim on the alleged felony of the defendant, there is no principle of which I am aware which prevents a defendant from alleging that the plaintiff's claim is vitiated by the plaintiff's own felony. On the contrary, public policy to my mind demands that where a plaintiff seeks to set up a claim arising out of his own felonious act, the defendant should be allowed to take full advantage, in his defence, of the rule that no man can be allowed to have recourse to the court to claim a benefit from his own crime. The other observation which I should like to make is that, even if, contrary to the view which I have expressed, there is any rule which would prevent the defendants in this action from resisting the plaintiff's claim on the ground of the plaintiff's alleged felony until the plaintiff has been prosecuted, I am far from satisfied that the plaintiff's proper remedy would be to have the paragraph of the defence struck out. This point, however, does not arise on the view which I take. I hold that there is no rule of law which disentitles the present defendants from alleging in their defence that the plaintiff has been guilty of felony.

For all these reasons my conclusion is that the registrar's decision was wrong, and his order striking out para. 1 of the defence and the substance of case thereunder must be set aside.

I am not blind to the fact that this court is not the ideal place in which to adjudicate upon an allegation of felony, and I recognise that there may well be grave practical difficulties and inconvenience in trying such an issue here. This, however, is not a reason for denying to the defendants the right to rely in their defence upon allegations which, if proved, will in my judgment defeat the plaintiff's claim and entitle the defendants to judgment.

Appeal allowed. Order of registrar set aside.

Solicitors: *Francis Miller & Steele*, agents for *Livingstone & Pattie*, Newcastle-upon-Tyne (for the plaintiff); *Hewitt, Woollacott & Chown*, agents for *Swinburn G. Wilson & Son*, Newcastle-upon-Tyne (for the defendants).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

OSENTHAL *v.* ALDERTON & SONS, LTD. ([1946] 1 All E.R. 583; 174 L.T. 214). *Distinguished.* SACHS *v.* MIKLOS .. .. .. [1948] 1 All E.R. 67

ROSENTHAL *v.* ALDERTON AND SONS, LTD.

[COURT OF APPEAL (Scott and Tucker, L.JJ., and Evershed, J.), January 24, 25, 28, 29, February 20, 1946.]

Trover and Detinue—Detinue—Assessment of value to be paid in default of return of goods—Value to be assessed as at date of judgment.

In an action of detinue it was contended by the defendants (i) that the value of the goods detained and not subsequently returned should be assessed as at the date when the cause of action arose, *i.e.*, when the defendants had refused the plaintiff's claim for the goods; (ii) that the value of such goods as had been wrongfully sold by the defendants should be assessed as at the date of sale :—

HELD : (i) the value of the goods detained and not subsequently returned should be assessed as at the date of judgment or verdict.

(ii) the same principle applied whether the goods had been converted (provided that the plaintiff was not aware of the conversion at the time) or whether the defendants failed to re-deliver them for some other reason. The defendants could not improve their position by reason of their own misconduct.

[**EDITORIAL NOTE.** It is of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods up to the date of verdict. The assessment of the value of the goods as at the date of the refusal to return presupposes an abandonment of this right of property. Where, therefore, damages are claimed in default of their return, the proceedings being in detinue and not in conversion, the proper time for assessment is the date of the judgment.

AS TO JUDGMENT IN DETINUE, see HALSBURY, Hailsham Edn., Vol. 33, pp. 78-80, paras. 135-139; and FOR CASES, see DIGEST, Vol. 43, pp. 530, 531, Nos. 654-669.]

Cases referred to :

(1) *Phillips* v. *Jones* (1850), 15 Q.B. 859; 43 Digest 530, *657*; 19 L.J.Q.B. 374; 16 L.T.O.S. 4.

(2) *Brinsmead* v. *Harrison* (1871), L.R. 6 C.P. 584; 43 Digest 531, *668*; 40 L.J.C.P. 281; 24 L.T. 798; *on appeal* (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99.

(3) *Williams* v. *Archer* (1847), 5 C.B. 318; 43 Digest 524, *615*; 5 Ry. & Can. Cas. 289; 17 L.J.C.P. 82.

(4) *Wilkinson* v. *Verity* (1871), L.R. 6 C.P. 206; 3 Digest 109, *338*; 40 L.J.C.P. 141; *sub nom. Williamson* v. *Verity*, 24 L.T. 32.

APPEAL by the defendants from a judgment of His Honour J. G. TRAPNELL, K.C., Official Referee, dated Dec. 6, 1945. The facts are fully set out in the judgment of the court delivered by EVERSHED, J.

H. V. Lloyd-Jones for the appellants.

Robert Fortune for the respondent.

Cur. adv. vult.

EVERSHED, J. [delivering the judgment of the court] : The plaintiff in the action sued in detinue for the return of certain goods or payment of their value and damages for their detention. The goods in question formed the equipment of a barber's shop in Fleet Street, of which the plaintiff had been tenant from the defendants prior to 1940, when he ceased to carry on the business and surrendered his tenancy leaving the goods in question on the premises. There was at that time £147 due from him in respect of arrears of rent. When he returned in 1943—after a period of service in the army—he found that the goods were missing. The main issue at the trial before an official referee was whether the goods were left on the premises in such circumstances as to amount to a bailment, or whether the defendants merely gave the plaintiff a licence to leave the goods there at his own risk, without taking them into their possession. The answer to this question depended on the view taken by the official referee of the evidence of the plaintiff and Alderton, the defendants' agent, with regard to an interview which took place prior to the surrender of the tenancy. The official referee accepted the evidence of the plaintiff in preference to that of Alderton. That is a pure question of fact with regard to which no appeal lies to this court. On this evidence the official referee held that the defendants had become gratuitous bailees of the goods in question. This raises a question of law. The defendants contended that, accepting the plaintiff's evidence in its entirety, it disclosed no bailment in law.

To constitute a bailment chattels must be delivered in trust, on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered as soon as the time or use for, or conditions on, which they were bailed shall have elapsed or been performed. Delivery involves the transfer of the actual or constructive possession of the chattel by the bailor to the bailee.

The plaintiff's evidence may be summarised as follows. He was in difficulties with regard to arrears of rent but was reluctant to give up the business as desired by Alderton with a view to avoiding payment of rates by the defendants. Eventually Alderton promised that, if the plaintiff closed down, he might return at the conclusion of hostilities and renew his tenancy. It was arranged that he should have a fortnight to clear out and pay £4 representing 2 weeks' rent. Alderton gave the plaintiff a receipt for the £4 in these terms :

> Dear Sir, This is to acknowledge with thanks receipt of £4 in respect of 2 weeks' rent to enable you to make preparations to close down. We hope you will be able to continue your tenancy on the cessation of hostilities. Yours faithfully, E. Alderton.

With regard to his goods, the plaintiff in examination-in-chief said the arrangement was that he could put his things in a room upstairs pending his return after the war. In cross-examination he repeated this and added : " He said it could be stored upstairs."

On this evidence the official referee, in our view rightly, held that the arrangement constituted an entrustment of the goods by the plaintiff into the possession and control of the defendants and amounted in law to a bailment. In view of the fact that the defendants ultimately removed the goods from the premises, sold some of them and claimed that they had been abandoned by the plaintiff, it is not, in our opinion, necessary to decide whether the bailment was gratuitous as held by the official referee, or for reward.

The defendants also contended that the official referee had erred in law in his assessment of the value to be paid for the goods in default of their return. It was said that he had fixed the values as at the date of trial, or at some date subsequent to the issue of the writ or the accrual of the cause of action, and that this was erroneous. The defendants' contention was that a demand by the plaintiff for the return of the goods having been refused by the defendants several months before the issue of the writ, the plaintiff's cause of action arose on the date of such refusal ; and that the proper assessment of the values of such of the goods as have not been returned by the defendants should, therefore, have been in accordance with their values on the date when the cause of action arose, which was (as it was claimed) notoriously less than their values as assessed by the official referee after action brought.

In an action of detinue, the values of the goods claimed but not returned ought, in our judgment, to be assessed as at the date of the judgment or verdict. A successful plaintiff in an action of detinue was, under the old practice, entitled to judgment for the re-delivery of the goods or, in case they were not returned, their value together with damages and costs ; and such value was either assessed by the jury at the trial or by the sheriff upon an inquest : see *e.g.*, Viner's Abridgement, Vol. VIII, pp. 40, 41 ; Bullen and Leake, Precedents of Pleadings, 3rd Edn., p. 313 ; *Phillips* v. *Jones* (1), per Parke, B., (15 Q.B. 859, at pp. 867, 868). Unless the alternative methods of assessing value were liable to produce substantially different results, the time at which the value was in each case to be determined must have been the date of the verdict. It should be added that until the power was given by the Common Law Procedure Act, 1854, s. 78, (now contained in R.S.C., Ord. 48, r. 1) the common law courts could not compel the return of the specific chattels claimed and the defendant had in effect, under the old forms of judgment, the option of retaining the chattels for himself and paying their values as assessed or found. It is further to be noted that the action of detinue was essentially a proprietary action implying property in the plaintiff in the goods claimed : see *e.g.*, Viner's Abridgement, Vol. VIII, p. 23 ; Holdsworth, History of English Law, Vol. VII, pp. 438, 439. It was, and still is, of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods claimed up to the date of the verdict. On this ground it has been held that a judgment in trover, if unsatisfied, is no bar to an action of detinue in respect of the same goods : (see *Brinsmead* v. *Harrison* (2)), the plaintiff not, in the absence of satisfaction, having been divested of his property in the goods claimed. In our judgment, an assessment of the value of the goods detained (and not subsequently returned) at the date of the accrual of the cause of action (*i.e.*, of the refusal of the plaintiff's demand) must presuppose that on that date the plaintiff abandoned his property in the goods: and such a premise is inconsistent with the pursuit by the plaintiff of his action of detinue.

The significance of the date of the refusal of the plaintiff's demand is that the defendant's failure to return the goods after that date becomes and continues to be wrongful. Moreover, the plaintiff may recover damages in respect of the wrongful "detention" after that date, *e.g.*, where the plaintiff has suffered loss from a fall in value of the goods between the date of the defendant's refusal and the date of actual return: see *Williams* v. *Archer* (3). Such damages must equally continue to run until the return of the goods or (in default of return) until payment of their value.

There is (as appears from the forms of judgment already mentioned) a clear distinction between the value of the goods claimed in default of their return and damages for their detention whether returned or not. The date of the refusal of the plaintiff's demand is the date from which the latter commence to run but appears to be irrelevant to the former and cannot convert a claim for the return of the goods into a claim for payment of their value on that date.

In the present case, the official referee awarded the sum of £25 for damages for detention. This award was (in accordance with the forms of judgment to which we have referred) wholly distinct from his assessment of the values of the goods not returned. In this court neither party has sought to challenge the official referee's award of damages. As regards the values of the goods (other than those which the defendants were willing and able to return or had returned) the official referee made his assessment on the basis of evidence of such values on dates between the date of the writ and the date of his judgment. It has not been suggested that there was any fall in the values between those dates and the plaintiff is willing to accept the values so found in satisfaction of that part of his claim. Moreover, this is not a case of valuable securities or goods with an ascertainable market price at a particular date, but concerns second-hand barber's furniture and utensils in a period when it is obvious that no one could attempt to do more than give an approximate estimate of values. In fact, neither expert attempted to prove any fluctuation of values over a period of a few months one way or another. The official referee, acting as a jury, had to come to the best conclusion he could on the material before him which was necessarily lacking in precision, and there is nothing to show that the figure found by him was, in respect of any period between the date of the writ and the date of the verdict, either too low or too high. On the other hand, for the reasons which we have stated, it would, in a claim of detinue, be wrong in our judgment to assess the values of the goods not returned at some date prior to that of the issue of the writ and thereby permit the plaintiff to lose, and the defendants to gain, by reason of their continuing wrong. This ground of appeal, therefore, also fails.

The defendants finally submitted that in any event the values of certain of the goods which they had in fact sold could not be assessed at any higher value than at the date of sale. In other words they say: "We have proved that we converted some of your goods and therefore we can have the benefit of any lower values prevailing at the date of conversion." It is, however, clear that it is no answer for a bailee, when sued in detinue, to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor: see *Wilkinson* v. *Verity* (4). It seems to us that the defendants are in effect saying: "Your real remedy is in conversion." But the bailor can in such circumstances elect to sue in detinue (at any rate where he was not aware of the conversion at the time) and there is no reason why the value of the goods in respect of which he sues should be assessed on a different basis from goods which the bailee has not converted but which, for some other reason, he fails to re-deliver. In our view, this contention likewise fails, and the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hardcastle Sanders & Co.* (for the appellants); *Mason & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MORRIS *v.* KANSSEN AND OTHERS.

[House of Lords (Viscount Simon, Lord Thankerton, Lord Porter, Lord Simonds and Lord Uthwatt), February 11, 12, 13, 14, 18, 20, 21, March 22, 1946.]

Companies—Directors—Failure to appoint—Allotment of shares by persons purporting to be directors—Distinction between defective appointment and no appointment—Rule in Turquand's case—Companies Act, 1929 (*c.* 23), *s.* 143, *Sched. I, Table A, art.* 88.

A certain company was incorporated in 1939 with a nominal capital of £100 in £1 shares. The articles of the company incorporated certain articles of Table A, including art. 88, which validated the acts of persons acting as directors though it was afterwards discovered that there was a defect in their appointment or qualification (the provisions of the article being similar in material respects, for the purpose of the case in question, to those of the Companies Act, 1929, s. 143). K. and C. were the first directors of the company and each held one share, these being the only shares allotted. Disputes arose between K. and C., and C. entered into a scheme with S. to remove K. from his directorship. With this object, C. and S. falsely claimed that in Feb., 1940, S. had been appointed a director and they fabricated an entry in the minute book to this effect. In Apr. 1940, C. and S. ineffectively attempted to deprive K. of his directorship, and they purported to issue one share to S. No general meeting of the company was held in 1941, as required by its articles, and therefore, from Jan. 1, 1942, there were no directors of the company. On Mar. 30, 1942, C. and S., purporting to act as directors, appointed M. a director of the company and thereupon C., S. and M. allotted 34 shares to M., 32 to S., and 24 to C. As the result of an action brought by K. for (*inter alia*) rectification of the register by the removal of the names of all persons as the holders of shares except himself and C. as holders of one share each, an order was made that the register should be rectified accordingly. On appeal, it was contended by M. (i) that the issue of shares to him had been validated by the Companies Act, 1929, s. 143, and Table A, art 88; (ii) that, by virtue of the rule in *Turquand's* case (1), he was entitled to treat the shares as validly allotted:—

Held: (i) sect. 143 of the 1929 Act and Table A, art. 88, did not validate the transactions of Mar. 30, 1942 (*viz.*, the allotment of shares to M., and his appointment as a director) because, on the facts of the case, neither C. nor S. were directors at the time; C.'s appointment had terminated at the end of 1941, and S. had never been appointed. Sect. 143 and Table A, art. 88, applied only to acts done by persons acting as directors whose appointment or qualification was afterwards found to be defective. They did not cover a case where there had been a total absence of appointment or a fraudulent usurpation of authority.

Tyne Mutual Steamship Insurance Assocn. v. *Brown* (2) *applied.*

(ii) M. was not entitled to invoke the rule in *Turquand's* case (1) because he himself was purporting to act on behalf of the company in the unauthorised transaction.

Decision of the Court of Appeal, sub nom. Kanssen v. *Rialto* (*West End*), *Ltd.* ([1944] 1 All E.R. 751) *affirmed on other grounds.*

[**EDITORIAL NOTE.** The decision in the House of Lords is based upon a different ground from that in the courts below. By virtue of art. 73 of Table A, as modified by the company's articles there were at the relevant date no directors in existence. Art. 88 of Table A is therefore irrelevant, since it applies where there is a defective appointment but not where there is no appointment at all. The argument based on the application of *Turquand's* case (1), which was fully developed for the first time by the indulgence of the House of Lords, fails since there is apparently no authority which holds that a director can invoke the rule to validate an irregular transaction to which he is himself a party. The question of the sufficiency of the inquiries made in order to satisfy this rule, upon which the trial judge and the Court of Appeal disagreed, does not, therefore, arise.

As to Defect in Appointment of Directors, see HALSBURY, Hailsham Edn., Vol. 5, pp. 298, 299, para. 511; and for Cases, see DIGEST, Vol. 9, pp. 440-442, Nos. 2855-2868.]

As to Contracts of Companies, see HALSBURY, Hailsham Edn., Vol. 5, pp. 423-425, paras. 698, 699; and for Cases, see DIGEST, Vol. 9, pp. 628-630, Nos. 4160-4175.]

Cases referred to:

*(1) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 9 Digest 615, *4094*; 25 L.J.Q.B. 317.

*(2) *Tyne Mutual Steamship Insurance Assocn.* v. *Brown* (1896), 74 L.T. 283; 9 Digest 323, *2046*.

(3) *Dawson* v. *African Consolidated Land & Trading Co.*, [1898] 1 Ch. 6; 9 Digest 433, *2823*; 67 L.J.Ch. 47; 77 L.T. 392.

(4) *British Asbestos Co., Ltd.* v. *Boyd*, [1903] 2 Ch. 439; 9 Digest 442, *2865*; 73 L.J.Ch. 31; 88 L.T. 763.

(5) *Channel Collieries Trust, Ltd.* v. *Dover, St. Margaret's & Martin Mill Light Ry. Co.*, [1914] 2 Ch. 506; 10 Digest 1147, *8118*; 84 L.J.Ch. 28; 111 L.T. 1051.

Appeal by the respondent Morris from a decision of the Court of Appeal, dated May, 26, 1944, and reported, *sub nom. Kanssen* v. *Rialto* (*West End*), *Ltd.* ([1944] 1 All E.R. 751). The facts are fully set out in the opinion of Lord Simonds.

Harold Christie, K.C., and *Hector Hillaby* for the appellant.

Raymond Jennings, K.C., and *Michael Albery* for the respondent Walker, trustee in bankruptcy of the respondent Kanssen.

C. R. D. Richmount for the respondent Rialto (West End), Ltd.

The respondent Kanssen did not appear.

The House took time to consider its opinion.

Viscount Simon: My Lords, the opinion which Lord Simonds has prepared in this appeal, and which he is about to deliver, covers the whole ground and I need say no more than that I concur in every respect with his conclusions. I move that the appeal be dismissed.

Lord Thankerton: My Lords, I also have had an opportunity of considering the opinion about to be delivered by my noble and learned friend, Lord Simonds, and I concur in it.

Lord Porter: My Lords, I have had the like opportunity and likewise concur.

Lord Simonds: My Lords, this appeal occupied many days in this House, but the facts relevant to the issues which your Lordships think it necessary to determine can be stated at no great length. In two consolidated actions, in which this appeal is brought, the respondent Kanssen, a Dutchman, the plaintiff in both actions, in which the respondent company, Rialto (West End), Ltd., and the appellant Morris and two other persons, Robert Cromie and Eric Paul Strelitz, were defendants, sought to have it determined who were the directors and who were the shareholders and what shares they held of the respondent company.

The company (as I will call the respondent company) was incorporated on Dec. 27, 1939, with the primary purpose of taking up a lease of the Rialto Cinematograph Theatre in Coventry Street, London. Its nominal capital was £100 in £1 shares. Upon its incorporation two shares were allotted to the subscribers to the memorandum of association, and they transferred them, the one to Cromie, the other to Kanssen. There is no question as to the validity of the issue and transfer of these two shares. At the same time the same subscribers to the memorandum, in exercise of the authority conferred on them by the articles of association of the company, appointed Cromie and Kanssen to be the first directors of the company. This was a regular and valid appointment. The company in due course embarked on the business for which it was incorporated. It entered into possession of the Rialto Theatre and acquired a lease of it. Soon disputes arose between Cromie and Kanssen, into the merits of which I need not enter. Cromie made an alliance with Strelitz and together they concocted a scheme for getting rid of Kanssen. It was an essential part of this scheme that Strelitz should be appointed a director, so that Cromie and he could, under art. 8 (7) of the company's articles, call upon Kanssen to resign. They claimed, but falsely claimed, that at a meeting of directors held on Feb. 1, 1940, at which Cromie and Kanssen were present, Strelitz was duly appointed a director, and they concocted a minute to this effect, which was entered in the company's minute book and in due course signed by Cromie. Strelitz assumed to act as director, and on Apr. 9, 1940, Cromie and he, in purported exercise of their power under the articles, requested Kanssen to resign his office of director. The request was a nullity and Kanssen remained a director.

On Apr. 12, 1940, Cromie and Strelitz purported to hold a meeting of directors, and thereat issued one share to Strelitz and seven more shares to Cromie. The issue was invalid and of no effect. On Apr. 26, 1940, an extraordinary general meeting of the company was held. Cromie was there ; so were Kanssen and Strelitz, but the latter had no right to be there. At that meeting Cromie moved, and Strelitz seconded, a resolution to confirm the appointment of Strelitz as a director. It appears to have been carried by the votes of Cromie and Strelitz against the opposition of Kanssen. There was no appointment to confirm. Strelitz had no right to second a resolution or to vote for it : Cromie could lawfully use one vote only. No resolution was effectively passed and no valid appointment emerged from these proceedings. Kanssen withdrew protesting and continued to protest. Nevertheless from that time onward, throughout 1940 and 1941, Strelitz acted as a director with Cromie. There was in fact little to be done, as the cinema was closed as the result of enemy action. No general meeting of the company was held in 1941. It is not disputed, therefore, that at the end of 1941 both Cromie and Strelitz (if he were a director) ceased to be directors under art. 73 of Table A as varied by art. 22 of the company's articles. From Jan. 1, 1942, there were no directors of the company.

Early in 1942 it appeared that the cinema might be able to reopen. Further finance was needed, and for that purpose Cromie got into touch with Morris and made an arrangement with him under which (*inter alia*) he was to become a director of the company and certain shares were to be allotted to him. In pursuance of this arrangement, on Mar. 30, 1942, Cromie and Strelitz held a meeting of directors, at which first Morris was appointed a director, then, Morris having joined the board, they three allotted 34 shares to Morris, 32 shares to Strelitz and 24 shares to Cromie. I will, later in this opinion, discuss this meeting in greater detail. On or about Apr. 20, 1942, Strelitz transferred 17 of his shares to Morris. If all the shares were validly issued, the position then was that Kanssen held one share, Morris 51 shares, Cromie 32 shares and Strelitz 16 shares. In the meantime, on Mar. 30, 1942, and Apr. 13, 1942, Kanssen issued his writs in the two actions, which were afterwards consolidated. It is sufficient for the present purpose to say that in effect he claimed that the only shares validly issued were the two shares issued to the subscribers and by them transferred to Cromie and to him, and that the register of the company should be rectified by altering Cromie's holding to one share and removing the names of all other persons except himself therefrom. He also claimed a declaration that he and Cromie were the only directors of the company and that Strelitz and Morris were not directors.

I will dispose at once, and in a few words, of the question of directorship. Though it appears not to have been realised until then, it was in the course of the trial appreciated what was the effect of art. 73 of Table A, as varied by the company's art. 22, and it was admitted then and at the bar of the House that neither Cromie nor Strelitz has, in any view, been a director since the end of 1941. The same consideration applies to Kanssen. Whether or not he ceased to be a director at an earlier date, at any rate he did so at the end of 1941. Morris rests his claim upon his appointment by Cromie and Strelitz at the meeting of Mar. 30, 1942. But, apart from the considerations which apply equally to the allotment of shares and to this appointment, it is, I think, clear that neither the Companies Act, 1929, s. 143, and Table A, art. 88 (which I shall have to consider), nor the general law can avail to establish him in his office of director when he was not in fact appointed a director. To Cohen, J., and to the Court of Appeal, this seemed too plain for argument.

I turn then to the more difficult question of the shares. From the short narrative that I have given, it is clear that no shares were in fact validly issued except the one share each held by Cromie and Kanssen. Cohen, J., accordingly, having decided the long and hotly contested question of fact in favour of Kanssen, ordered the register to be rectified by striking out the name of Cromie as the holder of any but one share and the name of Strelitz altogether. It remained to consider the case of Morris. Morris, faced with the fact that the shares were not validly issued, relied on defences arguable by him but not open to Cromie or Strelitz. He claimed the benefit of the Companies Act, 1929, s. 143, and of art. 88 of Table A. He further claimed under the general law that, even if the shares were not validly issued, yet he was entitled to treat them as validly issued, a claim that must have been faintly pursued in the courts below, since it finds no mention in any judgment. He further claimed that Kanssen was debarred by his laches from alleging the invalidity of the issue of shares. This last claim has no justification. I observe that neither Cohen, J., nor the Court of Appeal, deal with it, presumably because to them, as to me, it appeared upon the facts to be incapable of serious argument.

At the hearing before Cohen, J., and in the Court of Appeal, the major argument was upon the section and article to which I have referred, the defence upon which Morris relied being met by the plea that, in the circumstances of the case, neither section nor article was relevant and, even if they were, they would not avail him since he was put upon his inquiry and might, if he had made proper inquiries, have discovered the truth. Several questions of difficulty seem to be here involved : (i) whether either section or article has any application to the present case ; (ii) what amounts to discovery of a defect for the purpose of either section or article, and whether any party is debarred from its benefit unless and until he has himself discovered the defect ; (iii) (an elaboration perhaps of the second question) whether, if a party is put upon his inquiry and he might, if he made inquiry, discover the defect, he can still say that he has not discovered it ; (iv) in the circumstances of the present case whether Morris was in fact put upon his inquiry and, being so put, made the proper inquiry. It seems that in both courts below it was on the first question assumed (not indeed by counsel for Kanssen but in the judgments of the court) that the section and article were relevant. In both courts, too, on the second question it was decided that Morris could rely on them, unless he discovered the defect ; it was immaterial that Cromie and Strelitz were at all times well aware of it. On the third question both courts decided that Morris was put on his inquiry, holding that, if he relied on the section or article, he must be subject to the same obligation as if he was relying on the general law as stated in *Turquand's* case (1), to which I refer later. It was upon the fourth question that the courts diverged, Cohen, J., holding that, being put upon his inquiry, he made the inquiries that the circumstances demanded, the Court of Appeal holding that he had not made such inquiries and therefore could not be allowed to say that he had not discovered this defect. I have ventured to state in this compendious form judgments which covered a wide field. I have done so because the conclusion to which I understand that your Lordships have unanimously come upon the first question makes it unnecessary to consider the other questions. They arise only if the circumstances of the present case bring it within the scope of section or article.

Before I consider this first question I may dispose of two other matters. First, I agree with the Court of Appeal that in any view of the case Morris cannot maintain that the 17 shares allotted to Strelitz and by him transferred to Morris were validly allotted. Strelitz at all times knew of the defect and Morris could get no better title. Secondly, I observe that Lord Greene, M.R., dismissed Morris's plea on the additional ground that either Cromie was a principal as between himself and the company (in which case Morris was merely a nominee between whom and the company there was no privity) or that he was acting as agent for Morris in applying for the shares allotted to him. I do not think that the first alternative is on the facts a tenable view. But Lord Greene, M.R., went on to say that, if the latter view was right, the knowledge of the defect which the agent had must be imputed to the principal, Morris thus being affected with Cromie's knowledge. My Lords, I would not be taken as assenting to this view which appears to ignore both the capacity in which Cromie acquired the relevant knowledge and the fact that Cromie was acting fradulently as well towards Morris as to other parties.

The first question, to which I return, is whether (*a*) the Companies Act, 1929, s. 143, or (*b*) art. 88 of Table A (which was adopted by the company) has any relevance to the circumstances of the present case. The Companies Act, 1929, s. 143, which is in the same terms as corresponding sections in previous Acts, provides :

> The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

Art. 88 of Table A, which does not materially differ from similar articles in earlier Tables, provides :

> All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

The section can be invoked only where there is a defect afterwards discovered in the appointment or qualification of a director ; in the article, the condition is that it is afterwards discovered that there was come defect in the appointment of a director or person acting as a director, or that he was disqualified to act as a director. Though the language of the section differs in some respects from that of the article, it does not appear that the difference is material for the purpose of the present case.

The facts relevant to the question now under consideration have already been stated. I will very briefly tabulate them : (i) On Feb. 1, 1940, Cromie and Kanssen the only directors and the only shareholders holding one share each. (ii) On or about that date, the fraudulent assumption of office by Strelitz and a minute concocted to record an appointment which did not take place. (iii) On Aprl. 9, 1940, an ineffective attempt to expel Kanssen from his office. (iv) On Aprl. 12, 1940, the ineffective allotment of one share to Strelitz and seven shares to Cromie at a purported meeting of directors. (v) On Apr. 26, 1940, an extraordinary general meeting of the company at which, as I have pointed out, nothing was effectively done. (vi) At the end of 1941, the determination of the term of office of Cromie and Kanssen and of Strelitz, if he was a director, and from that date no directors of the company. It is in these circumstances that the question arises whether the section or article can be called in aid by Morris in order to validate the transactions of Mar. 30, 1942, *viz.*, the allotment to him of shares and the appointment of him as a director. Do the facts that I have stated establish a defect in the appointment or qualification of Cromie or Strelitz?

There is, as it appears to me, a vital distinction between (*a*) an appointment in which there is a defect or, in other words, a defective appointment, and (*b*) no appointment at all. In the first case, it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose : in the second case, there is not a defect ; there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director. Even if it did, it might well be contended that at least a purported appointment was postulated. But it does not do so, and it would, I think, be doing violence to plain language to construe the section as covering a case in which there has been no genuine attempt to appoint at all. These observations apply equally where the term of office of a director has expired, but he nevertheless continues to act as a director, and where the office has been from the outset usurped without the colour of authority. Cromie's acts after the end of 1941 were not validated by the section : Strelitz's acts were at no time validated.

I have so far dealt with defect in "appointment," and what I have said in regard to the section covers the article also where the same words are repeated. Some argument was founded by counsel for the appellant upon the words "or qualification," in the section, and "disqualified." in the article, This argument is not easy to follow. So far as both Cromie and Strelitz were concerned, there was no defect in their qualification after the end of 1941. They were not disqualified. They were, so far as I know, qualified to act, but they had not been appointed. I do not suggest that qualification refers only to the holding of qualification shares. But whatever extended meaning may be given to "qualification" or "disqualified," I find it impossible to say that it covers the case of Cromie or of Strelitz. The point may be summed up by saying that the section and the article, being designed as machinery to avoid questions being raised as to the validity of transactions where there has been a slip in the appointment of a director, cannot be utilized for the purpose of ignoring or overriding the substantive provisions relating to such appointment.

I have come to this conclusion unaided by authority, but I am glad to find that it is supported by clear and cogent authority. In *Tyne Mutual Steamship Insurance Assoc.* v. *Brown* (2), where the facts were that directors had continued to act after their term of office had expired, the meaning of the corresponding section of the Companies Act then in force and of a strictly comparable article had to be considered. Lord Russell of Killowen, L.C.J., having read the article, thus expressed himself (74 L.T. 283, at p. 285):

> What does this provide ? It provides for the cure of defects in the appointment or qualifications of directors . . . Here there has been no appointment at all.

He held, therefore, that the article had no application to the case. This authority has stood unchallenged for 50 years, and, though on two occasions since its decision the whole law relating to limited companies has been reviewed by expert committees and amended by the legislature, it has in this respect remained unaltered. This affords strong support for a construction which, in any case, appears to me to be the correct one. I would add that, though no other express authority has been called to the attention of the House, yet the language of Lindley, M.R., and Chitty, L.J., in *Dawson* v. *African Consolidated Land and Trading Co.* (3), of Farwell, J., in *British Asbestos Co.* v. *Boyd* (4), and of Lord Cozens-Hardy, M.R., and Swinfen Eady, L.J., in *Channel Collieries Trust, Ltd.* v. *Dover Light Ry. Co.* (5), clearly indicates that, in the opinion of those judges, the section and article alike deal with slips or irregularities in appointment, not with a total absence of appointment, and still less with a fraudulent usurpation of authority.

Coming to this conclusion, I do not find it necessary to express any opinion upon the question as what is the the meaning of the words "afterwards discovered" in the section. I would not be taken as either assenting to, or dissenting from, the proposition, which appears to have been accepted in the courts below, that the section or article can be called in aid by a third party unless and until he has himself discovered the defect in the appointment or qualification of a director. Nor would I express any final view upon what for this purpose amounts to "discovery," and, in particular, whether the rule as to inquiry is to be imported into the consideration of it.

The appellant having failed, for the reason that I have indicated, to establish his case upon the section or the article, was allowed by the indulgence of the House, although he had not raised the point in his formal case, to contend that he was in any case entitled to succeed by virtue of the rule of law which is conveniently called the rule in *Turquand's* case (1). Upon this contention the House has not the benefit of the opinion either of Cohen, J., or the Court of Appeal, before whom the point, if taken at all, appears not to have been pressed. The claim under this head refers only to the allotment of the 34 shares which were allotted to Morris on Mar. 30, 1942. Upon this contention two questions appear to arise; (i) whether Morris can in the circumstances invoke the rule; (ii) whether, if he can otherwise do so, he is nevertheless debarred from relief under it upon the ground that he was put upon his inquiry and might, if he had made proper inquiries, have learned the truth.

The first question involves, first, a consideration of Morris's position when the shares were allotted to him, and, secondly, an examination of the rule in order that it may be determined whether Morris comes within its scope. Though little credence could be attached to the uncorroborated testimony of Cromie or Strelitz, Morris was accepted by Cohen, J., as a witness of truth, and his evidence agreed with that of the recorded minute of Mar. 30, 1942, which itself is made *prima facie* evidence by the Companies Act, 1929, s. 120 (2). It appears then that the board meeting held on that day fell into two parts. There were first present as directors Cromie and Strelitz, with the company's solicitor in attendance. According to the minute, Cromie:

> . . . told the directors that he had received certain proposals from Mr. Lewis Morris which would enable the Rialto cinema to be reopened, and he, as a shareholder, proposed to write a letter to Mr. Morris setting out the terms of the arrangement. The letter was produced and read.

Upon this it was resolved that Morris be appointed a director of the company and that he be made managing director of the company. Morris, it is recorded, then joined the board. What I must regard as the second part of the meeting with the new board then began, and the minute records that an application from Cromie for 90 shares of £1 each in the capital of the company together with his cheque for £90 was received; that, at his request, the application asked that the shares be allotted 34 to Morris, 32 to Strelitz and 24 to Cromie; and that it was resolved that the shares be so allotted (the numbers of the shares being given); and that it was further resolved that share certificates be issued for all the shares which had been allotted in the company. There were certain further proceedings to which I need not refer. From this narrative it is clear that Morris himself acted as a director in the allotment and issue of the shares, including those allotted and issued to himself. It is, I think, an irrelevant consideration that he had only become a director immediately before that event. Upon this I will say something later. He in fact acted as a director and was the officer and agent of the company in the allotment and issue of shares. That neither his act nor those of his colleagues were valid is for the purpose of this argument assumed. The question is whether he can nevertheless, under the rule in *Turquand's* case (1), claim that he is entitled, as between himself and the company, to treat that act as done with the authority of the company, which was in fact and in law done without its authority.

My Lords, I think that this question admits of an easy answer. The so-called rule in *Turquand's* case (1) is, I think, correctly stated in Halsbury, Hailsham Edn., Vol. V, p. 423:

> But persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.

It was competent for three directors of the company to allot its shares: three persons purporting to act as directors did allot its shares: therefore Morris, who acted in good faith, was entitled to treat the shares as validly allotted. Thus runs the argument. I leave aside the question what, in the application of the rule, is the meaning of "good faith" and whether Morris, according to the true meaning of those words, acted in good faith, and I ask whether Morris can in any event bring himself within the scope of the rule. My Lords, I think it is clear upon principle that he cannot. In the transaction which he would sustain and Kanssen seeks to impeach, he was himself acting as a director. I asked counsel for the appellants whether there was any authority for the proposition that a director or *de facto* director could invoke the rule so as to validate a transaction which was in fact irregular and unauthorised. He could point to none. My own researches, though in such a matter they cannot easily be complete, have disclosed no case in which such a proposition has been affirmed. Nor have I met any case in which such a person has, without discussion of the principle, obtained such relief. Nor had I even heard the proposition put forward until I heard it at the bar of the House in this case. The reason is not far to seek.

One of the fundamental maxims of the law is the maxim *omnia praesumuntur rite esse acta*. It has many applications. In the law of agency it is illustrated by the doctrine of ostensible authority. In the law relating to corporations its application is very similar. The wheels of business will not go smoothly round unless it may be asumed that that is in order which appears to be in order. But the maxim has its proper limits. An ostensible agent cannot bind his principal to that which the principal cannot lawfully do. The directors or acting directors or other officers of a company cannot bind it to a transaction which is *ultra vires*. Nor is this the only limit to its application. It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, *i.e.*, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make might tell him that they were wrongly done.

What then is the position of the director or acting director who claims to hold the company to a transaction which the company had not, though it might have, authorised? Your Lordships have not in this case to consider what the result might be if such a director had not himself purported to act on behalf of the company in the unauthorised transaction. For here Morris was himself purporting to act on behalf of the company in a transaction in which he had no authority. Can he then say that he was entitled to assume that all was in order ? My Lords, the old question comes into my mind : *Quis custodiet ipsos custodes ?* It is the duty of directors and equally of those who purport to act as directors, to look after the affairs of the company, to see that it acts within its powers and that its transactions are regular and orderly. To admit in their favour a presumption that that is rightly done which they have themselves wrongly done is to encourage ignorance and condone dereliction from duty. It may be that in some cases, it may be that in this very case, a director is not blameworthy in his unauthorised act. It may be that in such a case some other remedy is open to him, either against the company or against those by whose fraud he was led into this situation, but I cannot admit that there is open to him the remedy of invoking this rule and giving validity to an otherwise invalid transaction. His duty as a director is to know ; his interest, when he invokes the rule, is to disclaim knowledge. Such a conflict can be resolved in only one way.

It was urged upon your Lordships that the purported appointment of Morris as a director having taken place immediately before the unauthorised allotment of shares, he had in fact no opportunity of learning the true state of affairs, and it was pointed out that, had the proceedings at the meeting of Mar. 30, 1942, been taken in the reverse order, first the allotment of shares, then the appointment of Morris as a director, the result would be different. And then it was said that it was so absurd that there should be a different result according to the order of proceedings, that the original conclusion could not be accepted. This argument has for me no weight or substance. Admit—as, to my mind, one must admit—that a director is not for the purpose of the rule in the same position as a stranger ; then it is as immaterial how long he has been a director, as it is whether he is an idle or diligent director, or a robust or sick director.

Concluding as I do that Morris is not a person who in respect of this transaction comes within the scope of the rule, I do not find it necessary to consider the further question whether in any case he would be deprived of its benefits by reason of the fact that, even regarded as an outsider, he was put upon his inquiry and did not make the inquiry that he should have made. This is a question of fact upon which different views have been, and may well be, entertained.

In my opinion the appeal should be dismissed.

LORD UTHWATT : My Lords, I agree.

Appeal dismissed.

Solicitors : *Billinghurst, Wood & Pope* (for the appellant) ; *Ashurst, Morris, Crisp & Co.* (for the respondent Kanssen) ; *Paisner & Co.* (for the respondents other than Kanssen).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

PETTIT *v.* LILLEY.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J., Croom-Johnson and Lynskey, JJ.), April 4, 12, 1946.]

Evidence—Admissibility—Documents—Regimental records—Confidential Crown documents—Not public documents—Inadmissible as evidence.

In registering the birth of a child, the respondent gave her husband's name as the father. She was convicted by a court of summary jurisdiction for having made a false statement contrary to the Perjury Act, 1911, s.4, on the ground that her husband was overseas on military service at the time that the child was conceived. She appealed and at the hearing of the appeal, in order to prove non-access the prosecution sought to put in evidence certain regimental records relating to him and the officer in charge of the records was called as a witness. He stated that the records in question were official records and documents, kept by a government department and preserved at the Regimental Records Office ; they were not documents to which the public had access, nor were they kept for the use or information of the public. The recorder held that the records were not admissible under the common law and since there was no other evidence, he found that the case was not proved and quashed the conviction. On appeal to the High Court, it was contended by the prosecution that regimental records were public documents and therefore admissible at common law as *prima facie* evidence of the facts stated therein :—

Held : regimental records were not public documents because they were not documents to which the public could have access and were not kept for the use and information of the public but for the information of the Crown and the Executive ; they were confidential Crown documents which the Crown could refuse to produce. Therefore, they were not admissible as evidence.

Sturla v. *Freccia* (3) *applied.*

[**EDITORIAL NOTE.** This is a case of considerable importance in regard to the admissibility of regimental records. It is clear on authority that it is essential for the admissibility of public documents as such, that the public should have access to them and they have no such right in the case of Army records. It might well be highly detrimental to the public interest that they should, and in *Anthony* v. *Anthony* (1919) 35 T.L.R. 559, the Secretary of State for War successfully claimed Crown privilege to refuse the production of army medical sheets. In *Gleen* v. *Gleen* (5) such sheets were admitted, but, in the opinion of Lord Goddard, L.C.J., incorrectly if the ground of the admission was that they were public documents. The case under consideration, however, was a criminal prosecution, and the Lord Chief Justice refuses to express an opinion on the effect of the Divorce Rules upon the question. As to this, the matter is dealt with, not by rule but by a Direction of the President, dated Mar. 30, 1944, providing for evidence of non-access by affidavit in the case of members of the Forces. The Evidence Act, 1938, which applies only to civil matters, is not here relevant, nor is the Army Act, 1881, s. 163, since the charge was not under that Act.

As to Public Documents, see HALSBURY, Hailsham Edn., Vol. 13, p. 654, para. 720, and pp. 656-679, paras. 726-747 ; and for Cases, see DIGEST, Vol. 22, pp. 314, 315, Nos. 3072-3075, p. 345, Nos. 3487-3493.]

Cases referred to :

*(1) *Irish Society* v. *Derry* (*Bp.*) (1846), 12 Cl. & Fin. 641 ; 22 Digest 350, *3543*.

(2) *Duncan* v. *Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 587 ; [1942] A.C. 624 ; 111 L.J.K.B. 406 ; 166 L.T. 366.

*(3) *Sturla* v. *Freccia* (1880), 5 App. Cas. 623 ; 22 Digest 314, *3072* ; 50 L.J.Ch. 86 ; 43 L.T. 209.

(4) *Arnold* v. *Bath & Wells* (*Bp.*) (1829), 5 Bing. 316 ; 22 Digest 338, *3391* ; 2 Moo. & P. 559 ; 7 L.J.O.S.C.P. 120.

*(5) *Gleen* v. *Gleen* (1900), 17 T.L.R. 62 ; 22 Digest 345, *3489*.

(6) *Doe d. France* v. *Andrews* (1850), 15 Q.B. 756 ; 22 Digest 338, *3389*.

*(7) *Heyne* v. *Fischel & Co.* (1913), 30 T.L.R. 190 ; 22 Digest 347, *3509* ; 110 L.T. 264.

(8) *Mercer* v. *Denne*, [1905] 2 Ch. 538 ; 22 Digest 382, *3907* ; 74 L.J.Ch. 723 ; 93 L.T. 412.

Special Case stated for the opinion of the High Court by the recorder of Cambridge (Sir Roland Burrows, K.C.), who allowed an appeal and quashed the conviction of the respondent by the court of summary jurisdiction sitting at Cambridge, for having on May 15, 1944, made a false statement relating to a birth contrary to the Perjury Act, 1911, s. 4. The facts are fully set out in the judgment of Lord Goddard, L.C.J.

B. Stuart Horner for the appellant.

R. E. Seaton for the respondent.

Cur. adv. vult.

Lord Goddard, L.C.J. : Quite shortly, the facts were that the respondent in registering the birth of a child gave her husband's name as the father, and it was alleged by the prosecution that her husband had been called up for service at the beginning of the war and they tried to prove that when the child was conceived he was overseas. The child was born on May 1, 1944, and in order to prove the date when the husband went overseas a civilian staff officer at the War Office who stated that he had charge of the records relating to the respondent's husband, was called as a witness. He stated that these records were official records and documents kept by a government department and preserved at the Regimental Records Office ; that they were not documents to which the public have access, nor were they kept for the use or information of the public.

The recorder held that the records were not admissible under the common law. It was conceded, at least before this court, that the documents were not admissible under the Army Act, 1881, s. 163, as the charge was not one under that Act. Nor could the Evidence Act, 1938, make the documents admissible as that Act has no application to a criminal charge. Another document which the prosecution sought to prove was rejected by the recorder and it was not contended before us that it was admissible. There was no other evidence from which any conclusion could be drawn as to where and when the respondent's husband was serving during any relevant time and there being no evidence, therefore, to show impossibility of access, the recorder found that the case was not proved and allowed the appeal.

The only question now before this court is whether the recorder was right in refusing to admit the regimental records. The contention of the appellant is that they are public documents and therefore admissible at common law as *prima facie* evidence of the facts stated therein. The first thing, therefore, is to see how these documents come into existence. The King's Regulations for the Army, 1940, provide for the keeping of records of a soldier's services and his military history and they contain elaborate and minute provisions as to what is to be recorded. Among other things that should certainly appear is the period of his services abroad. By reg. 1711 (*a*) it is provided :

> Service abroad is reckoned from the date of embarkation in the United Kingdom to the date of disembarkation on return, both dates inclusive . . .

So, if the record is admissible, no simpler or more convenient method of proving the period during which a particular soldier has been beyond the seas can be imagined. But because a method of proof may be convenient it is not necessarily permissible, and these records, though produced from proper custody, can be used to prove the facts recorded only if they come within settled rules of law relating to evidence. Now, it is a well settled rule that public documents are admissible as *prima facie* evidence of the facts stated in them and the question that we have to determine is whether these regimental records are public documents within the meaning of this rule. The King's Regulations are not statutory but are made by His Majesty in virtue of his prerogative as the head of the Army. They form part of the code by which persons subject to military law are bound and it is the duty of the officer in charge of the records to see that they are properly kept. No doubt it is his duty to satisfy himself, so far as he can, by such means as are available to him, that what he records is true ; but because a document is an official document it by no means follows that it is a public document, within the meaning of the rule. The *locus classicus* on the subject is *Irish Society* v. *Bishop of Derry* (1). The question in that case material for consideration in the present was whether certain writs issued from the Court of Exchequer in Ireland to the Bishops of Derry to ascertain the value of the first fruits and twentieths, and the returns to the writs made by the bishops were admissible. PARKE, B., in delivering the opinion of the judges in that case said (12 Cl. & Fin. 641, at pp. 668, 669) :

> The writs related to a public matter, the revenue of the Crown, and the Bishops, in making the return, discharged a public duty, and faith is given that they would perform their duty correctly : the return is, therefore, admissible, on the same principle on which other public documents are received . . . In public documents, made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not.

In my opinion, it is quite clear that PARKE, B., did not mean to lay down that every document that may be prepared by a servant of the Crown for the information of His Majesty is a public document. It may be that the words " for the information of the Crown, or all the King's subjects who may require the information they contain " should be read as meaning " for the information of the Crown, that is to say, all the King's subjects who may require the information they contain." But however that may be, he was there dealing with documents of record in the courts. Many documents are prepared for the information of the Crown (*i.e.*, the Executive), which are of a highly confidential nature and it is well known, and has recently been held by the House of Lords, that the Crown has an absolute right to object to produce any document on the ground that it would be against the public interest so to do: see *Duncan* v. *Cammell Laird & Co.* (2). It is difficult, therefore, to see how a document to which the public can have no access and which the Crown can refuse to produce under a *subpoena* could by any possbiility be described as a public document.

The next case to which reference may be made on this subject is *Sturla* v. *Freccia* (3), in which LORD BLACKBURN considered the *Irish Society's* case (1) and dealt in some detail with what can be described as a public document. *Sturla* v. *Freccia* (3) was concerned with the report of a committee appointed by a public department in a foreign State and acted on by the Government of that State, but the House held that it was not admissible as a public document. LORD BLACKBURN, after quoting the judgment of PARKE, B., went on to say (5 App. Cas. 623, at pp. 643, 644):

> Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that "public" there is to be taken in the sense of meaning the whole world. . . . But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made *for the purpose of the public making use of it, and being able to refer to it.* It is meant to be where there is a judicial, or *quasi*-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be *quasi*-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made *for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.* [The italics are mine.]

Later in the judgment LORD BLACKBURN referred to *Arnold* v. *Bishop of Bath and Wells* (4) and said (5 App. Cas. 623, at p. 646):

> Supposing . . . the entry had been made by the bishop on his visitation that such and such a man was the clergyman of the parish, and had been admitted some twenty years before, *secundum consuetudinem*, and suppose it was wrong to admit him, that falls completely within the principle which I think the case of the *Irish Society* v. *Bishop of Derry* (1) establishes. It seems to me it is clearly within that principle. The bishop made his visitation, and recorded it *with the wish and intent that it should be kept publicly as a register, to be seen by everybody in his diocese.* If the bishop had not the right to make such an inquiry, so as to make it evidence in future, that is another affair; but if he had, then he was a public officer performing what he thought a public duty, *with the view and intent that it should be public.* [Again the italics are mine.]

It seems to me clear from LORD BLACKBURN'S speech that to be a public document it must be one made for the purpose of the public making use of it. Its object must be that all persons concerned in it may have access to it.

Now here, it appears to be beyond controversy, and, indeed, it was found as a fact, that the public has no right of access to these records. They are records which in my opinion, an officer of the Crown could refuse to produce on a *subpœna* if it was considered contrary to the public interest so to do. If a document is a public document, it must be so equally in time of war as in time of peace, and it is obvious that it might be most detrimental to the public interest to allow in time of war persons to have access to these records as they would show the movement of troops. The very fact that no defence regulation was passed prohibiting access to these records tends to show that they are not public, otherwise it is impossible to suppose that precautions would not have been taken to prevent or restrict access to them. And again, the fact that by the Army Act, 1881, s. 163, special provision is made which would, in my opinion, include these records or some of them in proceedings under the Act, whether before a civil court or a court martial, also indicates that these are not public documents, for, if they were, there would have been no necessity to provide specially that they should be admissible. The only case in which it seems any part of a soldier's record has ever been accepted by a court is that of *Gleen* v. *Gleen* (5), where JEUNE, P., appears to have admitted the medical sheet of a soldier to prove that he was suffering from a disease so as to establish adultery. That was an undefended case so the question was not argued and the report is very meagre, but in my opinion that case ought not to be followed if JEUNE, P., admitted the sheet as a public document. Special provisions have since been made by the Divorce Rules which may have the effect of admitting these documents in matrimonial causes but these Rules have no application to the present case, and I express no opinion regarding them.

In my opinion, these records are not within the class that can be described as public documents. They are not kept for the information of the public but for the information of the Crown and the Executive, and accordingly, in my opinion, the recorder was right in refusing to admit them as evidence. It follows that this appeal must be dismissed with costs.

CROOM-JOHNSON, J. : I agree that this appeal should be dismissed with costs. I had prepared a judgment, but after I had read that of the Lord Chief Justice which has just been delivered, and with which I agree, I could see no necessity for delivering my own.

There are, however, one or two further points to which I desire to call attention. No record or document seemingly was ever tendered to the recorder. What happened was that a civilian staff officer at the War Office was called and he stated that he was in charge of the records relating to the respondent's husband, presumably relating to his army service. He added that :

> . . . these records were official records or documents kept by a government department and preserved at the Regimental Record Office but that they were not documents to which the public have access or kept for the use or information of the public.

At this point there was an objection that these unspecified documents were inadmissible and, without more evidence by the prosecution, after argument the objection was upheld. I can, therefore, only guess at the nature of the record or document which the prosecution were proposing to put in to show *prima facie* that the said husband was taken a prisoner of war at Singapore and was detained by the enemy as such at all material times, in order to prove non-access. I can only surmise that it was a record of service form or paper, that being, I suppose, something with which most of us are now familiar. If that had been tendered, it may be that a distinction might have been sought to be drawn between records or registers as a class and other official documents coming from official custody. Such a distinction may exist : see TAYLOR ON EVIDENCE, 12th Edn., p. 943, para. 1479, and pp. 1002, 1003, paras. 1591, 1592 ; PHIPSON ON EVIDENCE, 8th Edn., p. 332 ; and, seemingly, indicated in LORD BLACKBURN's speech (5 App. Cas. 623, at p. 644) in *Sturla* v. *Freccia* (3).

A register is evidence of the particular transaction which it was the officer's duty to record even though he has no knowledge of its occurrence : see *Doe* v. *Andrews* (6). Possibly that may be a reason for the distinction, if it exists, between registers and such public documents as are of a judicial or quasi-judicial nature. It is not necessary, however, to pursue that inquiry further. It would have had to be shown, however, that the person who keeps the register is under a public duty either by statute or by the nature of his office to make such entries, after satisfying himself of their truth and that the entries were made for the benefit or information of the public : see TAYLOR ON EVIDENCE, 12th Edn., pp. 1002, 1003, para 1592, and PHIPSON ON EVIDENCE, 8th Edn., p. 332, where the authorities are collected ; and *cp.* STARKIE ON EVIDENCE, 3rd Edn., Vol. I, at p. 230, 243. In view of the admission by the officer to which I have called attention and the state in which the evidence was left, it is difficult to see how these two conditions were satisfied in this case.

On the second of these points, reference may be made to *Heyne* v. *Fischel* (7) where the question of the admissibility of a public register or record was considered. That was an action brought to recover damages for breach of contract, an action in which the General Post Office was not concerned. It was sought to put in certain records kept by the Post Office showing the times of the receipt and delivery of telegrams. PICKFORD, J., who tried the case rejected the evidence : in the course of his judgment he dealt with the matter as follows (30 T.L.R. 190) :

> For the plaintiffs it was contended that these documents were public records, but looking at the definition of public documents in the cases he did not think it was wide enough to cover these—*Mercer* v. *Denne* (8) ; *Sturla* v. *Freccia* (3). These documents were not meant to be preserved for more than a short time ; they were not documents to which the public had access ; they were not the result of a public inquiry, and they did not deal with a general public right. They were merely documents enabling the Post Office to regulate the pay of its servants and to see how the telegraph boys were doing their work.

I agree with that reasoning.

I cannot help expressing my regret that the precise nature of the paper which it was proposed to adduce, called in the case indifferently "documents," "records," or both, was not plainly stated, so that it could have been specifically described or identified in the case. Whatever it was, however, I am satisfied that it was not shown to be admissible in this case either as a public document or as a public register or record.

Lynskey, J.: I agree with my Lord for the reasons my Lord has stated.

Appeal dismissed with costs.

Solicitors: *Director of Public Prosecutions* (for the appellant); *Speechly, Mumford & Craig*, agents for *John Hepworth*, Cambridge (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* L.B. (HOLDINGS), LTD. (IN LIQUIDATION).

[House of Lords (Lord Jowitt, L.C., Lord Thankerton, Lord Porter, Lord Goddard, Lord Uthwatt), January 11, 14, 16, March 22, 1946.]

Income Tax—Sur-tax—Undistributed income—Apportionment according to member's interest in assets—" Able to secure "—" Any means whatsoever "—Whether limited to lawful means—Finance Act, 1922 (c. 17), *s.* 21—*Finance Act,* 1939 (c. 41), *s.* 15.

The respondent company was an investment company all the shares of which, except one, were issued to B. Shortly after its incorporation B. executed a deed of trust in respect of his shares in favour of his wife (who held the remaining share) and his children. The whole of the trust income was paid into an account, controlled by B., in which there were also credited sums due to B. personally. B. drew on this account for discharge of his business liabilities, for such payments as he made to the beneficiaries under the trust and for his personal needs. No trust accounts were kept by B. The Inland Revenue Commissioners gave directions under the Finance Act, 1922, s. 21, and made apportionments, under the Finance Act, 1939, s. 15, of all the income of the company, to B., whereby the income so apportioned fell to be treated as part of B.'s total income for purposes of sur-tax under the Finance Act, 1922, s. 21, as amended. The Special Commissioners allowed an appeal against the apportionments and discharged them. This decision was affirmed by the Board of Referees, who held that the words "able to secure" in the Finance Act, 1939, s. 15, meant "able to secure by lawful means" and that the consent of the beneficiaries was necessary before B. could secure that assets or income of the company could lawfully be applied for his benefit; and, having regard to their findings of fact and their conclusions of law, they found that B. was not able and was not likely to be able to secure that the income or assets of the company would be applied directly or indirectly for his benefit. In a case stated to the King's Bench Division the Board of Referees asked whether their conclusions of law were correct. Wrottesley, J., in reversing the decision of the Board of Referees, stated that in the circumstances of the case he was not concerned with breaches of the criminal law and held that the words "able to secure" in the Finance Act, 1939, s. 15, were not to be interpreted as meaning by lawful means, if, by that, the Board meant, "without committing a breach of trust." The majority of the Court of Appeal (Scott and du Parcq, L.JJ.) thought Wrottesley, J., stated the law too favourably to the Crown; in particular they thought that "able to secure" meant "able to secure permanently"; they therefore set aside the order of the King's Bench and remitted the case to the Board of Referees, with an elaborate series of directions, for their further consideration of the facts in light of the principles stated in their judgment:—

Held: (i) on a true construction of the Finance Act, 1939, s. 15, there was no reason for placing any such limit as "lawful" on the words "any means whatsoever," especially when it was constituted a question of fact, and was expressly not confined to rights in law or in equity.

(ii) the word "secure" in the section did not imply some necessary element of permanency or certainty and neither of these elements should be accepted as a necessary or proper test.

(iii) as regards criminal means the point could be settled by a consideration of the whole phrase "to secure that income or assets (of the company) will be applied for his benefit," which meant that such application would be made by or on behalf of the company which would exclude any criminal action by the person in question.

(iv) the directions embodied in their order by the Court of Appeal were out of place and open to criticism; the question for the Special Commissioners was one of fact and peculiarly one for the application of their business knowledge and common sense.

(v) consequently, the order of the Court of Appeal should be set aside, the question asked in the case stated should be answered in the negative and the case should be remitted to the Board of Referees for further procedure.

Order of the Court of Appeal, ([1944] 1 All E.R. 308), *set aside.*

[**EDITORIAL NOTE.** It is held by the House of Lords, on the construction of sect. 15 of the Finance Act, 1939, that the question whether a member of an investment company is able to secure the application of assets or income for his own benefit is not affected by the legality of the means employed. Neither lack of permanence nor the use of unlawful means will exclude the application of the section. In the Court of Appeal the argument for the Crown proceeded on the assumption that criminal means were not included by the section. As to this, LORD THANKERTON says that the point may be settled by a consideration of the whole phrase "to secure that income or assets (of the company) will be applied for his benefit." In his view these words mean that such application will be made by, or on behalf of, the company, which would exclude any criminal action by the person. LORD UTHWATT holds that what is required of the Special Commissioners by the section is that, taking all the circumstances into account, they should make a rational estimate of the consequences that might flow from some supposed course of conduct open to the individual had he embarked upon it, and should form a view on the question whether in the result he could or could not have secured the relevant application: there is no apparent reason for excluding unlawful means from consideration.

FOR THE FINANCE ACT, 1939, s. 15, see HALSBURY'S STATUTES, Vol. 32, p. 185.]

Cases referred to:

*(1) *Penang and General Investment Trust, Ltd.* v. *Inland Revenue Comrs.*, [1943] 1 All E.R. 514; [1943] A.C. 486; 112 L.J.K.B. 356; 169 L.T. 93.

(2) *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61; 42 Digest 626, *277*; 26 L.J.Ch. 473; 29 L.T.O.S. 67.

(3) *Becke* v. *Smith* (1836), 2 M. & W. 191; 42 Digest 625, *261*.

(4) *The Duke of Buccleuch* (1889), 15 P.D. 86; 42 Digest 627, *293*; 62 L.T. 94; *on appeal*, [1891] A.C. 310.

APPEAL by the Crown and CROSS-APPEAL by the respondent company from a majority decision of the Court of Appeal, given on Feb. 1, 1944, and reported ([1944] 1 All E.R. 308). The facts are fully stated in the opinion of LORD THANKERTON.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Crown.

J. Millard Tucker, K.C., and *N. E. Mustoe* for the respondent company.

The House took time to consider its opinion.

LORD THANKERTON: My Lords, this appeal and cross-appeal raises a question as to apportionments of the income of L.B. (Holdings), Ltd., the respondents in the appeal and appellants in the cross-appeal, to whom I will refer as the holding company, for the years of assessment 1938-39 and 1939-40 to one Luke Brady under the Finance Act, 1939, s. 15, whereby the income so apportioned to Brady fell to be treated as part of his total income for purposes of sur-tax under the Finance Act, 1922, s. 21, as amended. The main question relates to the proper construction of sect. 15 of the Act of 1939, and the material for the consideration of this House is contained in a case stated by the Board of Referees under the Finance Act, 1922, Sched. I, para. 2, on the requisition of the present appellants. The Special Commissioners had allowed an appeal against the apportionments and discharged them, and this decision was affirmed by the Board of Referees.

On the present appellants' appeal against the decision of the Board of Referees on the case stated, the appeal was allowed, and the decision of the Board of Referees was reversed by order of the King's Bench Division (WROTTESLEY, J.) dated Nov. 3, 1942, but an appeal against that order was allowed by the Court of Appeal by an order dated Feb. 1, 1944, and the case was remitted to the Board of Referees to draw such further inferences and find such further facts as might be necessary by reason of the answer of the court to the question of law asked in the case stated.

These apportionments were made under the Finance Act, 1939, s. 15, following directions made under the Finance Act, 1922, s. 21, as later amended, that the income of the holding company should be treated as the income of the members. An appeal against these directions was withdrawn at the hearing before the Special Commissioners, leaving the question whether, on a proper construction of sect. 15 of the Act of 1939, Brady's position in relation to the holding company was such as to warrant the apportionment of its income to him. The material portions of sect. 15 are as follows :

> (1) If in the case of any investment company the Special Commissioners are of opinion that any person who is not a member of the company for the purposes of section twenty-one of the Finance Act, 1922, and the enactments relating thereto is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit, they may, if they think fit, treat him as a member of the company for the said purposes.
>
> (2) In apportioning for the purposes of the said section twenty-one the income of an investment company—
>
> (*a*) to any person who is treated as a member of the company by virtue of the preceding sub-section ; or
>
> (*b*) to any person who is a member of the company but has no relevant interests in the company, and in their opinion is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit ; or
>
> (*c*) to any person who is a member of the company and in their opinion is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit to a greater extent than is represented in the value for apportionment purposes of his relevant interests in the company, considered in relation to the value for those purposes of the relevant interests of other persons therein ;
>
> the Special Commissioners may apportion to him such part of the income of the company as appears to them to be appropriate and may adjust the apportionment of the remainder of the company's income as they may consider necessary.
>
> (3) For the purposes of this section, a person shall be deemed to be able to secure that income or assets will be applied for his benefit if he is in fact able so to do by any means whatsoever, whether he has any rights at law or in equity in that behalf or not, and the Special Commissioners may draw the inference that a person is likely to be able to secure that assets or income of a company will be applied for his benefit, or, as the case may be, will be so applied to a greater extent than is represented in the value for apportionment purposes of any relevant interests which he has in the company, if and only if they are satisfied—
>
> (*a*) that he has, directly or indirectly, transferred assets to the company the value of which is not represented, or is not adequately represented, in the value for apportionment purposes of any relevant interests which he has in the company ; and
>
> (*b*) that the persons who, whether as directors or shareholders or in any other capacity, have, or will at any material time have, powers or rights affecting the disposal or application of the income or assets of the company are likely to act in accordance with his wishes or that he is able to secure that persons who at the material times will have such powers or rights will be persons likely to act in accordance with his wishes.
>
> (6) For the purposes of this section—
>
> (*a*) references to a person shall, in the case of an individual, be deemed to include the wife or husband of the individual . . .
>
> (*c*) the expression " relevant interests " means, in relation to a person connected in any way with a company, interests by reference to which income of the company could be apportioned to him for the purposes of section twenty-one of the Finance Act, 1922, apart from the provisions of this section, and the expression " value for apportionment purposes " means, in relation to any relevant interests in any company, the value falling to be put thereon in apportioning income of the company for the purposes of the said section twenty-one.

It should be remembered that by sect. 21 (7) of the Act of 1922, it is provided that in that section the expression " member " is to include any person having a share or interest in the capital or profits or income of a company. It is admitted that the holding company is an investment company within the meaning of sect. 15 of the Act of 1939.

The facts may be shortly stated as follows: On Mar. 17, 1934, Brady, who owned a valuable public house business, caused to be incorporated the Holding company to carry on the business of an investment company, with a share capital of £1,000 divided into 1,000 shares of £1 each, of which 605 have been issued. Of these, 500 were originally issued, 499 to Brady and 1 to Mrs. Brady; A a further 105 shares were issued to Brady on Oct. 21, 1935. At all material times Mr. and Mrs. Brady were the only directors of the holding company, Brady being the governing director, and as such invested with the widest possible control and powers.

On the same date, Brady caused to be incorporated another company, Luke Brady, Ltd., with a capital of £50,000 divided into 50,000 shares of £1 each. Mr. and Mrs. Brady were the first directors, entitled to hold office for life, Brady B being governing director, with powers and control similar to those which he had in the holding company. By agreement dated Mar. 22, 1934, he sold his public house business to Luke Brady, Ltd., in consideration of 49,988 fully paid shares of that company. Under the agreement the debts owing by Brady in respect of the business so sold remained his personal liability. Shortly afterwards Brady sold the 49,988 shares in Luke Brady, Ltd., in consideration of the 500 C shares in the Holding company already allotted to him and Mrs. Brady.

On Mar. 22, 1934, Brady also executed a declaration of trust in favour of his wife and children in regard to such of his investments as he should from time to time specify in the schedule thereto. The income of the trust fund in each year was payable to Mrs. Brady up to £2,000, any balance being payable in equal shares to their five children. Brady was sole trustee, and in sole control. In the schedule to the declaration of trust, and thereafter from time to time, a D large number of shares and securities, including the 500 shares in the Holding company already mentioned, were brought into the trust fund by Brady. On May 2, 1935, all the shares and securities held in trust, except the 500 shares in the Holding company, were sold to the Holding company for £101,000 (their then market value) payable with interest within six months. On Oct. 16, 1935, the transfer of these shares and securities was completed, along with the transfer of further investments belonging to Brady personally, the market value of E which was £4,000, and the transaction was completed by the issue and allotment to Brady at a premium of £999 per share, of a further 105 shares in the holding company, all of which he held thereafter as trustee, and by the transfer to Brady personally of the sum of £4,315 4*s.* out of the trust funds.

Accordingly, at all material times the sole capital asset of the trust was a holding of 605 shares in the holding company, 604 of which stood in the name of Brady and one in the name of his nominee, Mrs. Brady, and these shares F constituted the whole issued capital of the holding company.

The whole trust income was paid into the account of Luke Brady, Ltd., in whose books it was credited to an account entitled "Mr. Brady's Personal Account," in which there were also credited sums due to Brady personally, such as director's fees and debts due to him in respect of the public house business prior to its sale. Brady drew on this account for discharge of the liabilities G of that business, for such payments as he made to the beneficiaries under the trust, and for his personal needs. No trust accounts were kept by Brady, and it does not seem possible to ascertain the balance of the trust funds in the hands of Luke Brady, Ltd., though the income of the trust consisted solely of dividends paid by the holding company and can easily be traced.

Brady's debts in respect of the business turned out to be substantially greater than the debts due to the business, and Brady paid these debts out of moneys H in Luke Brady, Ltd. It is stated in the case that Brady's eldest son:

> . . . was not aware, and there was no evidence that any of the other children were aware, of the fact that up to some date in 1939 the liquid assets of Luke Brady, Ltd., were depleted by Mr. Brady to a greater extent than they were increased by the receipt of the trust income. Mr. Brady in effect misled his elder children into the belief that by "lending the surplus trust income to Luke Brady, Ltd.", he was increasing the value of the company's business by enabling it to undertake capital expenditure which it could not otherwise have undertaken, whereas the fact is that, if Mr. Brady had paid his debt to the company, the surplus trust income would not have been needed.

The following dividends were declared by Luke Brady, Ltd., in the years 1937-38 and 1938-39, and formed the larger part of the income of the holding company :

For the year ended Jan. 6, 1938—£12,000 gross ;
For the year ended Jan. 7, 1939—£14,000 gross ;

The dividends paid by the holding company (tax free) were as follows :

For the year ended Apr. 30, 1938—£10,587 ;
For the year ended Apr. 30, 1939—£11,697.

The holding company went into liquidation on July 22, 1939, and the liquidator distributed the assets in specie to Brady as the shareholder entitled thereto, which assets Brady was then holding as trustee.

By deed dated July 31, 1940, Brady appointed two additional trustees, and for the first time a separate banking account was opened for the trust in the names of the trustees and the investments were registered in their names. On the same day the three children of Brady who were then of age executed a deed of release, releasing Brady from all liability for acts or omissions done in respect of his trusteeship.

In para. 29 of the case stated the Board of Referees found the following facts :

> (*a*) That Mr. Brady did not intend to deprive his children permanently of the trust income or any substantial part of it ; but, he did intend, so long as his children allowed him to do so, to retain control over the income and to use most of it temporarily to increase the liquid assets of Luke Brady, Ltd., depleted by his own borrowing. He took a lax view of his duty as a trustee and as a director, and, although he knew that he was liable to account, he did not expect that his children would ever call upon him to account strictly ;
>
> (*b*) That prior to the deed of release none of the children who were of age had agreed to forego any of their rights, and the rights of the infant children could not be released. Mr. Brady's assets were sufficient to enable him to make good any claim by the beneficiaries. We, therefore, held that the trust was not a sham ;
>
> (*c*) That it was likely that the children who were of age would consent to a substantial part of the trust income being lent to Mr. Brady, if he asked for it ;
>
> (*d*) That there was not sufficient evidence to satisfy us that any of the children were likely to have consented to assets or income of the company being given to Mr. Brady, unless he had been in serious financial difficulty. That event had not occurred, and up to the date of the direction appeared to be unlikely to occur. We considered it likely that, in that event, some of the children would have helped their father, but there was too much uncertainty to make it appropriate to apportion any of the income to Mr. Brady.

Para. 30 and 31 of the case stated are as follows :

> 30. We held that the words "able to secure" in the Finance Act, 1939, s. 15, mean "able to secure by lawful means," and that the consent of the beneficiaries was necessary before Mr. Brady could secure that assets or income of the holding company could lawfully be applied for his benefit.
>
> 31. Having regard to the findings of fact as set out in para. 29 and the conclusions of law as set out in para. 30, we found that Mr. Brady was not able and was not likely to be able to secure that the income or assets of the company would be applied directly or indirectly for his benefit.

The Board stated two questions for the opinion of the court :

> (1) Whether there was any evidence to support our findings of fact as set forth in paras. 29 and 31 ;
>
> (2) Whether our conclusions of law as set forth in para. 30 were correct.

After an affirmative answer by Wrottesley, J., to the first question, it dropped out of the case, and the second question was the only one before the Court of Appeal or this House. In all these three stages an additional contention, which does not appear in the case stated, was maintained on behalf of the holding company, to which I will refer later.

The only express point of construction in para. 30 of the case stated was that the words "able to secure" in the Finance Act, 1939, s. 15, mean "able to secure by lawful means." Wrottesley, J., stated that in the circumstances of this case he was not concerned with breaches of the criminal law, and that it was clear that the Board of Referees thought that if and in so far as Brady's ability to secure that the income of the holding company would have been applied for his benefit involved a breach of trust, he was not within the meaning of sect. 15, and he held that that construction was wrong, and answered the question by stating that the words "able to secure" used throughout sect. 15 were not to be interpreted as meaning by lawful means, if by that the Board meant, as it obviously did, "without committing a breach of trust." On the appeal by the holding company, Luxmoore, L.J., agreed with the view of Wrottesley, J., but he thought that the order of the King's Bench remitting the case should have been elaborated so as to give fuller guidance to the Board of Referees. The majority, consisting of Scott and du Parcq, L.JJ., delivered a joint judgment, in which they stated that, while there was much in the judgment of Wrottesley, J., with which they agreed, they thought that he had stated the law too favourably to the Crown. In particular they thought that "able to secure" meant "able to secure permanently," and they thought that the case should be remitted to the Board of Referees for their further consideration of the facts in light of the principles stated in their judgment. Thereafter the Court of Appeal made the order appealed against, by which the order of the King's Bench was set aside and the case was remitted to the Board of Referees with an elaborate series of directions, to which I will refer later.

Coming then to sect. 15 of the Act of 1939, subsect. (1) does not apply to Brady as he is a registered member of the holding company, and as he also admittedly has relevant interests in the company, heads (*a*) and (*b*) of subsect. (2) do not apply, but head (*c*) applies, subject to the Special Commissioners being of the opinion therein specified, and, in that event the Special Commissioners have a discretion as to apportionment to him of an appropriate part of the income of the company.

In subsect. (1) and heads (*b*) and (*c*) of subsect. (2) the same phrase is repeated —"is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit," and in subsect. (3) is to be found a definition of this phrase for the purposes of the section, and it is at once noticeable that it deals separately with the case of "is able to secure . . ." and the case of "is likely to be able to secure . . .", and their respective treatment is markedly different. The first case relates to a person who is able to secure the application of the company's assets or income for his benefit; the second case relates to a person who is likely to be able to secure that other persons having powers or rights affecting the disposal or application of the income or assets of the company are or will be likely to act in accordance with his wishes. A second important difference is that the words "by any means whatsoever, whether he has any rights at law or in equity in that behalf or not" are omitted from the second case, and further, in my opinion, the second case contemplates that the powers or rights are to be properly exercised in a question with the company by the parties having such powers or rights. A third difference is that the first case is a question of fact, while the second is a question of an inference to be drawn by the Special Commissioners.

The Board of Referees held that "able to secure" meant "able to secure by lawful means"; this view has been disapproved of by Wrottesley, J., and by all the learned judges of the Court of Appeal. So far I agree, and the question of law falls to be answered in the negative. I can see no good reason for placing any such limit on the words "any means whatsoever," expecially when it is constituted a question of fact, and is expressly not confined to rights at law or in equity. The limit proposed by the Board of Referees may perhaps be said to be implied in the second case in which there is no such wide description of the means.

My Lords, it has been suggested that "secure" implies some necessary element of permanency or certainty, but I am unable to accept either of these elements as a necessary or proper test. On the facts of this case, it seems correct to say, though the Board of Referees have not drawn any distinction in their findings—as I am strongly of opinion that they should have done—that it falls under the first part of subsect. (3), and I proceed on that footing. The first part of the subsection, which I have ventured to refer to as the first case, requires a finding of fact as to ability to secure, whether that ability has been already put into action or not. If it has already been put into action, that, of course, may afford good evidence of the existence of the ability. In this first case there is no question of future ability as in the second case. Now, what is to be secured is the application of the company's income or assets for his benefit, and a temporary application may be of great benefit, even as a loan repayable later, and I see no reason for excluding such a benefit from the purview of the Special Commissioners, though doubtless they will not trouble themselves with doubtful ability, or with benefits which are unsubstantial.

As regards criminal means, Wrottesley, J., said that he was not concerned with them, and the judges in the Court of Appeal were content with the statement of counsel for the Crown, that it was not contended by the Crown that any criminal action could be within the means referred to in subsect. (3). In my opinion, however, this question cannot be so lightly brushed aside on such a question of construction as the present one. It appears to me that the point may be settled by a consideration of the whole phrase—" to secure that income or assets (of the company) will be applied for his benefit." In my view this means that such application will be made by, or on behalf of, the company, which would exclude any criminal action by the person in question.

As regards the directions embodied in their order by the Court of Appeal, I am of opinion that they are out of place, and I therefore find it unnecessary to criticise them. The question for the Special Commissioners under the first case of subsect. (3) is one of fact, and is peculiarly one for the application of their business knowledge and common sense. They will naturally accept the construction of subsect. (3) as expressed in this House, and if any fresh or further question of law arises, it will be for the court to decide it on the facts then placed before the court.

There remains the further point raised on behalf of the holding company, *viz.*, that Brady's case could only fall under head (*c*) of subsect. (2) of sect. 15 of the Finance Act, 1939, as he and his wife were the registered shareholders of the whole share capital of the holding company throughout the material periods, that the value of their relevant interests for the purpose of apportionment as defined in subsect. (6) (*c*) of sect. 15 was the whole of the income and, as established by the *Penang* case (1), the whole income could be apportioned to Brady alone in view of subsect. (6) (*a*), and it did not matter on whom the assessment was finally made. That, accordingly, there was no room for the adjustment of the apportionment of any remainder, as contemplated by the last part of subsect. (2). This contention rests on a completely false basis. When, as here, you have the further extension of the provisions of sect. 21 of the Finance Act, 1922, by the provisions of sect. 15 of the Finance Act, 1939, you have the problem of 100 per cent. of the income to be apportioned among a variety of interests, one or more of which, taken by itself, may amount to 100 per cent., but that does not alter the problem. The Special Commissioners would have before them the trustees, the beneficiaries, and Brady's further personal interest ascertained under the provisions of sect. 15, in order to consider whether it was appropriate to apportion to Brady personally any part of the income of the holding company. Counsel for the holding company, if I understood him correctly, maintained that there were passages in the speeches in the *Penang* case (1), which expressed the view that once the apportionment was made on the trustees, that could not be altered, though subsequently, on getting the necessary information, the beneficiaries might be assessed. No such point was raised or involved in the *Penang* case (1); the apportionment had been made on the trustees, and the assessment had been made on the settlor and the only question was whether it was competent to apportion to trustees. It was admitted that, if the apportionment was competent, the assessment was competent and valid. I confess that I have difficulty in understanding how, if the information as to the beneficiaries is obtained subsequently to an apportionment on the trustees, you can assess the beneficiaries separately, with a view to their liability to sur-tax, without a fresh apportionment. I am of opinion that this contention of the holding company is untenable.

I am accordingly of opinion that the appeal of the Crown should be allowed, and that the cross-appeal should be dismissed; that the order of the Court of Appeal should be set aside; that question No. 2 asked in the case stated should be answered in the negative, and that the case should be remitted to the Board of Referees for further procedure.

My Lords, I have been requested by Lord Jowitt, L.C., and Lord Goddard to express their concurrence in the opinions which have been delivered.

Lord Porter: My Lords, I find myself in general agreement with the reasoning and result of the opinions just expressed by LORD THANKERTON. I have also had an opportunity of seeing the opinion about to be delivered by LORD UTHWATT with whom I feel myself also in agreement.

LORD UTHWATT: My Lords, the point at issue is stated by the Board of Referees in a form which raises the question whether they were correct in their conclusion of law that the phrase "able to secure" as used in the Finance Act 1939, s. 15, means "able to secure by lawful means." That phrase appears many times in the section but always, either expressly or impliedly, as part of the wider phrase "able to secure that income or assets will be applied for his benefit," but wherever it appears there is by virtue of the "deeming part" of subsect. (3) included in its ambit a particular meaning. The real question that arises—and it is this question which is raised by the case in a shortened form—is not whether the words "able to secure" are subject to the qualification suggested, but whether in construing the sentence "a person shall be deemed to be able to secure that income or assets will be applied for his benefit if he is able to do so by any means whatsoever"—in which necessarily the words "so to do" mean "able to secure that income or assets will be applied for his benefit"—there is implied the limitation that the means must be lawful. The gloss can be put only upon the phrase "by any means whatsoever" not upon the words "able to secure." But the question is the construction of the sentence as a whole, not the interpretation of a particular phrase contained in it.

The point arises for determination by reason of the fact that the Commissioners of Inland Revenue appear—see para. 23 of the case stated—to have failed to convince the Board of Referees that, apart from breach of duty, Brady could have secured an application of income or assets of the company for his benefit. It was indeed urged in argument before this House that Brady might have achieved the specified object without involving himself in any breach of duty. That matter is not raised by the stated case and accordingly I do not propose to embark upon a consideration of it.

In the Court of Appeal the argument for the Crown upon the point of construction apparently proceeded on the lines that the sentence under consideration did not cover criminal means. In this House, the Solicitor-General, rightly in my view, did not pursue this line. The choice was to lie between any means whatsoever and any lawful means whatsoever.

I turn to the question of construction. The language of the sentence is unambiguous; the grammatical meaning is clear. Ability of itself involves means, and the emphasis is on the existence of the ability whatever the means by which it is exercised. If there is to be a departure from the grammatical meaning—and it is for this that the respondents to the appeal contend—a compelling reason must be shown. The applicable rule of construction which has been stated in many cases—see, *e.g.*, *Grey* v. *Pearson* (2); *Becke* v. *Smith* (3); *Duke of Buccleuch* (4)—amounts in substance to this, that a departure from grammatical construction is justifiable only when that construction would be repugnant to the intention of the Act or would lead to some manifest absurdity or to some inconsistency. Inconsistency is not here in question and the only question therefore is whether the grammatical construction is contrary to the intention of the Act or in itself absurd. Is that true in this case? The two matters may be considered together.

To ascertain the object of the legislation one must go back to the Finance Act, 1922, s. 21. Under that section with a view, it is stated, to preventing the avoidance of the payment of super-tax through the withholding of income from distribution, powers were given to the Special Commissioners where a company had not distributed a reasonable part of its income, to apportion the income of the company to its members as therein defined. In the Finance Act, 1936, s. 20, investment companies make their appearance as a class requiring special treatment for the purposes of the Finance Act, 1922, s. 21. Loan creditors are to be treated as members. The Finance Act, 1937, made further provisions as respects investment companies, the powers of the Special Commissioners being extended. It is unnecessary to go into details. So far the persons to whom an apportionment may be made are to be determined by reference only to facts. Then comes the Finance Act, 1939, which adopts a new principle as regards investment companies. Broadly investment companies—a narrow class—are treated as machines which are to be inspected and to have their possible methods of working considered. Under sect. 14 (1) of that Act the whole of the investment income of an investment company however much or little has been distributed is to be deemed for sur-tax purposes to be the income of the members, and the Special Commissioners are placed under a duty to give the direction mentioned in the Act of 1922. One then turns to sect. 15. Under that section there is set up an artificial class of persons to whom special treatment may be accorded. Persons not members who pass the ability test may, if the Special Commissioners think fit, be included in the class and there must be included in the class those members who under head (*b*) of subsect. (2) merely pass the ability test and those members who under head (*c*) of subsect. (2) pass that test with honours.

Turning to the test its substance does not suggest that any limitation is to be implied. The actual exercise of the ability and the likelihood of its exercise are irrelevant; and there is no specific provision as to the amount of income or assets to which the ability is to extend. The test is to some extent an objective test and the possibility of the particular *praepositus* in fact resorting to any particular means does not come up for consideration.

The general meaning of the words "secure an application for his benefit" embodied in the test is clear enough. Due regard must be paid to the words "secure" and "benefit," but no technical meaning is attached to either word. Exact directions designed to help those called on to apply the test cannot I think be stated and examples are apt to be misleading. To my mind what is required, and all that is required, is that the Special Commissioners, taking into account the whole position in which the *praepositus* is found embedded, should make a rational estimate of the consequences that might flow from some supposed course of conduct open to him had he embarked upon it and should form a view on the question whether in the result the *praepositus* could or could not have secured an application of assets or income for his benefit. Can he rationally be said to be able to secure an application of income or assets for his benefit? That is the test. If that be so there does not appear to be any reason for excluding unlawful means from consideration. Where resort to unlawful means is envisaged one is faced with the possibility that the *praepositus* may in the case supposed be able to bring about an application of assets or income to his use, without thereby "securing" an application for his "benefit." There is always the possibility—but never the certainty—of intervention by those whose rights have been infringed. Both the probability of appropriate action by them and the probable results of that action would have to be considered. After a consideration of these matters a view can be formed on the question at issue.

The order of the Court of Appeal contains certain directions—I will advert to them in a moment—as to the matters to be taken into account when the means envisaged are unlawful. With all deference to the Court of Appeal I do not think the matter admits of directions so specific and detailed as those contained in this order. All the circumstances have to be considered and considered as a whole. If the view as to the nature of the duty cast upon the Special Commissioners which I have expressed is right, any specific directions would be merely an individual exposition of what is meant by an instruction to the Special Commissioners that, in reaching their conclusions, they should use their common sense as men of affairs, neither disregarding documents and rights, nor being blinded by them. Heads may go in the air in imagining the possibilities open to the *praepositus*, but the feet must be kept on the ground in estimating the probable consequences.

In my view there is nothing absurd in including unlawful means among the means referred to in the section. The contrary is I think the case.

A consideration of the effect of the test reinforces this conclusion. Inclusion in the class as a result of the application by the Commissioners of the test does nothing save give rise to a discretionary power, to be exercised judicially, to apportion to an included person such part of the income of the company as appears to them appropriate. That being the only result of inclusion, why should not the net be widely cast?

One other consideration may be mentioned. In the realm of tax avoidance ingenuity need not deny, and in practice does not deny, itself any extravagance. The thoughtful *praepositus*, if faced by the section with the necessity of rendering any exercise of his ability unlawful, might readily secure the inclusion in the articles of association of the company a provision that no assets or income of the company shall be applied for his benefit by any means whatsoever, whatever that may mean in the Act of 1939, and set up trusts applicable to the shares in favour of a class no member of which could be ascertained in his lifetime. Surely it was not the intention of the legislature in its repeated efforts to secure the avoidance of sur-tax to leave such a door open.

For these reasons I am of the opinion that there is not implicit in the section, any such limitation as is suggested.

My Lords, I turn now to the directions given by the Court of Appeal which are to be applicable when the supposed means are unlawful. It is true that a consideration of these directions is not essential to the question of construction raised by the case stated, but as they have been given I think it right to deal with them.

In form these directions merely state that if the Inland Revenue succeed in establishing certain matters to the satisfaction of the tribunal, an inference of the necessary ability or likelihood of ability may be drawn. If read strictly in this way, I do not quarrel with them. But it may well be that the directions would be read as stating what matters must be proved by the Inland Revenue in the particular case and perhaps also in all cases where unlawful means are supposed.

It is only when read in this alternative way that I venture to criticise them. None of my observations are addressed to the facts of this particular case. My main objection is implicit in what I have already said : I differ from an approach to the matter which involves precise directions. The section requires a review of the whole situation, not the application of an exact formula. I agree that the burden of making out a case of ability rests on the Inland Revenue. In the course of any investigation the burden of proof on particular matters may vary in the light of the circumstances and I do not think it is possible to say in general terms that the burden of proof on any particular point lies on the Inland Revenue.

As regards the formula itself, and matters suggested by its terms, I make these observations.

First, in my opinion neither precariousness nor lack of permanence of enjoyment or of substantial permanence of enjoyment necessarily excludes the inference that a benefit could be secured. Those features may have to be considered in particular cases—whether the means supposed be lawful or unlawful—but only as part of the general question whether (the other qualities of a "benefit" being present) it was possible to obtain something worth having.

Second, the directions relating to acquiescence and condonation are open to criticism. The directions require acquiescence or condonation in every case where unlawful means are envisaged, if ability to secure the application of income or assets for the benefit of the *praepositus* is to be established. It is a prerequisite of effective acquiescence or effective condonation that there should be knowledge of the relevant facts. In some particular cases there may well be barriers to such knowledge being acquired in due time or in time enough to exclude the securing of a benefit. I give an example. Excessive remuneration to a governing director might in the case of some such company as is present here (it holds all the shares in a subsidiary company) be voted to a governing director in general meeting and passed through the profit and loss account. The articles of association might lawfully provide that members were to be entitled only to obtain copies of the balance sheet and the auditors' report. The auditors would not be concerned to mention the matter in their report, because for the company's purposes, the matter is in order. The governing director in the supposed company is, I assume, the sole trustee under a settlement of all the shares. How and when would the beneficiaries find out the supposed action ? There is no one who is likely to spread abroad the supposed facts. What would lead them to think that there was any occasion for suspicion ? Diminution in the divisible profits of the subsidiary might account for the drop in the trust income. Suspicion without due ground is not likely where a benevolent parent is concerned. But if the beneficiary does suspect, how can he find out ? The governing director has no relevant accounts of the company in his possession as trustee and it is only documents he holds as trustee that the beneficiaries as *cestuis que trustent* have a right to see. In such a case, it cannot be properly said that the tribunal is precluded from drawing an inference that the governing director is able to secure an application of income or assets for his benefit, though there is not present the probability of either acquiescence or condonation. I do not accept the argument that in such a case the " income " would not be applied for the benefit of the *praepositus*. " Income " in the section means in my view what it says and does not mean the balance on the profit and loss account.

Other examples may possibly be given directed to showing that the presence of acquiescence or condonation is not a condition precedent to the inference of ability (*e.g.*, none of the beneficiaries may know anything about the settlement) but one example sufficiently makes my point.

Again, in cases where it is necessary to consider the probability of acquiescence or condonation, it may well be that acquiescence or condonation by some only of the beneficiaries who would suffer would, despite objection taken and pursued by other suffering beneficiaries, be sufficient for practical purposes. Their acquiescence or condonation might be sufficient to ensure that the *praepositus* secured some benefit. The directions of the Court of Appeal suggest that in their view the condonation or acquiescence by all the interested parties was necessary. I do not doubt that in certain cases the probability of acquiescence or condonation by interested parties may well have to be taken into consideration when the only possible means are unlawful. But an inquiry into that probability is not the substance of the matter. It comes in as part of a wider question. Is there a reasonable probability that such effective action would be taken as would prevent the *praepositus* " securing a benefit " by the transaction supposed ? The matter has to be viewed as a whole. I have mentioned the difficulties there may be in ascertaining the supposed facts. But there are many other matters which may be reasonably regarded as likely to deter legal proceedings. My supposed man of affairs in considering the probable family reaction to a situation merely envisaged—and as a rule it is a family which is concerned—comes back to the realities of the case and to a homely consideration of the facts. The substance of the case does not lie in the mysteries of acquiescence and condonation.

I desire to make two criticisms on para. 31 of the case stated. First, in applying the ability test it is, as I have said, the possibilities open to a person in Brady's position that have to be envisaged and the supposed consequences of the use of one of the means open to him. Anything actually done by Brady and the consequences of his acts are, at this stage, irrelevant except in so far as they inform the mind as to a possibility and its probable consequences. On this basis the facts stated in para. 29 (*a*) and the second sentence of para. 29 (*d*) are irrelevant in drawing the inference stated in para. 31. I may observe that head (*a*) of the direction given by the Court of Appeal may be thought by some to be open to a similar comment. Second, the wording of para. 29 (*d*) raises in my mind a doubt whether the Board of Referees had sufficiently in mind that the ability test does not contain any provision as to quantum except such as is implicit in the word " benefit."

I would therefore allow the appeal and dismiss the cross appeal.

Appeal allowed and cross-appeal dismissed. Case remitted to Board of Referees for further procedure.

Solicitors : *Solicitors of Inland Revenue* (for the appellants) ; *Wetherfield, Baines and Baines* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

BRIDDON *v* GEORGE.

[COURT OF APPEAL (Scott and Morton, L.JJ., and Wynn-Parry, J.), February 27, 28, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—Alternative accommodation offered—Relevant matters for consideration—" Reasonable to make order "—Misdirection—" Suitable alternative accommodation "—Absence of garage irrelevant—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1), *Sched. I, para.* (*h*).

The appellant was landlord and the respondent tenant of a dwelling-house which the appellant had bought, after Dec. 6, 1937, while the respondent was in possession. On the ground that he required the house for himself and his family the appellant brought an action to recover possession of the house, and offered, as alternative accommodation, the house in which he and his family were then residing. The only material difference between the two houses was that the house offered as alternative accommodation lacked a garage. The county court judge, in coming to the conclusion that it was not reasonable to make an order for possession, took into account the hardship provisions of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I, para. (*h*), and introduced as an important, if not a conclusive element, the fact that the house had been bought after Dec. 6, 1937. Further, he held as a fact that, except for the absence of a garage, the alternative accommodation offered was suitable within the meaning of sect. 3 of the Act :—

HELD : (i) the provisions of Sched. I, para. (*h*), of the Act were relevant for consideration only when the landlord was not able to offer suitable alternative accommodation and was applying for an order in spite of his inability to do so ; the judge had, therefore, misdirected himself on the question of reasonableness and the case must be retried on that issue.

(ii) the dwelling-house itself was the unit throughout the Rent Restrictions Acts, which were concerned with the provision of a suitable habitation ; the absence of a garage could not, therefore, properly be taken into consideration on the question of the suitability of the accommodation.

[**EDITORIAL NOTE.** This is an interesting decision on the question of alternative accommodation under the Rent Restriction Act. It was held in *Middlesex County Council* v. *Hall* (2) that the alternative accommodation to be offered to a tenant need only regard the user of the premises as a dwelling-house, and it is accordingly held that the absence of a garage does not affect the position if the house is in other respects suitable. It might be material in considering the question of reasonableness, but no decision is given on that point, since the judge, by introducing the date of purchase as an element in the consideration of reasonableness, had misdirected himself, and on this ground the case is sent back for rehearing.

AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399 ; and FOR CASES, see DIGEST, Vol. 31, pp. 576-578, Nos. 7256-7268.]

Cases referred to :

(1) *Cumming* v. *Danson*, [1942] 2 All E.R. 653.

*(2) *Middlesex County Council* v. *Hall*, [1929] 2 K.B. 110 ; Digest Supp. ; 98 L.J.K.B. 482 ; 141 L.T. 243.

APPEAL by the plaintiff from an order of His Honour JUDGE CAPORN, made at the Nottingham County Court, and dated Nov. 7, 1945. The facts are fully set out in the judgment of SCOTT, L.J.

W. Harvey Moore for the appellant.

J. P. Ashworth for the respondent.

SCOTT, L.J. : This is an appeal from His Honour JUDGE CAPORN, of Nottingham County Court, in a Rent Restriction Act case, in which the plaintiff was the landlord and the defendant was the tenant, the landlord seeking possession. The house in question was at Mapperley, near Nottingham, and was owned by the plaintiff, who had bought it a few years before, when the tenant was already there. The case turned entirely upon whether the plaintiff, as landlord, could show that he was in a position to give to the tenant suitable alternative accommodation at the date when the order would be executed. What he said was that he was willing to give up to the tenant the house in which he was then living, which also he owned. The essential feature of the case on appeal to us is that the judge held as a fact that the alternative accommodation which was so offered by the landlord was suitable within the meaning of the Act with one exception, namely, that it had not got a garage for a motor car. In my view, when the judge said: "For a tenant who has a car I hold it [that is the house where the landlord was then living] is not suitable alternative accommodation," he was wrong in coming to that conclusion.

Before I deal with the law upon the point, I will deal with the other issue which arose in the case, namely, the condition of reasonableness imposed by sect. 3 (1) of the Act of 1933, which provides that no order for the recovery of possession of any dwelling-house to which the principal Acts apply shall be made unless the court considers it reasonable to make such an order. The subsection goes on to impose one or other of two alternative conditions (1) under the provisions set out in Sched. I of the Act, or (2) if the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order is executed. In this case the landlord was not making any attempt to avail himself of the provisions of Sched. I to the Act because he was putting forward the alternative case of suitable accommodation. Sched. I, with its series of paragraphs from *(a)* to *(h)*, authorising the court to make an order for possession even though alternative accommodation is not offered, had, therefore, nothing to do with this case before the county court judge. It was solely concerned with the two issues, firstly, the reasonableness in the view of the court of making such an order, and, secondly, suitable alternative accommodation.

The facts of the case relating to the question of reasonableness were these. Taking them historically, I begin with the notice to quit, dated Sept. 22, 1944, giving a quarter's notice in accordance, no doubt, with the terms of the tenancy. It was agreed below that negotiations had thereupon taken place with a view to making an arrangement by consent. It was only when those negotiations failed that the landlord felt compelled because of his circumstances to apply to the court for an order.

The house where he was living contained two living rooms, three bedrooms, a kitchen, bathroom and w.c. The house where the tenant was living, called Mapperley House, contained four bedrooms, two living rooms, kitchen and other accommodation. It is not necessary to go in detail into the extent or character of the accommodation because the judge has held that, but for the one point of there being no garage for a car, the accommodation in the landlord's house was "suitable alternative accommodation." On the question of reasonableness, the family accommodated in each house had to be compared. In the plaintiff's house was his wife, a girl of 16, a son of 10, and an old mother aged 77. He himself was suffering from heart weakness and could not climb up hills without strain. I gather that the climbing of hills was incidental to his house and not to the tenant's house. The family in the other house were a wife, who suffered from hernia and said that walking uphill was difficult for her—but obviously not dangerous as in the case of the landlord's heart weakness—an old mother of 76, a daughter of 17, and a boy living in Gloucester. The mother stayed with her son for various periods. Apparently, on that comparison there was not much to choose between the two houses. On the comparison of rental, the tenant was paying for his house £72 10*s.* a year, and was offered the house in which the plaintiff was living at £1 a week plus rates, a considerable pecuniary advantage to the tenant.

The county court judge came to the conclusion that on the facts of the case it was not reasonable to make the order, but in doing so, in my opinion he completely misdirected himself for this reason: He took into account the various provisions, not in detail but generally, contained in Sched. I, para. *(h)*, which, as I have already said, are only relevant for consideration where the landlord is not able to offer suitable alternative accommodation, and is asking for an order in spite of his inability to do so. Para. *(h)* says, when read with the opening words of the schedule, that the court has power to make an order for recovery of possession of any dwelling-house where the court considers it reasonable so to do if:

> . . . the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein

after the sixth day of December, nineteen hundred and thirty-seven) [date substituted by Sched. II of 1938 Act] for occupation as a residence for—(i) himself; or (ii) any son or daughter of his over eighteen years of age; or (iii) his father or mother.

There follows the further proviso that an order shall not be made on any ground specified in that paragraph:

> . . . if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order . . . than by refusing to grant it.

That is usually referred to as the hardship paragraph.

The county court judge gave a judgment, which we have before us, in a form partly typed and partly corrected with numerous additions in red ink which, the judge said, in one form or the other or both represented accurately the judgment that he gave. The passage which shows that the judge misdirected himself by considering para. (*h*) of the schedule, when it had nothing to do with the case, reads thus:

> In my view, where a person purchases a house after date [these two words are written in in red ink] it requires strong circumstances, stronger than he [the landlord] reasonably needs it, that it is reasonable to turn the tenant out which has the effect of depriving the tenant of the tenancy. Unless the court keeps that in view the provisions of the Act in present condition would be very substantially interfered with and we shall have a wild orgy of buying houses at investment prices and not vacant possession prices, much better than they have got, and offering their own houses as suitable accommodation. I feel bound to hold it not reasonable to make an order.

One thing is quite clear from that paragraph that by the words "after date" referring to the date of the purchase by the landlord of his house, the judge is referring to the words in para. (*h*) "not being a landlord who has become landlord by purchasing the dwelling-house . . . after the sixth day of December, nineteen hundred and thirty-seven." In coming to the conclusion, as he did in the sentence which I have just read, that it was "not reasonable" he was taking into account the hardship provisions of the schedule on the erroneous footing that the application before him was one for possession by a landlord who was not offering "suitable alternative accommodation."

In *Cumming* v. *Danson* (1) to which I shall have to refer for other purposes in a moment, I added a very short judgment in which I said ([1942] 2 All E.R. 653, at p. 657):

> There is a fundamental difference in the Act between an application for possession where no alternative accommodation is offered and an application where it is offered. . . . In my view, the measure of reasonableness to be established by the landlord is much smaller in regard to the burden of proof in the case where alternative accommodation is offered than where it is not offered, and that is the reason why the language of the proviso to para. (*h*) of Sched. I is expressed in special terms.

The judge may have had that passage in his mind when he said, referring by implication to Sched. I, para. (*h*), that:

> . . . it requires strong circumstances, stronger than that he reasonably needs it that it is reasonable to turn the tenant out, which has the effect of depriving the tenant of the tenancy.

In the passage I have quoted from my judgment, I was merely pointing there to the character of the facts that have to be established by a landlord, who is not able to give alternative accommodation, putting a more onerous burden on him than where he is able to do so, and the judge must have had that difference in mind when he said what he does there. Otherwise, he could not have ended with his reference to "the orgy of buying houses at investment prices without vacant possession" and added that he "felt bound to hold it not reasonable to make an order." He having this misdirected himself on the question of reasonableness, the case must go back for a re-trial on that issue.

It remains only for me to deal with the question of law involved in the judge's conclusion that although the alternative accommodation offered was suitable in all other ways, the absence of a garage prevented it being suitable. On that *Cumming* v. *Danson* (1) is a direct authority. The headnote to that case says this:

> The appellant was the owner of a cottage and a house. The house was in the possession of the respondent under a lease which had been determined by notice but fell within the Rent Restriction Acts. The cottage was close by and inhabited by the

appellant and some refugees, one of whom was an invalid, and the appellant proposed to bring to the house her invalid sister and the sister's husband. The evidence was that the cottage was overcrowded whereas the house occupied by the respondent was very much larger. In the circumstances, the appellant offered to make an exchange with the respondent which offer was refused. [Then there was an application under the Act] and the county court judge refused to make an order on the ground that the appellant had failed to satisfy him that it was a reasonable application. It was contended, for the appellant, that the judge did not apply his mind as to what was reasonable under sect. 3 of the 1933 Act, and that he ought to have taken into consideration the refugees and the other persons.

It was held, by the court, that, under the second alternative of sect. 3 (1) (*b*), where alternative accommodation is offered, the county court judge has to be satisfied that it is reasonable in all the circumstances of the case to make an order for possession. It was further held that he had misdirected himself in law in excluding the refugees and the invalid sister and her husband from consideration and treating the matter as though it were an application by the appellant alone, and a new trial was ordered.

In giving his judgment, LORD GREENE, M.R., said ([1942] 2 All E.R. 653, at p. 654) :

> What is "suitable alternative accommodation" is defined in subsect. (3), which I need not read.

On p. 657 he says this :

> There are questions of fact as to the hardship, if any, of compelling the tenant to take the alternative accommodation ; there are questions possibly whether or not he has expended money upon the house ; there is the question whether or not the alternative accommodation offered satisfies the requirements of the definition in the Act.

With this word "definition" in mind, with which I respectfully agree and which indeed involves a decision binding on this court, I turn in sect. 3 to the subsection dealing with suitable alternative accommodation which says [subsect. (2)]:

> A certificate of the housing authority for the area in which the said dwelling-house is situated, certifying that the authority will provide suitable alternative accommodation for the tenant by a date specified in the certificate, shall be conclusive evidence that suitable alternative accommodation will be available for him . . . .

The policy of Parliament there obviously was to treat the housing authority as in a position to settle quite definitely the character of "suitable alternative accommodation." That policy re-appeared in subsect. (4) under which the housing authority is empowered to give a certificate of suitability, which is to be conclusive. Subsect. (3) says :

> Where no such certificate as aforesaid is produced to the court, accommodation shall be deemed to be suitable if it consists either—(*a*) of a dwelling-house to which the principal Acts apply ; or (*b*) of premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by the principal Acts in the case of a dwelling-house to which those Acts apply.

It is important to realise exactly what is required by what I have read. The accommodation must consist either of a dwelling-house to which the principal Acts apply or of a dwelling-house which is let on terms equivalent to those granted by the Rent Restrictions Acts. That is the first condition. The subsection goes on :

> . . . and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work . . .

That is the second condition. The third condition is the only other one ; it relates to the tenant's means and his family's needs and is expressed alternatively, namely, that the accommodation must be :

> . . . either (i) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family ; or (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character.

The judge has found as a fact that, but for the question of the garage, the alternative house offered was in all those respects reasonably suitable. The only question for this court, therefore, is whether the absence of a garage can properly be taken into consideration on the question of the accommodation being suitable. In my view, quite clearly it cannot, for this simple reason, that it is the dwelling-house itself which is the unit throughout the whole of these Rent Restriction Acts, and especially so under sect. 3 (3), which I am now considering. The words are " accommodation shall be deemed to be suitable " —that is an imperative direction—it must be deemed to be suitable ; then comes para. (*a*) " if it consists of a dwelling-house to which the principal Acts apply." That was the case here ; the alternative house where the landlord was then living was a house within the limits of the 1939 Act. Therefore, that condition is definitely satisfied. Then comes what I have called the second condition : " and is . . . reasonably suitable to the needs of the tenant and his family." That has been decided by the judge in the plaintiff's favour ; and there is nothing further in the two alternatives of my third condition which indicate that anything at all has to be considered except the dwelling-house. How then does the absence of a garage affect the position ? The question arose, in 1929, as to whether the alternative accommodation was suitable in a case where the tenant was in occupation of a house which had a shop attached to it, whereas the alternative accommodation offered had not. That was in *Middlesex County Council* v. *Hall* (2). The headnote says that the court consisting of TALBOT, J., and HUMPHREYS, J., came to the conclusion that :

> The alternative accommodation which must be offered to the tenant by an applicant for possession under the Rent Restriction Acts of premises used as a dwelling-house and also as business premises, need only be as regards their user as a dwelling-house, and not as regards their user as business premises.

In the judgment of the court delivered by TALBOT, J., there is this sentence ([1929] 2 K.B. 110, at p. 114) :

> But the court, having regard to the scope and object of the Act, which protected dwelling-houses only, considered that the words " alternative accommodation available for the tenant " must be confined to accommodation for the purposes of habitation.

That case was decided under sect. 5 (1) (*d*) of the Act of 1920, but that principle, I have no doubt, was in the mind of the Legislature in determining the details of subsect. (3) of sect. 3 of the Act of 1933.

That being the principle of interpretation to apply, the question of the garage was out of the picture so far as the meaning of " accommodation " was concerned. It may be that on the question of reasonableness it could be considered, though I feel considerable doubt whether it ought to be. But I express no opinion about that because, the judge having decided the question of reasonableness under a misdirection to himself as to what he ought to take into account, I do not think it desirable to say anything on the merits on the question of reasonableness, which will be decided on the new trial.

The appeal must be allowed and a new trial ordered.

MORTON, L.J. : The present case is not one in which the court has power to make an order for possession under the provisions set out in Sched. I to the Act of 1933. The circumstances did not bring the case within paras. (*a*) to (*g*) of that schedule and the landlord could not come within para. (*h*) because he bought 68, Hazel Grove after Dec. 6, 1937. The consequence was that under sect. 3 of the Act of 1933, the landlord could not get possession unless the county court judge considered it reasonable to make the order and sect. 3 (1) (*b*) was complied with, that is to say, the county court judge had to be satisfied that suitable alternative accommodation was available for the tenant or would be available for him when the order took effect. The question of reasonableness is one for the county court judge ; but in the present case, in my view, the county court judge introduced a consideration which was quite outside the scope of the matter before him. I do not propose to go into the matters of fact which might influence the judge one way or other on the question of reasonableness, but it is clear from his judgment that he has introduced as an important, if not a conclusive, element in considering the question of reasonableness the fact that the landlord bought this house after Dec. 6, 1937. My Lord has already read the relevant portion of the judge's judgment and I shall not read it again. To my mind the date of the purchase is not a relevant matter in considering the question of reasonableness ; it is only relevant in the present case in that it prevented the landlord from proceeding under para. (*h*) of Sched. I to the 1933 Act and made it necessary for him to proceed under sect. 3 (1) (*h*), and to satisfy the court that suitable alternative accommodation was available. In my view, the Act affords no justification for using the date of purchase, in addition to using it for the purpose of excluding the landlord from proceeding under para. (*h*), for the further purpose of increasing the burden of the landlord in proving reasonableness; and I think it is plain that the county court judge has regarded the date of purchase as increasing that burden. As to the county court judge's gloomy forecast of a wild orgy of buying houses at investment prices, I doubt if that forecast will be fulfilled, but, even if the judge was right in his forecast, the Legislature, while making purchase after Dec. 6, 1937, a complete bar to proceedings under para. (*h*) of Sched. I, has not indicated that it is to be a bar or even a hindrance in proceedings under sect. 3 (1) (*b*) of the Act. In my view, the judge has misdirected himself on this matter and his decision cannot stand. For my part, I doubt whether the judge had in his mind the dictum of my Lord in the case of *Cumming* v. *Danson* (1), which has already been referred to. I only desire to say this, that I myself have not arrived at a concluded opinion as to whether the burden of proving reasonableness, under sect. 3 of the Act, is lighter, when suitable alternative accommodation is offered, than it is, when the landlord is able to bring himself within the provisions of the schedule and is, therefore, in a position to proceed under sect. 3 (1) (*a*). On that matter I have formed no concluded view.

As to the question of suitable alternative accommodation in the present case, I entirely agree with what has fallen from my Lord and I only desire to add this. In my view, the Act is concerned to see that the tenant in a case such as this is provided with a suitable habitation, a suitable roof over his head for himself and his family, if he has one, and is not concerned with such external matters as whether there is or is not a garage. The Act has, of course, interfered to a very large extent, from benevolent motives, no doubt, with freedom of contract. In the present case the landlord is seeking to recover possession of a house: the tenancy has expired and the tenant can only rely on the protection of the Act. The landlord has a car and has had such a garage hitherto. The tenant also has a car. If the county court judge's decision were right, it follows that the tenant would be entitled to insist upon being provided with a garage in any alternative accommodation that could be offered. For my part I am relieved to think that the Act gives rise to no such conclusion.

I agree with the order proposed.

WYNN PARRY, J.: I agree. I would only add, in deference to the persuasive argument of counsel for the respondents on the first question, namely, whether or not it was reasonable to make the order, that I cannot agree that the first two sentences of the penultimate paragraph of the judgment constituted merely an irrelevant parenthesis. At the end of the preceding paragraph the judge poses the question "Is it reasonable to make an order?" At the end of the penultimate paragraph he states his conclusion "I feel bound to hold that it is not reasonable to make an order." In between there are two sentences which appear to me to lead to that conclusion. In those two sentences the judge takes into account a consideration material in a class (*a*) case but a consideration which ought not to be taken into account in a class (*b*) case. Therefore, in my view, he has misdirected himself on this issue.

As regards the issue of suitability of alternative accommodation, I have nothing to add. I agree that there must be a new trial.

Appeal allowed with costs and a new trial ordered.

Solicitors: *Radford, Frankland & Mercer*, agents for *C. H. Jackson*, Nottingham (for the appellant); *Sidney C. Elphick*, agent for *H. B. Clayton, Son & Ellis*, Nottingham (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* RECORDER OF LEICESTER, *Ex parte* GABBITAS.

[KING'S BENCH DIVISION (Lord Goddard, L.C.J., Croom-Johnson and Lynskey, JJ.), April 2, 3, 1946.]

Magistrates—Appeal to quarter sessions—Motoring offence—Licence suspended by magistrates—Disqualification removed by order—Jurisdiction—Desirability of stating special reasons—Road Traffic Act, 1930 (*c.* 43), *s.* 35—*Summary Jurisdiction* (*Appeals*) *Act,* 1933 (*c.* 38), *s.* 31 (1) (vii).

K. was convicted by petty sessions, under the Road Traffic Act, 1930, s. 35, of unlawfully permitting another person to use a certain motor van on the highway without having in force, in relation to the user of the vehicle, such a policy of insurance or such a security in respect of third party risks as complied with Pt. II of the Act. He was fined and disqualified for holding or obtaining a licence for twelve months. K. appealed and the recorder, without stating any reasons, allowed the appeal in so far as it related to the disqualification for holding or obtaining a licence. On a motion for an order of *certiorari* to bring up the order of the recorder :—

HELD : under the Road Traffic Act, 1930, s. 35, the justices could have refused to suspend the licence on the ground that there were some special reasons ; under the Summary Jurisdiction (Appeals) Act, 1933, s. 31 (1) (vii), the recorder could exercise any power which the justices might have exercised ; the recorder had, therefore, jurisdiction to vary the order of the justices and an order of *certiorari* must be refused.

Per LORD GODDARD, L.C.J. : If courts exercise their power of not endorsing or not suspending a licence for special reasons it is most important that they should state what the special reasons are which lead them to exercise it.

[**EDITORIAL NOTE.** On conviction for the offence of using a motor vehicle which is not insured against third party risks, a court of summary jurisdiction or, as now decided, a recorder, may refuse to suspend the driving licence for " special reasons." When this power is exercised, LORD GODDARD, L.C.J., expresses his opinion that the reasons should always be stated, so that, if they are insufficient, the decision may be challenged by the police and brought up for consideration on case stated. The court refuses to express any opinion on the argument relating to the question whether the disqualification imposed is part of the sentence or not, since the only point to be decided is the question of jurisdiction.

FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636 ; and for the SUMMARY JURISDICTION (APPEALS) ACT, 1933, s. 31 (1) (vii), see *ibid.*, Vol. 26, p. 547.]

MOTION for an order of *certiorari* to remove, for the purpose of quashing, an order made by the Recorder of Leicester (GILBERT PAULL, K.C.), adjudging that an order of the city magistrates that a person convicted of an offence under the Road Traffic Act, 1930, s. 35, be fined £1 and disqualified from holding a licence for twelve months, be varied by the removal of the disqualification. The facts are fully set out in the judgment of LORD GODDARD, L.C.J.

A. P. Marshall for the applicants, the Leicester City Justices.

M. D. Van Oss for the respondent, the Recorder of Leicester.

LORD GODDARD, L.C.J. : This case turns upon a small point. Counsel for the applicants obtained leave to serve a notice of motion asking for an order of *certiorari* to bring up an order of the Recorder of Leicester by which he varied a decision of magistrates.

The matter arises in this way : A man named Kibbler was convicted before the petty sessions in Leicester of unlawfully permitting another person to use a certain motor van on the highway without having in force in relation to the user of the vehicle such a policy of insurance or such a security in respect of third party risks as complied with the Road Traffic Act, 1930, Pt. II. That is an offence against sect. 35 of the Act, and as soon as there is a conviction, the statute provides that the person :

> (2) . . . shall (unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification) be disqualified for holding or obtaining a licence under Part I of this Act for a period of twelve months from the date of such conviction.

Then it is also provided :

> A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a licence shall, for the purposes of Part I of this Act, be deemed to be disqualified by virtue of a conviction under the provisions of that Part.

Under Pt. I of the Act there are provisions in regard to disqualification on conviction of certain offences.

That conviction having taken place the defendant Kibbler appealed to the quarter sessions, and then the recorder ordered :

> . . . that the appeal be allowed so far as the same relates to the disqualification for holding or obtaining a licence under Part I of the said Act for a period of twelve months.

In other words the recorder removed the disqualification.

A great deal of argument has been addressed to the court here as to whether the disqualification which is imposed by the section is part of the sentence or not. It is quite clear that what gave Kibbler a right of appeal, he being a person who had pleaded guilty, was the Criminal Justice Act, 1925, s. 25, which says :

> A person who after pleading guilty or admitting the truth of the information is convicted of any offence by a court of summary jurisdiction shall have a right to appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions against his sentence.

Counsel for the applicants has invited the court to say that the disqualification was no part of the sentence. Upon that point the court does not need to express any opinion whatever. The point does not arise because the question that we are considering is simply whether the recorder had the power to make the order he did make. That the man had a right of appeal against the sentence, that is to say, the fine of £1, is not disputed and could not be disputed.

The Summary Jurisdiction (Appeals) Act, 1933, amended the Summary Jurisdiction Act of 1879 by substituting a new section. Under the new sect. 31 (1) (vii), it is enacted :

> . . . quarter sessions may by their order confirm, reverse or vary the decision of the court of summary jurisdiction, or may remit the matter with their opinion thereon to a court of summary jurisdiction acting for the same petty sessional division or place as the court by whom the decision appealed against was given, or may make such other order in the matter as they think just [these are the important words] and by such order exercise any power which the court of summary jurisdiction might have exercised ; and any order made by quarter sessions shall have the like effect and may be enforced in the like manner as if it had been made by the court of summary jurisdiction . . .

It is quite clear that on the hearing before the court of summary jurisdiction the justices could have refused to suspend the licence on the ground that there were some special circumstances. That is what sect. 35, which I have just read, says. Therefore when the case comes before the recorder, if he can make any order which the court of summary jurisdiction could have made, it seems to follow perfectly clearly that he could find grounds for refusing to suspend the licence because the petty sessions could have done it.

One can visualise a great many cases in which a man may appeal against his conviction or against his sentence where he has not pleaded guilty. He may appeal against his sentence only. He may have been sentenced to imprisonment or he may have been sentenced to a fine, and the recorder might say : "I shall make a different order from what the justices did in this case. I will remit the sentence of imprisonment and substitute a fine for it, but if I do that, what I think is the right punishment in this case is that you shall be suspended for two years, or three years as the case may be, instead of for one year." If he can do that, he can, of course, say : "I think there are circumstances in this case which justify me in removing the suspension altogether." He can give the man that indulgence of not disqualifying him, and that is what the recorder has done in this case by his order.

We cannot say here that this order which it is sought to bring up to quash was made without jurisdiction, and that is the only point that we have to decide. This other very interesting question which has been argued at such length does not, in my opinion, arise in this case. Therefore it is not desirable for the court to express any opinion upon it, if for no other reason than that whatever opinion we express would be simply *obiter*.

Before, however, parting with this case I do want to make one other observation. We know that the recorder removed the disqualification in this case. He says that he does it and that he thinks that he can do it. The Act says that it can be done only for special reasons, but he nowhere tells us the reasons. I desire to say that in my opinion it is most important—and I do hope that not only courts of summary jurisdiction but all courts will take notice of this—that, if they are going to exercise the power which they have got of not endorsing a licence or not suspending a licence for special reasons, they should state what the special reasons are which lead them to exercise it. I do hope also that some police authority at some time when there appear to be no special reasons—except that the man is a first offender or something of that sort, which in my opinion cannot be a special reason—will have the courage to demand a case and bring up to this court the question as to whether the magistrates had power to refuse to disqualify. Motoring offences are likely now to increase with the increase of cars on the road. We hope that some day we may get back to the same degree of freedom of motoring, but whether it is desirable from the point of view of safety is another matter. There are likely to be many more cases brought before the court than there have been during the last six years. It would be idle to pretend that one has not seen a great number of cases reported in the public press in which magistrates have been asked to refrain from suspending licences—in other words, to refrain from doing that which the Act says shall be done except for special reasons—for reasons which are no reasons at all. It is most desirable, if they refrain from imposing a disqualification for special reasons, that they should state what the special reasons are. What are the special reasons in this case I do not know, but, at any rate, we cannot deal with the question because this case comes before us as a matter of *certiorari* and not in the matter of a special case. The only question for us is whether there is jurisdiction. In my opinion there clearly was jurisdiction, and, therefore, the order of *certiorari* is refused.

CROOM-JOHNSON, J.: The question here is whether the recorder had or had not jurisdiction to take the course which he did take. This court has come to the conclusion that he had, for reasons somewhat different from those expressed by the recorder himself.

I do not propose to say anything at all as to the precise meaning to be given to the word "sentence" in the Criminal Justice Act, 1925, s. 25. The point does not arise.

This is a perfectly simple case. The applicant was convicted on summons and he was fined. What results from that conviction under the Road Traffic Act, 1930, s. 35, is neither here nor there. He appealed beyond any question against at least so much of the sentence as consisted of the money penalty and possibly, more. Having in those circumstances invoked the jurisdiction of the court, it opened the door to the recorder exercising, not merely the jurisdiction of looking to see whether the fine which was assailed was too little or too much, but it also opened the door to reconsideration of all those matters which the justices in their court could have entertained. Once the fact emerges that there was a notice of appeal served against the sentence, on any view of it, the effect of sect. 31 (1) (vii) of the Act of 1933 comes into play, with the inevitable result that this application must fail.

LYNSKEY, J.: I agree.

Order of certiorari refused.

Solicitors: *Wilkinson, Howlett & Moorhouse*, agents for *W. E. Blake Carn*, Leicester (for the applicants); *E. P. Rugg & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HOPWOOD *v.* TEXTILE PAPER TUBE CO., LTD.

[COURT OF APPEAL (Scott and Tucker, L.JJ., and Vaisey, J.), February 18, 19, March 5, 1946.]

Workmen's Compensation—Industrial disease—Certifying surgeon's certificate—Limit to conclusiveness—Whether disease such as could reasonably be attributed to nature of employment—Onus of proof—Workmen's Compensation Act, 1925 (*c.* 89), *s.* 43.

The respondent had previously been employed, by one S., as a jig dyer working with caustic dyes in a steamy atmosphere, and whilst so employed, had in 1935, contracted dermatitis. Thereafter he had intermittent attacks which incapacitated him. He entered the appellant's employ, as a paper grinder's assistant, on May 8, 1944, after a spell of disablement due to dermatitis, and whilst a claim by him against S. in respect thereof was outstanding. That claim was settled by agreement whereby the respondent received a lump sum payment. Meanwhile, on June 24, 1944, he had another outbreak of dermatitis and was off work until Jan. 8, 1945. No compensation was claimed or paid in respect of that period. The respondent continued to work as a paper grinder's assistant from Jan. 8, 1945, until June, 1945, when he had another attack of dermatitis, and claimed compensation from the appellants under the Workman's Compensation Act, 1925. On June 25, 1945, the examining surgeon certified that the respondent was suffering from dermatitis and that the disablement commenced on June 23, 1945. This certificate was confirmed by the medical referee, on appeal, on July 12, 1945. The county court judge found that the employment of " helping the grinders of paper " was not of a nature rendering it probable that dermatitis produced by dust or liquids would, or did in fact, result therefrom ; but he considered himself bound by authority, once a certificate was produced, to hold that the bare existence of such a possibility was sufficient to discharge the onus which lay on the workman under s. 43 of the Act, and to entitle him to an award :—

HELD : (i) the county court judge was in error ; the certificate was conclusive as to disablement, but sect. 43 of the Act required proof *aliunde* that the disease was due to the nature of the employment.

(ii) the county court judge had, in effect, found, not only that the dermatitis was not in fact caused or aggravated by the last employment but, also, that the employment was not employment of a class to which dermatitis was in any reasonable sense incidental ; consequently the respondent was not entitled to an award.

[**EDITORIAL NOTE.** The burden of proof on a workman to show that an industrial disease is due to the nature of the employment is of the same weight as that in any other civil proceeding, and is not discharged by a finding that there is a possibility that the disease resulted from the work, since this falls short of the necessary degree of proof.

AS TO WHEN COMPENSATION IS PAYABLE IN RESPECT OF INDUSTRIAL DISEASES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 973, 974, paras. 1330, 1331 ; and FOR CASES, see DIGEST, Vol. 34, pp. 464, 465, Nos. 3802-3811.]

Cases referred to :

(1) *Wilsons & Clyde Coal Co., Ltd.* v. *Flynn*, [1930] A.C. 516 ; Digest Supp. ; 99 L.J.P.C. 139 ; 143 L.T. 362 ; 23 B.W.C.C. 159.

(2) *Richards* v. *Goskar*, [1936] 3 All E.R. 839 ; [1937] A.C. 304 ; Digest Supp. ; 106 L.J.K.B. 85 ; 156 L.T. 52 ; 29 B.W.C.C. 357.

(3) *Eaton* v. *Wimpey & Co., Ltd.*, [1937] 4 All E.R. 583 ; [1938] 1 K.B. 353 ; Digest Supp. ; 107 L.J.K.B. 259 ; 158 L.T. 6 ; 30 B.W.C.C. 408.

*(4) *Illingworth* v. *Leith Provident Co-operative Society*, [1943] S.L.T. 85 : 36 B.W.C.C. Supp. 1.

*(5) *Blatchford* v. *Staddon & Founds* (1927), 43 T.L.R. 424 ; 34 Digest 465, *3810* ; 20 B.W.C.C. 391.

APPEAL by the employers from an award of His Honour JUDGE BATT, made at the Stockport County Court, and dated Nov. 20, 1945. The facts are fully set out in the judgment.

R. Marven Everett for the appellants.

F. E. Pritchard, K.C., and *C. T. B. Leigh* for the respondent.

Cur. adv. vult.

TUCKER, L.J. [delivering the judgment of the court]: On June 25, 1945, the examining surgeon appointed under the Factories Act certified that the applicant was suffering from dermatitis, produced by dust or liquids, and was thereby disabled from earning full wages at the work at which he had been employed. He further certified that the disablement commenced on June 23, 1945. The certificate described the process in which the workman stated he was employed at or immediately before the date of disablement as "helping the grinders of paper." The name and place of business of the employer stated by the workman to have last employed him in the process above mentioned was given as "Textile Paper Tube Co., Ltd., Romiley." This certificate was confirmed by the medical referee on appeal on July 12, 1945. In his request for arbitration the applicant alleged that:

> . . . the above-mentioned disease is due to the nature of his employment in helping the grinders of paper and that he was last employed in such employment within the twelve months previous to the date of disablement by the Textile Paper Tube Co., Ltd., of Oakwood Mills, Romiley, near Stockport.

These words follow the language of the Workmen's Compensation Act, 1925, s. 43, which provides that where the certifying surgeon appointed under the Factory and Workshop Act certifies that the workman is suffering from a disease mentioned in Sched. III to the Act and is thereby disabled from earning full wages at the work at which he was employed:

> . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment . . .

The evidence showed that the applicant, who was aged 63 years, had been previously employed by an employer named Scholfield for 41 years, and, whilst so employed as a jig dyer, working with caustic dyes in a steamy atmosphere, had, in 1935, contracted dermatitis. Thereafter he had attacks on and off which incapacitated him. He entered the respondents' employ on May 8, 1944, after a spell of disablement due to dermatitis, and whilst a claim by him against Scholfield in respect thereof was outstanding. On July 11 his claim against Scholfield was settled by an agreement, which was duly recorded, whereby he received a lump sum of £400. Meanwhile, on June 24, 1944, he had another outbreak of dermatitis and he was off work until Jan. 8, 1945. No compensation was claimed or paid in respect of this period. From Jan. 8, 1945, until June, 1945, he worked at his former employment as a grinders' assistant, when he had another attack of dermatitis in respect of which he obtained the certificate referred to above.

His claim in the arbitration proceedings was based on the allegation that this outbreak was due to the dusty nature of his work with the respondents. There was a conflict of evidence as to this, and the county court judge, with the consent of the parties, visited the respondents' works. His findings of fact are stated by him in different parts of his reasons for his award as follows:

> He was in such a condition according to both doctors . . . that the dermatitis might be lighted up by a variety of causes, such as soap, water, handling tomatoes, working in a greenhouse in hot weather, handling chrysanthemums, or even general gardening. If I were left free of certain considerations of law, shortly to be mentioned, I should find that the applicant had not satisfied me that his attack of dermatitis in June, 1945, was related to his employment with the respondents, and make an award in their favour, and I accept the evidence of Dr. Auckland that such employment, or rather the work entailed thereby, was not likely to have been the cause of the attack or relapse . . . On the other hand I find as a fact that the work of helping the grinders of paper in that employ was a possible cause of the dermatitis of June, 1945. It can no more be excluded as a possibility than any of the other irritant causes, although it may be, and I think was, less probable.

In another passage he says:

> But there was some dust in the grinding room, as in any factory, and I am not prepared to find, on the evidence before me, that there was no causal connection as a question of fact and of medical knowledge between the work and the renewed attack of dermatitis.

Later he states :

> But I would say this—I find as a fact that there was nothing in the nature of the workman's employment with the respondents to cause the dermatitis, other than that it was work in which he might sweat and come in contact with dust or other irritant causes, just as in most other employments of a manual nature in a factory or indeed elsewhere.

Finally he says :

> Therefore, although I am not satisfied that the attack of June, 1945, was caused by the work which the applicant was doing, namely, " helping the grinders of paper " —indeed I think it improbable—yet, as on the medical evidence, and the facts of this case, it might have been so caused, I must make an award in the workman's favour.

He goes on to explain that he feels bound to arrive at this result on the authority of the following cases : *Wilsons & Co.* v. *Flynn* (1) ; *Richards* v. *Goskar* (2) ; *Eaton* v. *Wimpey* (3). He sums up his position, as he sees it, in these words :

> I understand my duty to be this : once a certificate is produced I must make an award for the workman (subject to the exceptions mentioned in the section) unless I find as a fact that the workman was not engaged as described in the certificate or did not in fact come into contact with any irritant cause : see *Illingworth* v. *Leith* (4). I am not to consider other factors equally or more likely to cause the outbreak. The factor has been isolated for me by the certificate. If the inference can be drawn in the way the medical referee has drawn it, I am not to consider its probability ; even if its truth is improbable it binds me, unless I find it impossible to be true.

With respect, we do not think this is the result of the authorities referred to. The certificate must either be conclusive or not conclusive. We cannot understand how it can have some intermediate effect, that is, to diminish the burden of proof from probability to possibility. The certificate is no doubt conclusive as to disablement, but sect. 43 still requires proof *aliunde* that " the disease is due to the nature of the employment." The case of *Blatchford* v. *Staddon & Founds* (5), which does not seem to have been cited below, appears to us to be the authority which is most helpful on the proper construction of sect. 43, although it does not deal with the precise question now under consideration.

The effect of *Blatchford's* case (5), so far as material to the present appeal, may be summarised in the words used by LORD ATKINSON (20 B.W.C.C. 391, at pp. 407, 408) :

> The workman, therefore, is only bound under sect. 8 (iii) (c) to prove that he was last employed by this employer during the 12 months immediately preceding his disablement in employment of the nature to which the disease was due ; that was, in this case, lead painting. The county court judge held that the onus of proof lay upon Blatchford to show that the lead poisoning from which he was suffering was, so to speak, brought to a head owing to the nature of his employment, and that he had failed to discharge this onus. The Lords Justices took apparently, to some extent if not altogether, the same view. With all respect, I do not think that it was necessary for the workman to prove that it was the employment with the last employer which, in fact, caused his disablement or suspension. It will, I think, be sufficient for him to prove that his work with his last employer during the 12 months immediately preceding his disablement was of the same nature and character as the work to which his disease is due.

It is to be observed that these observations are directed to that which the workman has to prove, namely, the causal connection between his disease and the nature of his employment in a particular period, and not to the measure of the burden of proof. There is no indication, in any of their Lordships' speeches, that the weight of that burden is any different from that which is required in any other civil proceeding. This is confirmed by the language of sect. 44, which recognises the existence of the burden by providing that it shall shift in the circumstances therein referred to. If the evidence shows that the employment in which the workman has been engaged for the preceding twelve months is not of a nature to cause the particular disease from which he is suffering, he must fail in his claim for compensation against any person who has employed him during that period, and it is, in our view, on the clear words of the section, for him to prove that the balance of probability is in favour of such employment being of this nature. On the other hand, once he proves that the employment is of this nature, he is not required to prove that the disease, in fact, resulted from his employment with any particular employer.

In the present case it is clear, from the reasons for his award given by the county court judge, that he found the employment of " helping the grinders of paper " was not of a nature rendering it probable that dermatitis produced by dust or liquids would, or did in fact, result therefrom. He appears, however to have considered himself bound by authority to hold that the bare existence of such a possibility was sufficient to discharge the onus which lay on the workman—in other words, that in cases within the Workmen's Compensation Act, 1925, s. 43, a different measure is to be used in applying the onus of proof. In so holding the county court judge was in error.

The mere statement that something is possible but improbable appears to us in itself to negative the existence of that degree of proof which is always required in legal proceedings. We cannot find, in the cases referred to by the county court judge, any authority for the proposition which he extracted from them. The nearest approach is to be found in some words used by the LORD JUSTICE-CLERK (COOPER), in *Illingworth* v. *Leith Provident Co-operative Society* (4) where he says (36 B.W.C.C. Supp. 1, at pp. 7, 8) :

> . . . it is enough to satisfy the requirements of the Act that the employment should be employment of a class to which the disease is incidental or which involves processes capable of causing the disease.

Reading the whole of the judgment from which these words are extracted, it is clear that the LORD JUSTICE-CLERK was not intending to lay down any new measure of the onus of proof. His view is indicated in the language he uses towards the conclusion of his judgment, where he says (*ibid.*, p. 8) :

> As I read the case, the arbitrator has not merely found that the dermatitis was not in fact caused or aggravated by any duties performed by the claimant for the last employer, but he has found that the employment with that employer was not employment of a class to which dermatitis is in any reasonable sense incidental.

These words are, in our view, an apt description of the findings of the county court judge in the present case and suffice to show that this appeal succeeds.

Appeal allowed with costs.

Solicitors : *Gardiner & Co.*, agents for *A. W. Mawer & Co.*, Manchester (for the appellants) ; *William H. Lill & Co.*, Manchester (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

GEORGE TWYFORD *v.* LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MANCHESTER.

[CHANCERY DIVISION (Romer, J.), February 28, March 1, 1946.]

Burial—Burial ground—Right of burial board to charge for permission to cut inscriptions on gravestones—" Monumental inscription "—Burial Act, 1852 (*c.* 85), *ss.* 33, 34, 38.

Under the Burial Act, 1852, s. 34, every burial board was empowered to fix and receive the sums to be paid for " the right of erecting and placing any monument, gravestone, tablet, or monumental inscription " in every burial ground provided by such board. It was contended by the plaintiff, a monumental mason, (i) that a burial board was not entitled to demand payment of any fee for permission to cut inscriptions on memorial stones or monuments ; (ii) that the plaintiff was entitled to recover certain other fees which the board had no legal authority to make but which the plaintiff had paid on demand, though under protest :—

HELD : (i) upon the true construction of sect. 34 of the 1852 Act, the words " monumental inscription " meant an inscription which appertains to a memorial to the dead. The burial board was, therefore, entitled to charge for permission to cut an inscription on memorial stones or monuments.

(ii) in regard to the sums paid by the plaintiff for charges which the burial board had no legal authority to make, the plaintiff was not entitled to recover back the sums because, on the facts of the case, he had paid them voluntarily although under protest.

Whiteley v. *R.* (2) *and Slater* v. *Burnley Corpn.* (3) *applied.*

Somes v. *British Empire Shipping Co.* (1) *distinguished.*

[**EDITORIAL NOTE.** This case contains an interesting discussion of the meaning of the words " monumental inscription " in the Burial Act, 1852. It is held that the words refer to an inscription in the ordinary sense of that word, and not to something solid, of the same character as a monument, gravestone or tablet.

FOR BURIAL ACT, 1852, s. 34, see HALSBURY'S STATUTES, Vol. 2, pp. 202, 203.
AS TO VOLUNTARY PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 279-281, para. 390; and FOR CASES, see DIGEST, Vol. 12, p. 555, Nos. 4607-4610, and pp. 558, 559, Nos. 4636-4649.]

Cases referred to:

*(1) *Somes* v. *British Empire Shipping Co.* (1860), 8 H.L. Cas. 338; 12 Digest 558, *4634*; 30 L.J.Q.B. 229; 2 L.T. 547.
*(2) *Whiteley (William), Ltd.* v. *R.* (1909), 101 L.T. 741; 12 Digest 94, *576*.
*(3) *Slater* v. *Burnley Corpn.* (1888), 59 L.T. 636; 12 Digest 559, *4646*.

ACTION by a stonemason claiming (i) a declaration that the Manchester corporation, as the burial board for Manchester, were not entitled to impose any fee in respect of the granting of permission for cutting inscriptions on memorial stones or monuments; (ii) the recovery of certain sums paid to the corporation but which the corporation had no authority to demand. The facts are fully set out in the judgment.

J. Neville Gray, K.C., and *George Maddocks* for the plaintiff.

Raymond W. Jennings, K.C., and *Wilfrid Hunt* for the defendant corporation.

ROMER, J.: This is an action which arises on what appears to have been a long-standing difference of opinion between the monumental masons who carry on their business at Manchester, on the one hand, and the city of Manchester Corporation in its capacity of a burial board, on the other. The Manchester Corporation maintains and have at all material times maintained, three burial grounds or cemeteries in Manchester, namely, the Philips Park Cemetery, the Southern Cemetery and the Gorton Cemetery. The only one of these three with which I am concerned to-day is the Philips Park Cemetery, a burial ground provided by the defendant corporation, as the burial board for Manchester, under the Manchester Burial Board Act, 1857, and to that burial ground the Burial Acts, 1852-1906, apply.

The plaintiff, George Twyford, is a monumental mason who carries on business in Manchester. He pleads (and there is no doubt about the facts in this case) that from time to time, acting on the instructions and on behalf of the owners of memorial stones or monuments in the Philips Park Cemetery, the plaintiff has applied to the defendant corporation for permission to cut, re-cut, re-paint or re-gild inscriptions on, or to clean or renovate, such memorial stones or monuments. The difficulty that has arisen relates to the fees which the corporation charge him, and have charged other masons, for permission to carry out those works. The plaintiff gives five instances in which he was charged fees of small amounts, some of them in respect of cleaning, some in respect of re-gilding, some in respect of re-painting, and the remainder in respect of cutting inscriptions. The aggregate amount of those fees is £5 7*s*. 5*d*.

The plaintiff claims, in the first instance:

> A declaration that the defendants are not entitled to impose demand or enforce payment of any fee or charge in respect of the granting [by them] of permission for the cutting, re-cutting, re-painting or re-gilding of inscriptions [of the character I have mentioned].

The only point of substance with which I am concerned at present is the claim which the defendant corporation made, and is continuing to make to-day, that they are entitled to charge fees for cutting inscriptions, as opposed to re-cutting, re-painting or re-gilding.

The fees, if properly payable at all, are payable by virtue of the Burial Act, 1852, s. 34, as amended in certain respects which are not relevant for present consideration. The defendant corporation alleges (and it is the fact) that a table of fees and charges in relation to the Philips Park Cemetery was settled by the defendant corporation in 1895; that the Secretary of the Home Department duly approved the same on Oct. 18, 1895; that in July, 1919, the defendant corporation increased the fees and charges by 50 per cent., and that this increase was duly approved on July 17, 1919, by the Minister of Health in whom the statutory power of approval was then vested. The fees and charges to which I have just referred were for permission to do the following acts: (i) to cut inscriptions on stones or monuments; (ii) to re-cut such inscriptions or to re-paint or to re-gild the same; (iii) to clean stones or monuments. Shortly after the writ in this action was issued—which was on Jan. 21, 1944—the defendant corporation gave an undertaking to the plaintiff's solicitors not to make any charge against anyone for permission to re-cut inscriptions on stones or monuments or to re-paint or re-gild the same, or to clean stones or monuments; but they refused to extend that undertaking so as to cover the cutting of inscriptions on stones or monuments. They claimed, and still claim, that the charge for that work is valid and within their powers under the Burial Act, 1852, and that they intend to continue it. The fees which they were authorised to make were put in in evidence—*i.e.*, the scale of charges at the cemeteries of the defendant corporation. They include an item, amongst other things, "For admission of memorials," and under that heading is said:

> These charges include one inscription only and head line. Extra names or additional lettering will be charged at the same rate as cutting of inscriptions, etc.

Then there is set out a table of fees:

> For permission to cut inscriptions, renovate memorials, etc.

Various charges are made differing in amount according partly to the material that is used and partly on other circumstances.

Having regard to the undertakings which were given, the question really is whether or not the defendant corporation is entitled to make a charge against people like the plaintiff for permission to cut inscriptions in gravestones, monuments and the like. That point arises principally, as I understand, in cases where there is erected in the burial ground a gravestone, bearing a suitable inscription and leaving a space to which may be added further inscription to commemorate the death of, members of the same family who may die subsequently. There may be other cases where a similar point arises, but I think that is the principal class of case where this particular point has to be considered.

The answer to the question depends entirely, as I think, on the proper construction of the Burial Act, 1852, s. 34, although, in order to derive some guidance as to the meaning of that section, it is legitimate and necessary to refer to other sections as well. The first section of the Act of 1852 to which I will refer is sect. 33. The marginal note to that section is:

> Board may sell exclusive rights of burial vaults, and right to erect monuments.

The section provides:

> Any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of any burial ground provided by such board, and also the right of constructing any vault or place of burial with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet, or monumental inscription in such burial ground.

The marginal note to sect. 34 is:

> Board to fix payments for interments in burial ground and for exclusive right of burial vaults, and right to erect monuments.

The section (as amended by the Act of 1900) provides:

> Every burial board under this Act shall and may fix and settle and receive such fees and payments in respect of interments in any burial ground provided by such board as they shall think fit, and also the sums to be paid for the exclusive right of burial, either in perpetuity or for a limited period, in any burial ground provided by such board, and also the right of constructing any vault or place of burial with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing any monument, gravestone, tablet, or monumental inscription in such burial ground, and every burial board, with the consent of the vestry [the Ministry of Health is now substituted for the vestry], may from time to time revise and alter such fees, payments, and sums as aforesaid; and a table showing such fees, payments, and sums, and all other fees and payments in respect of interments in such ground, shall be printed and published, and shall be affixed and at all times continued on some conspicuous part of such burial ground.

Finally sect. 38, the marginal note to which is, "Management to be vested in burial boards," provides:

> The general managment, regulation, and control of the burial grounds provided under this Act shall, subject to the provisions of this Act and the regulations to be made thereunder, be vested in and exercised by the respective burial boards providing the same; provided that any question which shall arise touching the fitness of any monumental inscription placed in any part of the consecrated portions of such grounds shall be determined by the bishop of the diocese.

It is upon the meaning of the words "monumental inscription" that the answer to this question depends. Counsel for the plaintiff says that a "monumental inscription " is a monument serving as an inscription ; and he refers to the definition of the word " monumental " in the OXFORD DICTIONARY as :

> 1. Pertaining to a monument or memorial . . 2. Serving as a monument or memorial.

He quotes for example " monumental chapel," and he says that that is the proper meaning to attach to " monumental inscription." He contends that it is something tangible of the same nature or character as the three objects which precede it in sect. 34, *viz.*, " monument, gravestone, tablet." Evidence was called on behalf of the plaintiff with a view to assisting the court with the views held amongst stonemasons as to the meaning to be attributed to the words " monument, gravestone, tablet and monumental inscription " ; and a photograph was put in which showed what was described as a " monumental inscription," *viz.*, a book placed in the centre of a grave on the surface—a book made of stone, or some such material, open and with words written upon it. I admitted this evidence *de bene esse*, but in my judgment it is not legitimate or admissible evidence, because what I have to do is to construe ordinary English words in a statute of 1852. Such evidence would not, I think, have been admissible even had the Act in question been passed last year ; but in any event it would be of no assistance, I think, in relation to an Act which was passed nearly one hundred years ago. It seems to me that I have to discover what was the meaning of these words as used in this Act of Parliament with such assistance as I may derive from references to dictionaries or to other sections of the same Act.

Counsel for the defendants says that the words " monumental inscription " in sect. 34 of the Act mean an inscription which appertains to a memorial to the dead, *i.e.*, an inscription on a monument, and that it does not mean, or say, an inscribed monument. If the words mean what counsel for the plaintiff says they mean, then it is plain that the claim which the defendants make to charge a fee for permission to cut inscriptions on stones cannot be supported, because, on that view, their right would be confined to charging fees for the right of erecting and placing a tangible memorial. If, on the other hand, the contention advanced on behalf of the defendants is right, then it would seem, I think, that they are entitled to charge for the right to cut an inscription.

I will confess that my mind has oscillated between the two interpetations which are respectively contended for on each side ; and had sect. 34 stood alone, I think it not improbable that I should have held that " monumental inscription " in that section did mean something of the same nature as a monument, a gravestone or tablet—*i.e.*, that it represented something solid which could not fairly be described as a " monument," " gravestone," or " tablet," but a thing which was erected for the same purpose as monuments, gravestones or tablets are erected and placed in burial grounds. In the first place, I agree that " erecting and placing " in a burial ground more aptly suggests the idea of introducing into the burial ground something solid and tangible rather than a mere inscription. Secondly, I think one would naturally expect, when one finds three different kinds of the same species succeeded by the word " or " that that which follows the word " or " would also be a different kind of the same species. Had sect. 34 stood alone, the inclination of my mind would have been to hold that that was the true view as to the interpretation of the section, and that the words " monument, gravestone, tablet " do not in themselves exhaustively enumerate all things of that kind which can be found, or are normally found, in burial grounds, but that there may be other things of the same description which were intended to be swept up by the general words " or monumental inscription."

Nevertheless, even on sect. 34, I think that the matter would obviously, have been doubtful, because of the word " inscription." It could well be thought that that was the significant and leading word in the phrase " monumental inscription," and that it was the intention of the draftsman of this section, having disposed of the three tangible objects which generally are to be found in a burial ground, to turn his attention to " inscription " as distinct from the matter upon which inscriptions are placed. But I then turn to sect. 38, the proviso to which says :

> . . . that any question which shall arise touching the fitness of any monumental inscription placed in any part of the consecrated portions of such grounds shall be determined by the bishop of the diocese.

This proviso seems to me to show conclusively that the words " monumental inscription " in this section cannot mean what counsel for the plaintiff would have me say they mean in sect. 34. If, in fact, " monumental inscription " in sect. 34 means one of four different kinds of tangible memorials, then I think the same interpretation must be put on that phrase where it is found in sect. 38, with the remarkable result that the bishop may declare his views as to the fitness of one of four different kinds of memorials, and that the least common of all the four, but that he has no such right in relation to the other three, *viz.*, monuments, gravestones or tablets. This is, in my opinion, an untenable view of the matter. In sect. 38 " monumental inscription " means, in my opinion, an inscription which appertains to a memorial to the dead, and it is in regard to the fitness of such an inscription that the bishop has the right of determination. I think that, in sect. 38, the emphasis of the words " monumental inscription " falls upon " inscription " and not on " monumental " ; that it means there what I have just said it means ; and that, as it has that meaning in sect. 38, on ordinary principles of construction I must attribute the same meaning to it in sect. 34.

It was suggested as a possibility by counsel for the plaintiff that " monumental inscription," both in sect. 34 and sect. 38, is used in a wide and general sense as embracing, in effect, the whole totality of tangible memorial ; but I think that no such construction as that can be accepted as far as sect. 34 is concerned because otherwise the draftsman would not have said " or monumental inscription in such burial ground " but " or other monumental inscription in such burial ground." The section is by no manner of means elegantly drawn ; but, having given the matter such consideration as I can, I have arrived at the conclusion which I have expressed, and in my judgment the words " monumental inscription " in sect. 34 of the Act bear the meaning for which counsel for the defendant corporation has contended.

That leaves to be considered the second part of this action, in which the plaintiff seeks to recover the sums which he paid to the defendant corporation's representative for fees for cleaning, re-gilding and re-painting. So far as cutting is concerned, it follows that the fees which he paid for that were justifiably demandable by the defendants and rightly paid by the plaintiff. So far as cleaning, re-gilding and re-painting is concerned, as I have already said, the defendants, shortly after the issue of the writ, gave an undertaking that they would not make any further charges for that class of work. But for the purpose which I am now considering, I have to determine whether they ever had the right to make such a charge in the past, and, to my mind, it is perfectly plain that they had not. Counsel on their behalf scarcely contended the contrary, and it seems to me that one would have to twist the language of sect. 34 almost beyond all permissible bounds to arrive at the conclusion that it covered a charge for cleaning, re-gilding and re-painting.

In my view, therefore, the defendants' representative, the registrar of the cemetery in question, had no right to demand this sum on behalf of the defendants. The only question is as to whether the plaintiff, having paid these small sums, is now entitled to have them back. Counsel for the plaintiffs contends that he is, and he founds his argument principally on *Somes* v. *British Empire Shipping Co.* (1). That was a case in which a shipowner who desired to have his ship repaired found himself in a difficulty about making immediate payment, whereupon the shipwright, to whom he had sent his ship, said that he was proposing to charge him £21 a day for the use of the dock on the footing that he had other ships waiting to go in, and that the shipowner was unnecessarily occupying his dock. The shipowner paid the sum demanded, in addition to the amount which he clearly had to pay for the repair of his ship, but he paid it under protest ; and the question for decision was as to whether he was entitled to have it back. The House of Lords held that he was, and in the course of his speech Lord Cranworth said (8 H.L.Cas. 338, at p. 344), that the point had been raised :

> . . . whether, supposing Messrs. Somes [the shipwright] had no right to add to their lien this extra claim of £567 for the use of their dock, the shipowners could, after paying that demand, seek to recover it back again, even though notice of their intention to do so had preceded and accompanied the payment ; and whether, when there was an improper claim made, they ought not themselves to have found what was the

right sum, and to have tendered that in order to make Messrs. Somes (as it was called in the argument at the bar) wrongdoers. In my opinion, Messrs. Somes must, for this purpose, be considered wrongdoers from the very moment when they said, We will not give you up your ship till you pay something *ultra* that which you are bound to pay. It does not lie in their mouths to say, that it was wrong on the part of the shipowners to pay a sum demanded by themselves, but which they had no right to demand. It is impossible so to contend.

Lord Wensleydale, dealing with the same point, after summarising the facts, proceeded (8 H.L.Cas. 338, at p. 347) :

> The additional sum thus charged and paid under protest includes the sum of £567, to which Messrs. Somes had no right by common law, and no right by contract to demand. They became wrongdoers by that act. Therefore, I am clearly of opinion, that in this case they have made a demand, which they had no right to make, for keeping possession of the ship till their charge for the dock hire was paid ; they have, by these means, obtained money which they had no right to obtain, and consequently an action for money had and received will lie, and the shipowners are entitled to a verdict.

Counsel for the plaintiff says that this action falls within the principles of that decision. It seems to me then that I have to turn to the evidence which was given and see what were the circumstances under which Twyford, the plaintiff in this action, paid his money. In his evidence, after telling me that Brown was the registrar of the cemetery, he said in effect that he used to produce to him the graveowner's authority to carry out the work which he wanted to do ; he paid the fee ; he protested and received a receipt, and substantially that was all that happened between Twyford and Brown. He added that the protests were made not only by him, but by other people as well, for over a period of some six years. Twyford said that over that period, on each occasion when the point arose, he adopted the same procedure—*i.e.*, he paid, protested and got from Brown the receipt. That is the only evidence that I had, and it was not suggested by Twyford that there was anything in the nature of a threat by Brown that unless he paid, he would be excluded from the burial ground in the future, or that any other unpleasant result would ensue to Twyford if he did not pay ; nor was Brown called, as possibly he might have been called had any such evidence been given. All I know is what Twyford himself told me—that he did not believe that he was liable to pay these fees, on the ground that the defendants had no right under the Act to charge them, but that he did pay them and protested at the time.

It seems to me that this position is very remote from the position that arose in *Somes* v. *British Empire Shipping Co.* (1), because in that case the shipwright had a stranglehold on the shipowner ; he had his ship, which the shipowner wanted to use. The shipwright said : "Unless you pay these sums you cannot have your ship" ; and, in order to get back his ship and make profitable use of it the shipowner paid the sum demanded under protest. It appears to me that that position is quite different from the circumstances which were proved in this case—where Brown made no threats, apparently of any action against Twyford, but merely made a demand which Twyford paid under protest, though believing that he was under no liability to do so.

I was then referred to *William Whitely, Ltd.* v. *R.* (2) and *Slater* v. *Burnley Corpn.* (3), which appear to me to be very much nearer the mark. In the former case, William Whitely were persuaded by the Revenue authorities to pay sums on the footing that certain persons in their employ were taxable as male servants. Eventually it was held that those persons were not taxable, so they presented a petition of right to get their money back. On each occasion when they sent to the Commissioners of Inland Revenue the sums for the licences which the Inland Revenue said they needed and had to take out, they sent a letter in which they said :

> . . . we beg again to protest against the ruling of the Inland Revenue authorities in respect of the licences taken out for male servants employed by us in our catering department. We are strongly of opinion that the Act was never intended to apply to such cases as ours . . . We shall be much obliged if you will kindly forward this protest to the proper quarter.

Eventually it was decided by the Divisional Court in certain proceedings that the persons concerned who were in the employ of William Whiteley were not male servants within the meaning of the Act. Having won that battle before the

Divisional Court, William Whiteley not unnaturally turned their minds to the question of getting back from the Inland Revenue what they need never have paid had they appreciated, in the light of that decision, what the true position was. But their claim was rejected by WALTON, J., The judge treated the matter as though it was a case of payment under a mistake of law and said that it could not be recovered back. But in the course of his judgment WALTON, J., said (101 L.T. 741, at p. 745):

> There is no doubt as to the general rule stated in LEAKE ON CONTRACTS [5th Edn., p. 61] that money paid voluntarily—that is to say, without compulsion or extortion or undue influence, and, of course, I may add without any fraud on the part of the person to whom it is paid, and with knowledge of all the facts, though paid without any consideration, or in discharge of a claim not due, or a claim which might have been successfully resisted, cannot be recovered back. There is no doubt, and no question raised, that that is an accurate statement of the general rule . . . But it was suggested that the case came within that class of cases in which money has been held to be recoverable back if it has been paid in discharge of a demand illegally made under colour of an office. Those cases are referred to in BULLEN AND LEAKE, 3rd Edn., 1868, p. 50, in the notes to the counts for money received. The rule as to money paid in discharge of a demand and made under colour of an office is, I think, very clearly explained by the paragraph in the notes which says (p. 50): "This count will lie for money paid by the plaintiff in discharge of a demand illegally made under colour of an office; as excessive fees paid to the steward of a manor for admission to copyholds; excessive fees paid to a broker under a distress; overcharges paid to a carrier to induce him to carry goods; an excessive charge paid to an arbitrator to take up an award; money improperly exacted as a toll at a turnpike." Those seem to me all to come within that class of cases to which I have just referred, which is described in LEAKE ON CONTRACTS (5th Edn., p. 61) in these words: "Money extorted by a person for doing what he is legally bound to do without payment, or for a duty which he fails to perform, may be recovered back." In all those cases in order to have that done which the person making the payment was entitled to have done without a payment, he had to make the payment, and someone who was bound to do something which the person paying the money desired to have done, refused to do his duty unless he was paid the money. If in those circumstances money is paid, then it can be recovered back. There is there an element of duress.

I personally should have felt a little doubtful whether this was a true case of money paid under a mistake of law, because William Whiteley, on their view of the law, were not liable to pay it at all, and said so. But, even though personally I feel there is some difficulty in sharing that particular view of this case. I respectfully agree entirely with what the judge said in the rest of his judgment, and what he said appears to me to be decisive of the present case—particularly the general rule which he said applied, namely:

> . . . that money paid voluntarily—that is to say, without compulsion or extortion or undue influence, and . . . without any fraud on the part of the person to whom it is paid, and with knowledge of all the facts, though paid without any consideration, or in discharge of a claim not due, or a claim which might have been successfully resisted, cannot be recovered back.

That seems to me to cover the present case; and it cannot be suggested, having regard to the evidence given before me, that the principle of duress *coleri officii* could prevail in the present action.

Slater v. *Burnley Corpn.* (3) was a decision in connection with water rate. Water rate in that case:

> . . . was demanded by the defendants, the sanitary authority, and paid by the plaintiff, such sum being 5 per cent. on the "gross rental" of the houses. After this payment, the defendants altered their basis of assessment, from "gross rental" to "rateable value" as the proper basis of assessment, they being entitled to charge 5 per cent. on the "annual value." If the rate had been calculated on the "rateable value" it would have been £7 3*s.* 10*d.* The plaintiff brought an action in a county court to recover the overcharge £1 11*s.* 6*d.*, the difference between these two sums, as being money paid under compulsion. There was no power to distrain for these rates (except when they did not exceed £1 a quarter, which did not apply to the present case), but the defendants had the power to cut off the water supply on non-payment of the rate. The defendants had not cut off the water and has not threatened to do so, nor had they taken any legal proceedings for the recovery of the rate. The county court judge held the payment to be a compulsory one, as the defendants had the power to cut off the water, and gave judgment for the plaintiff.

It was held in that case :

> . . . that the payment was a voluntary payment, and could not be recovered back.

Both CAVE, and WILLS, JJ., took the view that where a payment is a voluntary one, the plaintiff is not entitled to bring an action to recover back the money paid. In the course of his judgment WILLS, J., said (59 L.T. 636, at p. 639) :

> It seems to me in these circumstances that it is idle to say that there is anything like duress—there was nothing in the nature of a threat used ; it is simply the ordinary case of a person raising a contention when a demand is made upon him.

This seems to me to be precisely the position in the present case, and in my view the plaintiff here is not entitled to recover back the sums which he voluntarily, though under protest, paid to Brown. If he had wished to challenge the validity of the demand made by Brown, it would have been better for him to have refused to pay, and put the matter to the test by inviting the defendant corporation to sue him. I have no hesitation in holding that the circumstances which have been proved in which he paid these sums show that he paid them voluntarily within the meaning of the decisions in those cases, and that the fact that he paid them under protest does not avail him in his attempt in the present action to get them back.

That, I think, disposes of the points at issue in the action. I am unable to make a declaration in the form which the plaintiff seeks in the action, and I am unable to make any order for repayment of the sums amounting, I think, to £3 odd which he claims in respect of fees other than fees for cutting. As that is the only relief which the plaintiff seeks by his action, I have no other course than to dismiss it with costs.

Action dismissed with costs.

Solicitors : *Edwin Coe & Calder Woods*, agents for *Richard Higham & Co.*, Manchester (for the plaintiff) ; *Sharpe, Pritchard & Co.*, agents for *R. H. Adcock*, Preston (for the defendant corporation).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

JOHAN ADAM NETZ *v.* RT. HON. CHUTER EDE, P.C., H.M. SECRETARY OF STATE FOR HOME AFFAIRS.

[CHANCERY DIVISION (Wynn-Parry, J.), March 5, 6, 7, 1946.]

Practice—Pleading—Striking out statement of claim—No cause of action—Action to restrain Home Secretary from deporting enemy alien—R.S.C., Ord. 25, r. 4.

Aliens—Enemy alien—Deportation—Act of State—Licence allowing enemy alien to remain in the kingdom may be withdrawn at any time—Striking out statement of claim—R.S.C., Ord. 25, r. 4.

In an action brought by N. against the Home Secretary for an injunction restraining the Home Secretary from deporting N., it was pleaded in the statement of claim that N. was a German national who had entered the United Kingdom in 1931 with the intention of remaining here permanently ; that shortly before the war he had applied for naturalisation, but owing to the war the application had to remain in abeyance ; that he had been interned since 1940 ; and that in Oct., 1945, without any notice, his name was posted up on a notice board in the internment camp as a person whom the Home Secretary intended to repatriate to Germany. It was further pleaded that the acts of the Home Secretary were *ultra vires* or, alternatively a misuse of executive power. The Home Secretary applied under R.S.C., Ord. 25, r. 4, to have the statement of claim struck out as disclosing no reasonable cause of action :—

HELD : (i) on the statement of claim, as it stood, N. became at the outbreak of war, and still was, an alien enemy.

(ii) since N. was an alien enemy, he was allowed to remain in the kingdom only under licence from the Crown, it being part of the royal prerogative to allow an alien enemy to remain in the kingdom ; the Crown could at any time withdraw the licence and order N. to leave the kingdom.

Porter v. *Freudenberg* (8), *R.* v. *Knockaloe Camp* (*Commandant*) (9) *and Schaffenius* v. *Goldberg* (10) *applied.*

(iii) since the act complained of was an act of State, it could not be challenged in the courts. Therefore, the action could not possibly succeed and the statement of claim must be struck out.

Salaman v. *Secretary of State for India* (4) *followed.*

[**EDITORIAL NOTE.** The jurisdiction to strike out a statement of claim under R.S.C. Ord. 25, r. 4, is one which should only be exercised in plain and obvious cases, when the pleading discloses a case which the court is satisfied will not succeed.

An order for the repatriation of an alien enemy is an act of state, an exercise of the prerogative of the Crown which the courts must accept. It is, indeed, a lesser exercise of sovereign power than internment, which involves loss of liberty, and as to which the Divisional Court decided in *R.* v. *Bottrill*, p. 635, *post*, that no writ of *habeas corpus* would lie. No action restraining such deportation can succeed, and the statement of claim in the case reported may properly be struck out under R.S.C. Ord. 25, r. 4.

It is held in this case that as the plaintiff was a German national when the war broke out and there was nothing in the statement of claim to suggest that he had ceased to be an alien enemy on the termination of the war he must be treated as an alien enemy for the purpose of considering whether there was a "reasonable cause of action." Reference may be made to *R.* v. *Bottrill*, p. 635, *post*, where the certificate of the Foreign Secretary was put in to prove a continuance of a state of war making the applicant an alien enemy.

As to Striking out Claims Disclosing no Cause of Action, see HALSBURY, Hailsham Edn., Vol. 25, pp. 253-256, paras. 419, 420; and for Cases, see DIGEST, Pleading and Practice, pp. 71-76, Nos. 623-650.

For R.S.C., Ord. 25, r. 4, see YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 401-407, and Supplement.

As to Position of Enemy Alien, see HALSBURY, Hailsham Edn., Vol. 1, pp. pp. 455-457, paras. 771-774, and pp. 461, 462, para. 780; and for Cases, see DIGEST, Vol. 2, p. 147, Nos. 200-202, pp. 154-158, Nos. 250-280, and pp. 193-198, Nos. 540-563, and Supplement.]

Cases referred to:

(1) *Peru Republic* v. *Peruvian Guano Co.* (1887), 36 Ch.D. 489; Digest Pleading 73, *635*; 56 L.J.Ch. 1081; 57 L.T. 337.

(2) *Hubbuck & Sons, Ltd.* v. *Wilkinson, Heywood & Clark Ltd.*, [1899] 1 Q.B. 86; Digest Pleading 72, *626*; 68 L.J.Q.B. 34; 79 L.T. 429.

(3) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; Digest Pleading 75, *645*; 81 L.J.K.B. 217; 105 L.T. 753.

*(4) *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. 613; Digest Pleading 85, *714*; 75 L.J.K.B. 418; 94 L.T. 858.

(5) *R.* v. *Vine Street Police Station Superintendent, Ex p. Liebmann*, [1916] 1 K.B. 268; 2 Digest 141, *162*; 85 L.J.K.B. 210; 113 L.T. 971.

(6) *Sylvester's Case* (1703), 7 Mod. Rep. 150; 2 Digest 139, *144*.

(7) *Thurn & Taxis (Princess)* v. *Moffitt*, [1915] 1 Ch. 58; 2 Digest 156, *259*; 84 L.J.Ch. 220; 112 L.T. 114.

*(8) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel (S.) & Rosenfeld, Re Merton's Patents*, [1915] 1 K.B. 857; 2 Digest 156, *260*; 84 L.J.K.B. 1001; 112 L.T. 313.

*(9) *R.* v. *Knockaloe Camp (Commandant), Ex p. Forman* (1917), 117 L.T. 627; 2 Digest 198, *563*; 87 L.J.K.B. 43; 16 L.G.R. 295.

*(10) *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284; 2 Digest 156, *261*; 85 L.J.K.B. 374; 113 L.T. 949.

(11) *A.-G. for Canada* v. *Cain, Same* v. *Gilhula*, [1906] A.C. 542; 2 Digest 193, *541*; 75 L.J.P.C. 81; 95 L.T. 314.

Procedure Summons by the defendant under R.S.C., Ord. 25, r. 4, asking that the plaintiff's statement of claim be struck out on the ground that it disclosed no reasonable cause of action. In the action the plaintiff claimed an injunction restraining the defendant from deporting the plaintiff. The facts are fully set out in the judgment.

H. O. Danckwerts for the applicant (defendant).

Hon. Ewen Montagu, K.C., and *Douglas Lowe* for the respondent (plaintiff).

Wynn-Parry, J.: This is a procedure summons in this action, taken out by the defendant, by which he asks that the statement of claim be struck out. The relevant facts are very few. The writ in the action was issued on Oct. 24, 1945. By the writ the plaintiff claims an injunction restraining the defendant, the Right Hon. Chuter Ede, His Majesty's Secretary of State for Home Affairs:

> . . . his servants or agents from deporting, expelling or repatriating the plaintiff from the United Kingdom or causing him to be deported, expelled or repatriated from the United Kingdom or otherwise causing him to leave, quit or to part from the United Kingdom.

The statement of claim was delivered on Jan. 11, 1946, and on Feb. 12, 1946, the defendant issued this summons, by which he asks :

> 1. That the statement of claim in this action may be ordered to be struck out on the grounds that (*a*) it discloses no reasonable cause of action (*b*) the action is frivolous and vexatious and (*c*) the action is an abuse of the process of the court. 2. That the action may be ordered to be stayed or dismissed. 3. That the plaintiff may be ordered to pay to the defendant his costs of this action.

The application is made under R.S.C., Ord. 25, r. 4, and the defendant also invokes the inherent jurisdiction of the court. I think, however, it will be sufficient if I deal with this matter upon the first basis, R.S.C., Ord. 25, r. 4, which is in these terms :

> The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

The jurisdiction given by R.S.C., Ord. 25, r. 4, is a very powerful jurisdiction, and is, therefore, one to be exercised very sparingly. The principles on which the court is to proceed are stated quite clearly in the authorities, to three of which I will refer. The first is *Republic of Peru* v. *Peruvian Guano Co.* (1). Chitty, J., said (36 Ch.D. 489, at p. 495) :

> This motion is made under the first branch of Ord. 25, r. 4. There is some difficulty in affixing a precise meaning to the term " reasonable cause of action " used in Ord. 25, r. 4. In point of law, and consequently in the view of a court of justice, every cause of action is a reasonable cause. But obviously some meaning must be assigned to the term " reasonable." Demurrers are abolished, and it could not have been intended to abolish demurrers by the right hand and restore them by the left. So far as method of procedure was concerned, demurrers, certainly in the Court of Chancery, and in the Chancery Division at the time when these orders came into operation, were a cheap and expeditious mode of obtaining a decision ; the mere substitution of a motion or summons for the demurrer would not be an adequate explanation of Ord. 25. Having regard to the terms of r. 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the court sees that a substantial case is presented the court should, I think, decline to strike out that pleading ; but when the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation. What I have just stated is intended to be not an exhaustive explanation of the rule, but merely an indication in a general way of the limits of its meaning.

In *Hubbuck & Sons, Ltd.* v. *Wilkinson, Heywood & Clark, Ltd.* (2), Lindley, M.R., delivering the judgment of the Court of Appeal, said ([1899] 1 Q.B.D. 86, at pp. 90, 91) :

> The application is made under Ord. 25, r. 4. Ord. 25 abolished demurrers and substituted a more summary process for getting rid of pleadings which show no reasonable cause of action or defence. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Ord. 25, r. 2 ; the other is to apply to strike out the statement of claim under Ord. 25, r. 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression " reasonable cause of action " in r. 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases.

Thirdly, in *Dyson* v. *A.-G.* (3), Fletcher Moulton, L.J., made these observations on this rule ([1911] 1 K.B.D. 410, at pp. 418, 419) :

> Now it is unquestionable that, both under the inherent power of the court and also under a specific rule to that effect made under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary

> dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.

It will be apparent from these extracts from the authorities that there is thus thrown upon the applicant in this summons a heavy onus, which has been frankly accepted by counsel for the defendant, and the question which arises is whether he has discharged that onus.

Three points at once fall for consideration. The first is the status of the plaintiff. For this purpose I must consider the statement of claim, because, in deciding a matter such as this, neither the applicant nor the court can go outside the language of the statement of claim. The statement of claim is as follows:

> 1. The plaintiff is a German national who entered the United Kingdom in 1931 with the intention of permanently residing therein . . . 3. . . . Shortly before the outbreak of the present war the plaintiff became eligible to apply and did in fact apply for naturalisation as a British subject but the formalities connected with the said application could not be completed prior to the said outbreak of war [*i.e.*, the present war with Germany] and the said application had to remain and still remains in abeyance.

In para. 4 the plaintiff pleads that in or about June, 1940, he was interned. He says that he has remained interned ever since the said date:

> . . . despite his applications for release and the grounds for such continued internment have never been vouchsafed to him. As far as the plaintiff is aware no just or adequate grounds for such continued internment exist.

I may observe in passing that no relief is claimed in respect of the matters pleaded in that paragraph. The plaintiff then pleads:

> 5. At or about the beginning of Oct., 1945, without any or any previous notice to the plaintiff his name was included in a notice which was posted by or on behalf of the defendant upon a notice board in the internment camp where the plaintiff then was as being a person whom the defendant intended to repatriate to Germany or concerning whom the defendant had ordered the repatriation on Oct. 28, 1945. 6. The said notice did not state the ground or grounds upon which the defendant was acting or purporting to act as alleged in para. 5 hereof and the defendant has refused and refuses to state upon what (if any) ground or grounds he acted or purported to act as aforesaid.

Then in para. 7 there is a plea that the acts of the defendant are *ultra vires* or, alternatively, a misuse of executive power:

> Alternatively the defendant acted as aforesaid upon no or no sufficient ground. In the further alternative the defendant has failed to state the ground or grounds (if any) upon which he in fact acted as aforesaid.

Then the plaintiff says:

> In the further alternative by reason of the premises if the defendant be permitted to carry out his aforesaid intention to repatriate the plaintiff and, or alternatively, if any order made by the defendant for the repatriation of the plaintiff be allowed to stand the plaintiff will suffer without any justification a serious and irreparable injury both to his person and in his aforesaid business.

On that he claims the injunction to which I referred when referring to the writ of summons.

For the purpose of considering what the status of the plaintiff is, the two material allegations are (i) that he is a German national, and (ii) that he was still a German national when the war broke out. Upon those two allegations as they stand, in my judgment, I must come to the conclusion that the plaintiff at the outbreak of war, became an alien enemy, and still is an alien enemy. I was urged by counsel for the plaintiff to say that I ought not to decide this question on this application, but that it was one that should be reserved for the trial; and in the course of his very persuasive argument he invited me to take the view that there was ample material for canvassing the question of the plaintiff's status at the trial. Further, he said that there was no obligation upon him to plead anything in the statement of claim to the effect that, as a fact, the plaintiff has ceased to be a German national. I do not accept that plea. I am bound, just as counsel for the defendant is bound, by the pleading as it stands, and on the pleading as it stands I have come to the conclusion that the plaintiff is at present an alien enemy. There is nothing in this statement of claim to suggest that the plaintiff's status has changed, either by reason of the termination of the war with Germany or by reason of any other fact. I, therefore, proceed upon the basis that the plaintiff is an alien enemy.

The second point which must be noted is that the defendant is sued in his official capacity. He is described in the title to the action as the Right Hon. Chuter Ede, P.C., His Majesty's Secretary of State for Home Affairs. Thirdly, it is important to consider what is the nature of the complaint which is made by the plaintiff in his statement of claim. The gist of his complaint is in para. 5, that in Oct., 1945, the plaintiff's name was included in a notice:

> . . . posted by or on behalf of the defendant upon a notice board in the internment camp where the plaintiff then was as being a person whom the defendant intended to repatriate to Germany or concerning whom the defendant had ordered the repatriation . . .

It is upon that allegation that the plaintiff founds his claim to the relief and injunction restraining the defendant, his servants and agents, from carrying out that intention, *viz.*, to deport, expel or repatriate the plaintiff from the United Kingdom.

In my judgment, on the true view of this statement of claim, the plaintiff is complaining that the defendant, acting in his official capacity, intends to cause the deportation of the plaintiff, and the plaintiff challenges the right of the defendant, acting in his official capacity, to do so. On that view a number of important questions arise. The first is, what is the nature of the act complained of? Is it an act of State? An act of State, as Fletcher Moulton, L.J., said, in *Salaman* v. *Secretary of State for India* (4), is essentially an exercise of sovereign power. In my view, the act complained of here is an act of State.

Secondly, upon that view must be considered what consequences flow from the circumstance that the act complained of is an act of State. Assuming that the act complained of was a valid exercise of the prerogative, the result is in law that it cannot be challenged in this court. For that proposition I refer to what Fletcher Moulton, L.J., said ([1906] 1 K.B. 613, at p. 639), in *Salaman* v. *Secretary of State for India* (4):

> An act of state is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal courts must accept it, as it is, without question. But it may, and often must, be part of their duty to take cognisance of it. For instance, if an act is relied upon as being an act of state, and as thus affording an answer to claims made by a subject, the courts must decide whether it was in truth an act of state, and what was its nature and extent.

Later, Fletcher Moulton, L.J., said (*ibid.*, at pp. 640, 641):

> The true view of an act of State appears to me to be that it is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. Its duty is simply to accept the new departure; and its power and its duty to adjudicate upon, and enforce rights of individuals, or of the Government, in the future, appear to me to be precisely the same whether the origin of such rights be an act of State or not. But, although this be so, it must not be supposed that the principles of interpretation applicable to an act of State are the same as those which apply to other acts. For instance, if an act of State be expressed in a document purporting to confer benefits on an individual, it by no means necessarily follows that there is any intention to create a contract, or that the document should be construed by the same canons of interpretation as would be adopted in the case of a contract between two individuals. A government in the exercise of its sovereign power may well desire to reserve to itself discretionary powers quite inconsistent with contractual relations. There is no presumption in the case of an act of State

> that this is not the case, and, if the language of the document and the circumstances of the case point to such a conclusion, the court is bound to accept it, however vague and indefinite it may make the effect of the act of State.

In between those two passages Fletcher Moulton, L.J., gave a number of examples, and counsel for the plaintiff sought to argue that, when those examples are considered and analysed, they indicate that Fletcher Moulton, L.J., in the two passages I have read, was not intending to lay down an absolutely general view as to what was the nature, effect and extent of an act of State. I do not, for myself, accept that view. In my view, Fletcher Moulton, L.J., was intending to state a view as to the nature, effect and extent of an act of State in completely general terms and of general application.

It is on the basis that that is the true nature of an act of State that the judgments are rested, in the cases which decided that an alien enemy who is interned cannot apply for a writ of *habeas corpus*. In *R.* v. *Superintendent of Vine Street Police Station, Ex p. Liebmann* (5) Low, J., said ([1916] 1 K.B. 268, at p. 277) :

> It was alleged on behalf of the Crown (i) that the applicant is an alien enemy ; (ii) that he is a prisoner of war ; (iii) that the Crown is entitled in exercise of its prerogative to imprison an alien enemy, and that this court has no jurisdiction to interfere with the exercise of such prerogative.

Low, J., decided each of these questions in favour of the Crown, and as to the third point said (*ibid.*, at pp. 278, 279) :

> With regard to the third question, as to the prerogative of the Crown to arrest an alien enemy, I have really answered almost as much of it as is necessary to deal with the present case when I have been dealing with question 2. I have no doubt at all that such action is quite within the Crown's prerogative. At common law an alien enemy had no rights (see *Sylvester's* case (6)), and he could be seized and imprisoned and could have no advantage of the law of England. This position, however, has been softened by custom and by decision of the courts, and the judgment of Sargant, J., in *Princess Thurn and Taxis* v. *Moffitt* (7), approved by the Court of Appeal in *Porter* v. *Freudenberg* (8), shows that an alien enemy registered under the Aliens Restriction Act, 1914, as this applicant is, is entitled to sue in the King's courts (which would, I suppose, include such an application as the present) as he is resident here by tacit permission of the Crown, and so is *sub protectione domini regis*. He is, therefore, in a similar position to an alien enemy resident here under licence from the Crown. That licence, however, can be terminated at any time by the Crown . . .

In *R.* v. *Commandant of Knockaloe Camp, Ex p. Forman* (9) Avory, J., said (117 L.T. 627, at p. 631) :

> I have only one other word to add on the contention put forward by Mr. Powell that the prerogative of the Crown, which he does not dispute, to imprison alien enemies as prisoners of war has been curtailed or restricted by the operation of the Aliens Restrictions Act, 1914. Mr. Powell read it as if its title was " The Prerogative Restriction Act, 1914." But it is not. It is the Aliens Restriction Act, and it is expressly provided in the subsection which my Lord has already read, that any powers given under sect. 1 of the Act, which section is practically the whole of the statute, or under any Order in Council, " shall be in addition to, and not in derogation of, any other powers with respect to the expulsion of aliens, or the prohibition of aliens from entering the United Kingdom, or any other powers of His Majesty." I am quite unable to read that as Mr. Powell suggests in the light of the doctrine of *ejusdem generis*. I think that the words " any other powers of His Majesty " must clearly include other powers besides those with respect to expulsion or prohibition of aliens from entering the United Kingdom.

The next point I have to consider is this. It is quite true, as counsel for the plaintiff submitted, that the court is entitled to inquire, and is bound to inquire, into the question whether or not the act complained of is an act within the prerogative. For that proposition I was referred to Halsbury's Laws of England, Hailsham Edn., Vol. 6, p. 444, para. 512 :

> The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows, nor such as are contrary to Magna Carta, or any other statute, or to the liberties of the subject. The courts have jurisdiction, therefore, to inquire into the existence or extent of any alleged prerogative . . .

That statement, with which I understand counsel for the defendant has no quarrel, I accept as an accurate statement of the position.

I pass, therefore, to the next question : Is the act complained of here an act within the prerogative, bearing in mind my finding that, as the pleading stands, I must treat the plaintiff as an alien enemy ? As an alien enemy he is, as has been seen from the authorities, here under licence. It is clearly part of the royal prerogative to allow a person who is an alien enemy to enter and remain in the kingdom. That, I think, clearly appears from the judgment of LORD READING, L.C.J., in *Porter* v. *Freudenberg* (8). While the licence continues, it is perfectly true that the alien concerned can sue a subject of the Crown to protect his property. That clearly appears from *Schaffenius* v. *Goldberg* (10). As is shown by this case (which is only one example of the well-established proposition) the licence may be withdrawn at any time. It is true that, differing from the earlier view of Low, J., [*in R.* v. *Vine Street Police Station Superintendent* (5)], it was held that internment is not a revocation of the licence, but I am satisfied on the authorities that there is no doubt that the Crown has the right to withdraw the licence at any time. Apart from authority, it appears to me to be plain that, as the Crown can licence an alien enemy either to enter or remain in the kingdom, *a fortiori* it can withdraw the licence and order such a person to leave the kingdom. That was clearly the view, I think, of AVORY, J., as is shown in the passage of his judgment in *R.* v. *Commandant of Knockaloe Camp* (9), which I quoted earlier. It also appears to me to be the basis of the judgment of the Privy Council in *A.-G. for Canada* v. *Cain* (11). Indeed, it appears to me that expulsion of an alien enemy may be regarded as a lesser exercise of sovereign power than the internment of such a person. In the latter case, the individual is deprived of his liberty, whereas, in the former, he retains his liberty and is under no greater disability than that which follows from the absence of licence or permission to enter or remain within the kingdom.

Bearing in mind all these considerations, I now have to ask myself the question: Has the defendant discharged the admittedly heavy onus cast upon him by the first principle which emerges from the first three cases to which I have referred and particularly *Dyson* v. *A.-G.* (3). I was pressed by counsel for the plaintiff, on the authority of *Dyson* v. *A.-G.* (3), to allow the matter to go to trial, on the ground that the case raises a question of public importance and that it cannot conveniently be sufficiently canvassed on this occasion. I agree that it raises a question of public importance. That, of itself, is not a decisive reason for refusing to exercise my jurisdiction at this stage.

In my judgment, holding the view that I do that on the statement of claim as it stands the plaintiff must be regarded as an alien enemy, I have no alternative but to take the view that there cannot be at any stage any doubt that this action cannot possibly succeed. In those circumstances I propose to accede to the defendant's application, and to order that the statement of claim be struck out, subject to any application which counsel for the plaintiff may make for leave to amend. This course has been followed in a previous case, it is not objected to by counsel for the defendant, and as the matter is so vital to the plaintiff, if such an application is made, I shall be prepared to accede to it.

Liberty to apply for leave to amend statement of claim. If no application made, statement of claim to be struck out. Leave to appeal granted.

Solicitors : *Treasury Solicitor* (for the applicant, the defendant in the action) ; *William J. Stoffel* (for the respondent, the plaintiff in the action).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

R. *v.* BOTTRILL, *Ex parte* KUECHENMEISTER

[King's Bench Division (Lord Goddard, L.C.J., Croom-Johnson and Lynskey, JJ.), April 3, 1946.]

Crown Practice—Habeas Corpus—Interned alien enemy—Availability of writ—Declaration of Government as to state of war—Whether conclusive.

A *Public Authorities—Act of State—Declaration of Government—State of war—Continued existence of country as a state—Whether conclusive.*

Aliens—Interned—Habeas corpus—Availability of writ.

In an application for a writ of *habeas corpus* by an interned German national, who had resided in England for some time but had never been naturalised, a certificate was produced from the Secretary of State for Foreign Affairs which stated (*a*) that the allied powers had assumed supreme B authority with respect to Germany including all powers possessed by the German Government and other German authorities; (*b*) that Germany still existed as a state and German nationality as a nationality; and (*c*) that no treaty of peace or declaration of the allied powers having been made terminating the state of war with Germany, His Majesty was still in a state of war with Germany:—

Held: (i) the court had no right to go behind the certificate, but was C bound by the statements therein contained; consequently the applicant was still an alien enemy.

(ii) an alien enemy interned by the Crown was debarred from applying for a writ of *habeas corpus* and the court had no power to grant a writ.

[**EDITORIAL NOTE.** Legal theory recognises no intermediate state between peace and war. The unconditional surrender of Germany in 1945, although putting an end to active hostilities, did not conclude the state of war between the two countries, and D the certificate of the Foreign Secretary as to this, since it relates to a matter of state, is conclusive.

The applicant, therefore, remains an alien enemy and no *habeas corpus* to secure his release from internment is available. This point was discussed also in the case of *Netz*, p. 628 *ante*, and the same view expressed, namely, that as the Crown may in the exercise of the prerogative permit an alien enemy by licence to live in this country in time of war, so such licence may be withdrawn equally by the exercise of the prerogative, E and no power exists in the courts to secure the release of the alien from the subsequent internment.

As to Declarations of the Crown as Acts of State, see HALSBURY, Hailsham Edn., Vol. 26, p. 247, para. 557; and for Cases, see DIGEST, Vol. 38, pp. 5-8, Nos. 3-16.

As to the Availability of a Writ of Habeas Corpus to Aliens, see HALSBURY, Hailsham Edn., Vol. 9, p. 703, para. 1202; and for Cases, see DIGEST, Vol. 16, p. 253.]

F Cases referred to:

*(1) *Duff Development Co., Ltd.* v. *Kelantan Government*, [1924] A.C. 797; 38 Digest 7, *14*; 93 L.J.Ch. 343; 131 L.T. 676.

*(2) *R.* v. *Vine Street Police Station Superintendent, Ex p. Liebmann*, [1916] 1 K.B. 268; 2 Digest 157, *276*; 85 L.J.K.B. 210; 113 L.T. 971.

*(3) *Ex p. Weber*, [1916] A.C. 421; 2 Digest 141, *161*; 85 L.J.K.B. 944; 114 L.T. 214; affg., [1916] 1 K.B. 280n.

G *(4) *R.* v. *Home Secretary, Ex p. L.*, [1945] 1 K.B. 7; 114 L.J.K.B. 229.

Application for a writ of *habeas corpus*. The facts are fully set out in the judgment of Lord Goddard, L.C.J.

John G. Foster for the applicant.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *Hon H. L. Parker* for the Crown.

H Lord Goddard, L.C.J.: In this case counsel for the applicant moves the court for a writ of *habeas corpus* on the instance of one Kuechenmeister, who apparently is detained at the present time at the Beltane School, Queensmere Road, Wimbledon, and this motion is directed to the commandant of that place with a view to his being released.

It appears that the applicant was a German national. He was born in Germany in 1896, and came to England in 1928, where he lived but never became naturalised. He returned to this country after residence in Eire and he was sent overseas in the Arandora Star, which was sunk by enemy action, from which he escaped. Then he returned to this country in Mar., 1945. after he had been in Australia. On returning to this country, we do not know how— the affidavit does not tell us how or in what circumstances he came back to this country—he was detained at the Beltane School, Wimbledon, in what is called an internment camp, and from that he applies to be discharged.

The court has been furnished by the Attorney-General, who appears for the Crown in this case, with a certificate from His Majesty's Secretary of State for Foreign Affairs, which states :

> (1) Under para. 5 of the preamble to the declaration dated June 5, 1945, of the unconditional surrender of Germany, the Governments of the United Kingdom, the United States of America, the Union of Socialist Soviet Republics and France, assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority. The assumption for the purposes stated of the said authority and powers does not effect the annexation of Germany." (2) That in consequence of this declaration Germany still exists as a state and German nationality as a nationality, but the Allied Control Commission are the agency through which the government of Germany is carried on. (3) No treaty of peace or declaration of the allied powers having been made terminating the state of war with Germany, His Majesty is still in a state of war with Germany, although, as provided in the declaration of surrender, all active hostilities have ceased.

Inviting the court to take that certificate, the first point taken by counsel for the applicant was that matters of law arose upon it and that it was for the court to decide whether or not Germany still existed as a country and whether a state of war still existed, as I understand him to say, between that country and His Majesty, his contention being that as the German Government ceased to exist there was no German state and, therefore, there was no one with whom His Majesty was at war. But the Secretary of State on behalf of His Majesty has certified to this court that His Majesty is still in a state of war with Germany.

It is my opinion that it is not open to this court to go behind that certificate in any way and if authority is needed for it our attention has been called to *Duff Development Co., Ltd.* v. *Government of Kelantan* (1), where LORD FINLAY said ([1924] A.C. 797, at p. 815) :

> There is no ground for saying that because the question involves considerations of law these must be determined by the courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law.

Therefore, as it seems to me, this court has no right to go behind the certificate which has been presented to us from the Secretary of State, and we are bound to take it that at this present moment there is a state of Germany, the government of which is being conducted by the allied powers, but that His Majesty is still in a state of war with Germany. That being so, German subjects are still alien enemies and this gentleman on whose behalf the court is moved is an alien enemy. The court has no right to consider him as otherwise than a subject of a state with which His Majesty is at war.

The next point that is taken is that in spite of his being an alien enemy he is entitled to be released, because it is said that the right to intern him depends entirely upon a decision of this court in 1915 in *Ex p. Liebmann* (2), and that the reasoning on which that case was based no longer applies. It is said that *Liebmann's* case (2) decided an alien enemy could be treated as a prisoner of war and that the reason for that was because enemy civilians might be equally as dangerous to this country as alien soldiers or persons in the armed forces of the enemy state. Whatever were the reasons which moved the court in *Liebmann's* case (2) to come to the conclusion that they did, there is no doubt in my mind that what was decided in that case was that an alien enemy could not have resort to this court for a writ of *habeas corpus* so long as a state of war existed and as long as he was interned. That seems also to have been decided by the Court of Appeal in *Ex p. Weber* (3). The case afterwards went to the House of Lords on the question whether the man could change his nationality in time of war. The House of Lords, affirming the Court of Appeal on that point, did not even think it necessary to discuss the question. It was taken for granted once he was an alien enemy that he could not have a writ of *habeas corpus*.

Then there have been other cases to which it is not necessary to refer in detail until we come down to a case recently decided in this court *R.* v. *The*

Home Secretary, Ex p. L. (4), in which it was laid down in the clearest possible terms that an alien enemy had no right to apply to this court for a writ of *habeas corpus.* It seems to me, whatever the grounds that may have been given in *Liebmann's* case (2) influencing the court in coming to the decision that they did, in my opinion, at common law, that was and always has been the law. His Majesty can always allow any alien, the subject of any state with which he is at war, to remain in this country, carry on his business and live as an ordinary citizen. One knows during the Napoleonic Wars and other wars in which this country has been engaged very frequently it was done. French subjects lived in this country and were allowed to live in this country, carry on their business and reside as ordinary citizens. So long as they are doing that it is presumed they are doing so by the licence of the Crown, but the Crown can withdraw that licence at any time. When the Crown thinks it necessary, in the interests of the safety of this country, to deprive an alien enemy of that right, the Crown withdraws the licence to live in the way he has been living and, by imprisoning him, the Crown considers, in the interests of the State, the alien enemy should no longer be allowed to remain here in the position he has been in and restores him (if one may so put it) to the status of an alien enemy and a person who should be put under restraint for the safety of the state.

In those circumstances it seems to me the decisions which are binding on this court—and, as it seems to me, also on the Court of Appeal—show perfectly clearly that once the Crown has taken that step with regard to an alien enemy the alien enemy is debarred from applying for a writ of *habeas corpus* and this court has no power to grant a writ.

The consequence is that the application fails and must be dismissed.

Croom-Johnson and Lynskey, JJ., agreed.

Application dismissed.

Solicitors: *Marsh & Ferriman,* Worthing (for the applicant); *Treasury Solicitor* (for the Crown).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* AYRSHIRE EMPLOYERS MUTUAL INSURANCE ASSOCIATION LTD.

[House of Lords (Lord Thankerton, Lord Macmillan, Lord Wright, Lord Simonds and Lord Uthwatt), February 25, March 29, 1946.]

Income Tax—Mutual insurance association—Surplus arising from transactions with members—Whether assessable—Finance Act, 1933 (*c.* 19), *s.* 31 (1).

The respondent association was incorporated as a company limited by guarantee. It had no share capital and its transactions were exclusively with its own members. Its purpose was to insure its members on the mutual principle against liability for injuries to their workmen. An assessment to income tax was made on the association for the year ended Apr. 5, 1936, on a sum representing the estimated surplus arising in that year from the insurance transactions of the association with its members. The question for consideration was whether this surplus was assessable to income tax by virtue of the Finance Act, 1933, s. 31 (1):—

Held: (i) the definition of "company or society" in sub-sect. (7) of sect. 1 of the Act limited the members referred to in sub-sect. (1) of that section to members of an incorporated company or society and could not include contributor-participators, in an exclusively mutual insurance scheme, who were not members of the incorporated company or society, who were the insurers.

(ii) it was not membership or non-membership which determined immunity from or liability to tax; it was the nature of the transactions; if the transactions were of the nature of mutual insurance the resultant surplus was not taxable, whether the transactions were with members or non-members.

(iii) "those transactions" in sect. 31 (1) were *ex hypothesi* transactions in which the element of mutuality was an integral, essential and inseparable part.

(iv) the surplus from the transactions of the association with its members was, therefore, not assessable to income tax by virtue of s. 31 (1) of the Act.

Decision of the First Division of the Court of Session, [1944] S.C. 421, *affirmed.*

[**EDITORIAL NOTE.** Sect. 31 (1) was passed after a series of cases had decided that a mutual insurance company was not liable to be taxed in respect of a surplus arising from transactions of purely mutual insurance between the company and its members. Its intention was to render the surplus taxable. But it is held to have failed because it assumes erroneously that transactions with non-members are taxable: this is not so where the transactions are mutual insurance. The word " members " in the subsection does not include contributor-participators in an exclusively mutual transaction of insurance, and so far as the legislature intended the surplus in such circumstances to be taxable, the purpose fails.

FOR THE FINANCE ACT, 1933, s. 31 (1), see HALSBURY'S STATUTES, Vol. 26, p. 160.

Cases referred to:

*(1) *New York Life Insurance Co.* v. *Styles* (1889), 14 App. Cas. 381; 28 Digest 59, *300*; 59 L.J.Q.B. 291; 61 L.T. 201; *sub nom. Styles* v. *New York Life Insurance Co.*, 2 Tax Cas. 460.

*(2) *Municipal Mutual Insurance, Ltd.* v. *Hills* (1932), 147 L.T. 62; Digest Supp.; 16 Tax Cas. 430.

APPEAL by the Crown from a decision of the First Division of the Court of Session, reported ([1944] S.C. 421.) The facts are sufficiently set out in the opinion of LORD MACMILLAN.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), *the Lord Advocate* (*Reid Thomson, K.C.*), *Reginald P. Hills* and *Gordon Thomson*, for the appellants.

R. P. Morrison, K.C., and *C. J. D. Shaw* for the respondents.

The House took time to consider its opinion.

LORD THANKERTON: My Lords, this appeal arises out of an assessment to income tax made on the respondent association for the year ended Apr. 5, 1936, on the sum of £13,492, being the estimated surplus arising in that year from the transactions of the association with its members. It is not disputed that the assessment was made on the footing that such surplus constituted profits chargeable to income tax by virtue of the Finance Act, 1933, s. 31, and could not otherwise be justified. On appeal, the Special Commissioners affirmed the assessment, and, on the requisition of the association, stated a case for the opinion of the Court of Session, the question of law being:

> Whether the surplus arising from transactions of insurance of the association with its members is assessable to income tax by virtue of the said sect. 31 (1) of the Finance Act, 1933?

The case was heard by the First Division of the Court of Session, by whose interlocutor, dated July 20, 1944, the appeal was sustained and the question of law submitted for their opinion was answered in the negative. Hence the present appeal by the Crown.

It had been settled in a series of cases in this House, beginning with *New York Life Insurance Co.* v. *Styles* (1) and ending with *Municipal Mutual Insurance, Ltd.* v. *Hills* (2), that the surpluses arising out of transactions of purely mutual insurance between an association and its members, or between an association as insurers and the policy holders as the insured, were not assessable to income tax. The ground of these decisions is well summarised by LORD MACMILLAN in the *Municipal Insurance* case (2) as follows (16 Tax Cas. 430, at p. 448):

> The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words, there must be complete identity between the contributors and the participators. If this requirement is satisfied, the particular form which the association takes is immaterial.

and, earlier on the same page, he stated:

> As the common fund is composed of sums provided by the contributors out of their own moneys, any surplus arising after satisfying claims obviously remains their own money.

It may be added, however, by way of contrast, that such surpluses were held liable to be included in computing profits for the purposes of corporation profits tax, by virtue of the express provisions of the Finance Act, 1920, s. 53 (2) (*h*), the material part of which provides :

> . . . profits shall include in the case of mutual trading concerns the surplus arising from transactions with members . . .

The Crown concedes that the respondent association is a typical mutual insurance society, indemnifying its members in respect of claims by their workmen for injuries arising out of accidents or alleged accidents, and its members being the only contributors and the only participators, and that the surpluses arising on its transactions would not have been assessable to income tax in view of the decisions already referred to, but the Crown maintains that such liability is imposed by the provisions of the Finance Act, 1933, s. 31, the material part of which enacts as follows :

> 31.—(1) In the application to any company or society of any provision or rule relating to profits or gains chargeable under Case I of Sched. D (which relates to trades) . . . any reference to profits or gains shall be deemed to include a reference to a profit or surplus arising from transactions of the company or society with its members which would be included in profits or gains for the purposes of that provision or rule if those transactions were transactions with non-members, and the profit or surplus aforesaid shall be determined for the purposes of that provision or rule on the same principles as those on which profits or gains arising from transactions with non-members would be so determined.
>
> (3) It is hereby declared that in computing, for the purposes of any provision or rule mentioned in sub-sect. (1) of this section, any profits or gains of a company or society which include any income which is chargeable to tax by virtue of the foregoing provisions of this section, there are to be deducted as expenses any sums which : (*a*) represent a discount, rebate, dividend, or bonus granted by the company or society to members or other persons in respect of amounts paid or payable by or to them on account of their transactions with the company or society, being transactions which are taken into account in the said computation ; and (*b*) are calculated by reference to the said amounts or to the magnitude of the said transactions and not by reference to the amount of any share or interest in the capital of the company or society.
>
> (7) In this section the expression "company or society" means any incorporated company or society whether incorporated in the United Kingdom or elsewhere . . .

On behalf of the appellants counsel submitted three points of construction of sub-sect. (1) of the section. He maintained, in the first place, that the word "members"—once used in the sub-section—should not be construed as confined to members of the company or society in the strict sense, but should be held to include contributor-participators in an exclusively mutual transaction of insurance, such as was the case in *Municipal Mutual Insurance, Ltd.* v. *Hills* (2), in which the members of the company were not parties to the mutual insurance, nor entitled to participate in any surplus arising thereon. In the second place, counsel contended that the phrase, "if those transactions were transactions with non-members" did not mean that the two sets of transactions could be treated as identical, but only involved that, though the respondent association had no transactions with non-members, the transactions with their members were not to be treated as mutual transactions, and any surplus arising from them would be taxable profit. In the third place counsel contended that, on a proper construction, the sub-section provides that the surpluses are to be deemed to be profits.

Counsel's first contention appears to me to be completely negatived by the definition of "company or society" in sub-sect. (7), which limits the members referred to in sub-sect. (1) to members of an incorporated company or society, and cannot include contributor-participators in an exclusively mutual insurance scheme, who are not members of the incorporated company or society, who are the insurers. These contributor-participators would, accordingly, be included among the non-members referred to in the sub-section, and this would apparently create havoc in the second contention. In other words, the class of mutual insurance concerns exemplified by the *Municipal Mutual Insurance* case (2) will remain exempt from liability to assessment to income tax, and their transactions would fall to be included among "transactions with non-members," and the companies or societies who are struck at by the sub-section would hardly object to having their transactions treated as if they were transactions of that class of non-members.

It was hardly surprising that counsel stated that, if he was wrong in his first contention as to the meaning of " members," he was not prepared to say that he could succeed in the appeal. Accordingly, I find it unnecessary to deal further with his contentions, and I am of opinion that the appeal fails, and should be dismissed with costs, the judgment of the First Division of the Court of Session being affirmed.

Lord Macmillan: [read by Lord Simonds]: My Lords, the respondent association was assessed to income tax on a sum of £13,492 for the year ended Apr. 5, 1936. This sum represented the surplus arising from the association's transactions of mutual insurance with its members. The question of law for determination is formulated in the case stated by the Special Commissioners as follows:

> Whether the surplus arising from transactions of insurance of the association with its members is assessable to income tax by virtue of sect. 31 (1) of the Finance Act, 1933.

The Special Commissioners answered the question in the affirmative, but their decision was reversed by the First Division of the Court of Session on appeal. The Crown is now in turn the appellant in your Lordships' House.

The association was incorporated in 1898 as a company limited by guarantee. It has no share capital and its transactions are exclusively with its own members. Its purpose is to insure its members on the mutual principle against liability for injuries to their workmen. The constitution of the association is typical of mutual insurance companies and its familiar provisions are fully set out in the opinion of Lord Fleming. In a series of well known cases before the enactment of the Finance Act, 1933, this House held that a mutual insurance company was not liable to be taxed in respect of a surplus arising from the excess of premiums contributed over claims met. The ground of these decisions was that such a surplus was not profit within the meaning of the Income Tax Acts, but merely represented the extent to which the contributions of those participating in the scheme had proved in experience to have been more than was necessary to meet their liabilities. The balance or surplus was the contributors' own money and returnable to them. Nothing had been earned and nobody had made a profit. Sect. 31 (1) of the Act of 1933 was passed after these decisions and no doubt in consequence of them.

Counsel for the appellants with engaging candour submitted that he ought to succeed because, although the sub-section might not in terms fit the case, it was nevertheless manifest that Parliament must have intended to cover it; if it did not cover it, then he could not figure any case which it could cover and Parliament must be presumed to have intended to effect something. I can imagine what he would have said had the case been the converse one of a taxpayer pleading that although the words of the charging enactment covered his case, it was nevertheless manifest that Parliament could not have intended to tax him. With this deprecatory preface counsel endeavoured to attack the decision of the First Division.

The structure of sect. 31 (1) is quite simple. It assumes that a surplus arising from the transactions of an incorporated company with its members is not taxable as profits or gains. To render such a surplus taxable it enacts that the surplus, although in fact arising from transactions of the company with its members, shall be deemed to be something which it is not, namely a surplus arising from transactions of the company with non-members. The hypothesis is that a surplus arising on the transactions of a mutual insurance company with non-members is taxable as profits or gains of the company. But unfortunately for the Inland Revenue the hypothesis is wrong. It is not membership or non-membership which determines immunity from or liability to tax; it is the nature of the transactions. If the transactions are of the nature of mutual insurance, the resultant surplus is not taxable whether the transactions are with members or with non-members.

The argument for the Crown sought to make out that the expression " transactions with non-members " in the sub-section meant transactions not of a mutual character and submitted that a mutual transaction with a non-member was a contradiction in terms. But this is a misconception. There is nothing to prevent a mutual insurance company entering into a contact of mutual insurance with a person who is not a member of the company. The argument will not fit the terms of the sub-section. It is "those transactions," that is, mutual transactions with members, which are to be treated as if they were transactions, that is, mutual transactions, with non-members. But it is unnecessary to elaborate the point, for I find myself in complete agreement with the opinions expressed by the Lord President (Normand) and his brethren, which are as unanswerable as they are admirably lucid.

The legislature has plainly missed fire. Its failure is perhaps less regrettable than it might have been, for the sub-section has not the meritorious object of preventing evasion of taxation, but the less laudable design of subjecting to tax as profit what the law has consistently and emphatically declared not to be profit. I should dismiss the appeal.

Lord Wright: (read by Lord Thankerton) My Lords, I do not feel that I can add anything to the brilliant and incisive judgment of the Lord President (Normand) with which I am in complete agreement. His logic is unanswerable. I can see no escape from the conclusion at which he has arrived. The appeal should, in my opinion be dismissed.

Lord Simonds: My Lords, I am so fully in accord with the view felicitously expressed by the Lord President (Normand) that I should be content to do no more than state my concurrence but for the argument addressed to the House by counsel for the appellants.

The case is an unusual one. The section under discussion, sect. 31 of the Finance Act, 1933, is clearly a remedial section, if that is a proper description of a section intended to bring further subject-matter within the ambit of taxation. It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed.

I need not restate the facts of the present case or the history or judicial decisions which led to the enactment here in question. The vital words for your Lordships' consideration are:

> . . . a profit or surplus arising from transactions of the company or society with its members which would be included in profits or gains for the purpose of that provision or rule [*i.e.*, under Case I of Sched. D] "if those transactions were transactions with non-members."

Counsel for the appellants argued, and there was, I think, some force in his argument, that in the passage I have cited the expression "non-members" means persons who are not contributors to and participators in a mutual insurance scheme and does not mean persons who are in the strict sense not members of a company or society according to its contitution or rules. The badge of membership, he said, for the purpose of this section is contribution and participation in some mutual scheme. I do not think it necessary to decide this question, which may in other connections have far-reaching importance. For, assuming for this purpose that the argument is so far well founded counsel is still faced with a difficulty which appears to me, as it did to the Lord President (Normand) to be insuperable. For the hypothetical profit or surplus with which the section deals is one that is assumed to arise out of "those transactions" with "non-members." What are "those transactions?" They are *ex hypothesi* transactions in which the element of mutuality is an integral essential and inseparable part. How then can the two factors coalesce? On the one hand a transaction in which mutuality is essential, on the other hand a party to that transaction who by the postulated definition of non-member is excluded from any transaction which involves just that element of mutuality. It follows that upon an initial assumption in favour of counsel the section becomes meaningless and the hypothetical profit or surplus indeterminable. The appeal must, in my opinion, be dismissed.

Lord Uthwatt: My Lords, this case was dealt with by the First Division of the Court of Session and argued in this House by the appellants upon the assumption—dictated by the form of the case stated—that the relevant terms of the contracts of insurance between the company and its members were such that, apart from the Finance Act, 1933, s. 31, no taxable profit could thereby arise to the company. Into the validity of this assumption it is not permissible to enter. The assumption implies that in the case of a member all those terms in the articles of association which secure to him rights in respect of surplus contributions—as those articles stand at the date of his contract of insurance—enter into and form part of the contract of insurance. The member therefore as respects surplus contributions can rely not only on his rights as a member of the company under the articles but also on his contractual rights.

Upon the construction of sect. 31 it is, in light of the definition of company or society, beyond dispute that the members there referred to are members of the company or society under consideration. The subsection brings within the compass of profits or gains for purposes of income tax the surplus which would arise if transactions with members were transactions with non-members. The status of membership and all that results from that status are to be ruled out. But there the section stops.

The ruling out of the status of membership and its consequences leaves unaffected the substance of the contract and in that there is inherent the right in respect of surplus contributions. There is therefore—on the assumption made—no sum finding its origin in payments under the contract which can enter into the " profit or surplus " referred to in the section.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Allen & Overy*, agents for *J. & R. A. Robertson, W.S.*, Edinburgh (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

DONCASTER AMALGAMATED COLLIERIES LTD. *v.* BEAN (INSPECTOR OF TAXES)

[House of Lords (Viscount Simon, Lord Thankerton, Lord Wright, Lord Porter and Lord Simonds), January 29, 30, 31, March 22, 1946.]

Income Tax—Deduction against profits—Coal mine—Statutory obligation to remedy damage to district drainage system resulting from subsidence—Contribution to scheme releasing mine owner from statutory obligation—Contribution payable by instalments—Whether capital or revenue expense.

The Doncaster Area Drainage Act, 1929, s. 9 (1), imposed on mineowners, working or proposing to work minerals under lands within the Doncaster district, certain obligations to obviate or remedy any decrease in the efficient working of the drainage system in that district. The appellant company was a mine owning company, in that district, which, in respect of the working of a rich seam of coal, had carried its extraction forward to a point at which faces could no longer be pushed further forward without the risk of subsidence, which would destroy the efficiency of the surface drainage system, unless the appellant company discharged its statutory duty of obviating this result at its own expense. The discharge of this duty did not necessarily involve only revenue expenditure; it might easily have entailed very heavy capital expenditure. The appellant company investigated the possibility of carrying forward their workings by first executing works to avoid subsidence of the surface. The cost was roughly estimated at £68,000 but the scheme was never developed in detail, because the drainage board devised a comprehensive scheme of extensive drainage work which would benefit both parties. An agreement was entered into whereby the appellant company undertook to contribute a certain proportion, not to exceed £39,000, towards the capital cost of the scheme, together with a proportion of the cost of the loan charges. This payment with interest was spread over a number of years. The Commissioners for the General Purposes of the Income Tax Acts held that two payments for the years 1940-41 and 1941-42 were made by the appellant company as indivisible sums under their agreement with the drainage board in order to fulfil their obligations under the Doncaster Area Drainage Act, 1929, and were a permissible deduction. It was contended on behalf of the appellant company, *inter alia*, that, on a proper construction of sect. 9 (1) of the 1929 Act, any expenditure incurred in fulfilment of the obligations thereby imposed on the appellant company must necessarily be expenditure chargeable against revenue and not capital expenditure :—

HELD : (i) it was not strictly accurate to say that the payments were made " in order to fulfil " the appellant company's obligations ; the payments were made because, if the drainage board carried out its own scheme, the appellant company would be able to win coal without incurring the burden which would otherwise fall upon it under the Act of 1929; the obligations remained, but the occasion for fulfilling them was largely avoided.

(ii) the expenditure by the appellant company, under sect. 9 (1) of the Act of 1929, would not necessarily be of the nature of revenue expenditure and the actual outlay which obviated such expenditure could not, therefore, be held to be substituted for revenue expenditure.

(iii) the Act of 1929 should not be construed in such a way as to exclude inquiry as to the nature of the expenditure in a particular case ; it followed that the Commissioners' decision was based on an error in law.

(iv) the natural course, if circumstances admitted of it, would be to send the case back for the Commissioners to find what was the nature of the expenditure contemplated, and that would be a question of fact ; but reference back could not be effective, for inquiry as to the details of an unexecuted scheme which was never worked out was bound to be abortive ; it followed that the appellant company had failed to prove that the deductions claimed were justified and the appeal must be dismissed.

(v) the same conclusion might be reached if the payments made were not regarded as substituted for the discharge of obligations under the Act of 1929, but rather as sums paid to secure " an enduring advantage," and the outlay could rightly be classified as capital also on that ground.

Decision of the Court of Appeal ([1944] 2 All E.R. 279) *affirmed.*

[**EDITORIAL NOTE**. The onus is on the taxpayer to show that a payment is a revenue expenditure suitable for deduction in arriving at profits assessable under Sched. D, Case I. The expenditure under the Drainage Act considered in this case did not necessarily involve a revenue expenditure ; it might have involved much heavy capital expenditure. As it is impossible to apportion the payments between capital and revenue, no deduction is justifiable. Alternatively it is held that the payments were sums paid to secure an "enduring advantage" within LORD CAVE's dictum in *Atherton's* case (3) and are disallowable on that ground.

AS TO EXPENSES OF MINES, see HALSBURY, Hailsham Edn., Vol. 17, p. 141, paras. 290, 291 ; and FOR CASES, see DIGEST, Vol. 28, pp. 42-56, Nos. 215-283.]

Cases referred to :

(1) *Boyce* v. *Whitwick Colliery Co., Ltd., Coalville Urban District Council* v. *Boyce* (1934), 151 L.T. 464 ; Digest Supp. ; 18 Tax Cas. 655.

(2) *Anglo-Persian Oil Co., Ltd.* v. *Dale*, [1932] 1 K.B. 124 ; Digest Supp. ; 100 L.J.K.B. 504 ; 145 L.T. 529.

(3) *British Insulated & Helsby Cables* v. *Atherton*, [1926] A.C. 205 ; 28 Digest 52, *264* ; 95 L.J.K.B. 336 ; 134 L.T. 289.

APPEAL by the taxpayer from a decision of the Court of Appeal (SCOTT and DU PARCQ. L.JJ., and UTHWATT, J.), given on July 26, 1944, and reported [1944] 2 All E.R. 279. The facts are fully set out in the opinion of VISCOUNT SIMON.

Sir Cyril Radcliffe, K.C., and *J. H. Stamp* for the appellants.

Sir Patrick Hastings, K.C., and *Reginald P. Hills* for the respondent.

VISCOUNT SIMON : My Lords, this appeal arises from a case stated for the opinion of the High Court by the Commissioners for the General Purposes of Income Tax for the Division of Doncaster Borough. The Commissioners decided, subject to the case stated, that the present appellant was entitled to deduct two sums of £1,666 13*s*. 2*d*., and £2,176 10*s*. in arriving at its profits for purposes of assessment to income tax under Case I of Sched. D for the years 1940-41 and 1941-42 respectively. These sums were paid by the appellant to the Dun Drainage Commissioners (hereinafter called " the drainage board ") pursuant to an agreement dated Sept. 28, 1939, made between them relating to certain drainage work to be carried out by the board.

In the High Court Macnaghten, J., dismissed the Crown's appeal, holding that the deductions were justified, but the Court of Appeal (Scott and du Parcq, L.JJ., and Uthwatt, J.) reversed this decision.

The circumstances out of which the controversy has arisen are as follows. By the Doncaster Area Drainage Act, 1929, s. 9 (1), it is provided that :

> . . . it shall be the duty of every mine owner working or proposing to work minerals under the lands situate within the Doncaster district . . . to construct and maintain in proper condition such works and do such things as may, by reason of any subsidence which results or may result from the working of the minerals, be requisite in order to obviate or remedy, so far as having regard to all the circumstances of the case is reasonably necessary, any loss of efficiency which has arisen or may arise in the drainage system and drainage works of the Doncaster district.

The appellant, in respect of the working of a seam of coal known as the Parkgate seam, had carried its extraction forward to faces which were within 400 to 600 yards short of a position vertically under an important watercourse on the surface known as the Mill Brook, which there ran close to and roughly parallel with the London and North Western Railway main line. There remained unworked in this seam some 5,000,000 tons of coal, which would take six or seven years to extract, but the faces could not be pushed further forward without risk of subsidence, which would destroy the efficiency of the surface drainage system unless the appellant discharged its statutory duty of obviating this result at its own expense. It is particularly to be noticed, as Scott, L.J., observed ([1944] 2 All E.R. 279, at p. 281), that the discharge of this duty does not necessarily involve only revenue expenditure : it might easily entail very heavy capital expenditure, not only in raising the banks of many miles of watercourses, the floor of which would be lowered by subsidence, or in constructing new raised channels, but also in erecting expensive pumping stations or the like. In 1937 the appellant investigated the possibility of carrying forward their workings in the Parkgate seam under the Mill dyke and the railway by first executing works to obviate subsidence of the surface such as were called for in sect. 9, but for reasons now to be stated the scheme was never developed in detail. The cost was roughly estimated at £68,000. Barker Walker & Co., Ltd., who owned the neighbouring Bentley colliery, was also preparing a scheme to discharge their corresponding liabilities.

The areas in question were part of a much larger area for the surface drainage of which the drainage board had a responsibility. The drainage board had been created a statutory body in 1873, and on the passing of the Land Drainage Act, 1930, became also an internal drainage board for the purposes of that Act within the area of the River Ouse Catchment Board.

The drainage board now devised a comprehensive scheme of extensive drainage work, including five pumping stations, covering a wider area than that with which the appellant and Barker Walker & Co. were concerned, but including that area, inasmuch as the scheme, by diverting upland water, would get rid of the necessity of preserving the use of the Mill dyke to carry the water thus diverted. The execution of such a scheme would benefit all three parties, and accordingly the appellant and the drainage board entered into an agreement dated Sept. 28, 1939, by which, in consideration of the board's undertaking to execute and maintain the scheduled works, the appellant was to contribute one-third of the capital cost of the scheme, the contribution not in any case to exceed £39,000, together with a proportion of the cost of the loan charges. This payment, with interest, was spread over thirty years and the two sums now dealt with in the case stated represent two instalments of it. A corresponding agreement was presumably made between the drainage board and Barker Walker & Co.

Before the Commissioners, the present appellant raised no point as to so much of the instalments as represented interest, since if this was not allowed to be deducted as revenue expenditure it was in the nature of an annual payment from which tax could be deducted when payment was made.

The Commissioners' decision was phrased as follows :

> We are of opinion that the payments of £1,666 13*s.* 2*d.* for the year 1940-41 and £2,176 10*s.* for the year 1941-42 were made as indivisible sums under their agreements with the Dun Drainage Commissioners in order to fulfil their obligations under the Doncaster Area Drainage Act, 1929, and are a permissible deduction.

It is from this decision that the Crown appealed as being erroneous in point of law.

The language of the decision calls for some exegesis. It is agreed by the appellant's counsel that the last phrase should be understood to mean "and are *therefore* a permissible deduction." Moreover, it is not strictly accurate to say that the payments were made "in order to fulfil" the appellant's obligations. The payments were made because, if the drainage board carried out its own scheme, the appellant would be able to win coal without incurring the burden which would otherwise fall upon it under the Act of 1929. The obligations remained, but the occasion for fulfilling them was largely avoided.

But apart from these refinements, there is, as it seems to me, a simpler consideration which shows that the appeal must fail. No doubt the contribution made by the appellant is not necessarily to be treated as its capital outlay merely because it counts as capital, or is spent to produce capital, in the hands of its recipient the drainage board. No doubt, too, a lump sum payment may retain the quality of a revenue expenditure when it represents the commutation of a series of annual revenue payments, just as the discharge of a capital debt by annual instalments does not change its nature : *Boyce* v. *Whitewick Colliery Co. Ltd.* (1), (18 Tax Cas. 655, *per* Romer, L.J., at p. 686.) Here, however, expenditure by the appellant under sect. 9 (1) of the Act of 1929 would not necessarily be of the nature of revenue expenditure, as Scott, L.J., pointed out, ([1944] 2 All E.R. 279, at p. 281) and the actual outlay which obviated such expenditure cannot therefore be held to be substituted for revenue expenditure. Rowlatt, J., in *Anglo-Persian Oil Co. Ltd.* v. *Dale* (2) (16 Tax Cas. 253 at p. 260) observed that when it is contended that a single payment may be charged against revenue on the ground that it obviates a series of annual expenses, the question still remains whether the annual expense which it supplants was itself chargeable against revenue. I do not think the Act of 1929 should be construed in such a way as to exclude inquiry as to the nature of the expenditure in a particular case, and it follows that the Commissioners' decision is based on an error in law. The natural course, if circumstances admitted of it, would be to send the case back for the Commissioners to find what was the nature of the expenditure contemplated, and this would be a question of fact : but, as counsel for the appellant admits, this reference back could not be effective, for inquiry as to the details of an unexecuted scheme which was never worked out is bound to be abortive. It follows that the appellant has failed to prove that the deductions claimed are justified.

The same conclusion may be reached if the payments made are not regarded as substituted for the discharge of obligations under the Act of 1929, but rather as sums paid to secure "an enduring advantage" within the proper application of Lord Cave's phrase in *Atherton's* case (3). Uthwatt, J., said in the Court of Appeal ([1944] 2 All E.R. 279 at p. 285) :

> . . . the result of the transaction clearly was that the value of the particular coal measures—a capital asset remaining unchanged in character—was increased both for use and exchange. There was, therefore, as the result of the transaction, brought into existence, not indeed an asset, but "an advantage for the enduring benefit of the trade of the company."

I agree, and would consider it right to classify this outlay as capital expenditure on this ground also. The borderline between revenue and capital expenditure is sometimes difficult to draw, and there may be cases in which the conclusion is properly reached by the Commissioners as a question of fact which will not be disturbed. But where, as here, the Commissioners find facts which in law must lead to the conclusion that the item falls into one class and not into the other, or reach their result by misconstruing the language of a statute, the error can be corrected on appeal.

I move that the appeal be dismissed with costs.

Lord Thankerton : My Lords, Lord Simon has stated the material facts and statutory provisions, and I need not recapitulate them. At the close of his argument on behalf of the appellant company, counsel admitted that if he failed in his leading argument the appeal must be dismissed. The leading argument submitted by the appellant was that, on a proper construction of sect. 9 of the Doncaster Area Drainage Act, 1929 (Part II), and, in particular of sub-sect. (1) of that section, any expenditure incurred in fulfilment of the obligations thereby imposed on the appellant must necessarily be expenditure chargeable against revenue, and not capital expenditure. The appellant agreed that this was the meaning of the decision of the Commissioners in para. 18 of the case stated. My Lords, I am unable to find any words in sect. 9 of the Act of 1929 which suggest any limitation to revenue expenditure; on the other hand, it appears to me that it might very well be found that it was necessary or expedient to construct works involving expenditure of a capital nature. That is sufficient reason for rejection of the appellant's leading argument. It follows that the decision of the Commissioners was erroneous in point of law, and, in ordinary course, the case would have to be remitted to the Commissioners in order that the expenditure in question might be disintegrated into separate amounts of revenue and capital expenditure, but counsel has stated that such a remit would be abortive, as the sums paid to the Dun Drainage Commissioners under the agreement of Sept. 28, 1939, were not capable of such disintegration, and he further agreed that the necessary consequence was a failure on the appellant's part to establish that the payments in question formed a proper deduction in computing the company's profits.

In these circumstances, the appeal fails and should be dismissed, and the order of the Court of Appeal should be affirmed.

LORD WRIGHT [read by LORD SIMONDS]: My Lords, I have had an opportunity of studying in print the opinion of LORD SIMON and have nothing to add. I think the appeal fails and should be dismissed.

LORD PORTER: My Lords, I concur.

LORD SIMONDS: I also concur.

Appeal dismissed.

Solicitors: *Bird & Bird*, agents for *C. M. H. Glover*, Doncaster (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILLIAM A. JAY AND SONS *v.* J. S. VEEVERS, LTD.

[MANCHESTER WINTER ASSIZES (Lynskey, J.), March 8, 14, 1946.]

Negligence—Contributory negligence—Apportionment of liability—Assessment of damages—Costs—Law Reform (Contributory Negligence) Act, 1945 (*c.* 28), *s.* 1.

In an action and counterclaim for damages for negligence arising out of a collision between two motor lorries, it was found on the facts that the drivers of both vehicles were guilty of negligence, that the negligence of each contributed to the accident and was contemporaneous, but that the driver of the plaintiffs' lorry had the greater share of blame in that he had created the emergency. Under the Law Reform (Contributory Negligence) Act, 1945, both parties were entitled to succeed on their claim for damages notwithstanding their contributory negligence:—

HELD: (i) following the principle established in the Admiralty Division as to assessment of damages, on the facts of the case liability should be apportioned as to two-thirds on the plaintiffs and as to one-third on the defendants, with the result that the plaintiffs were entitled to recover one-third and the defendants two-thirds of the respective sums claimed by them.

(ii) in order to avoid double taxation, the plaintiffs were to have no costs, and the defendants were to have one quarter of the costs of the claim and counterclaim and the taxation costs.

[**EDITORIAL NOTE.** The Contributory Negligence Act, 1945, introduced into common law actions the principle of apportionment of liability in case of contributory negligence. This has always been the rule in Admiralty practice, and the judge consequently assesses the damages, so far as possible, as they would have been assessed in Admiralty proceedings. On the question of costs, the Court of Appeal in *Cinema Press, Ltd.* v. *Pictures and Pleasures, Ltd.*, [1945] 1 All E.R. 440, expressed a very strong view against double taxation, and the order as to costs in the case reported is designed to avoid the necessity for this.

As to Contributory Negligence, see HALSBURY, Hailsham Edn., Vol. 23, pp. 679-684, paras. 963-967, and Supplement; and for Cases, see DIGEST, Vol. 36, pp. 109-118, Nos. 726-790, and Supplement.]

Action and counterclaim for damages for negligence. The facts are fully set out in the judgment.

F. E. Pritchard, K.C., and *R. Gordon Clover* for the plaintiffs.

A. D. Gerrard, K.C., and *T. M. Backhouse* for the defendants.

A Lynskey, J.: In this case William A. Jay & Sons are claiming damages from Veevers, Ltd., for damages to their Morris light motor lorry, and the defendants are counterclaiming against the plaintiffs for damage to their Dennis motor lorry.

The claim and counterclaim arise out of a collision which took place a few minutes after nine on Aug. 24, 1945. On that occasion the plaintiffs' lorry B was coming along Stott Lane intending to turn into the Eccles Old Road and proceed in the direction of Manchester. The defendants' lorry was coming down the road from Manchester to Eccles along the Eccles Old Road, and just near the junction, or at the junction, of the two roads these two vehicles came into collision, and the defendants' lorry, after the collision, went on and mounted the footpath and ran into a low stone wall, doing some little damage C to the low stone wall.

As is usual in this type of case, I have two quite contradictory stories. The plaintiffs' driver says he came up Stott Lane towards the junction. He was not doing more than 10 miles an hour. He got to the junction and stopped, and having stopped, he looked to his left and saw nothing coming from Eccles, and looked right and says he saw the defendants' motor lorry something between 150 and 200 yards away down the Manchester Road. Having stopped and seen D that, he restarted his lorry, proceeded to cross the road and then, just getting on the second set of tramlines, he says he saw the defendants' motor lorry, out of control, skidding along the road, so he stopped with his vehicle practically across the two lots of tramlines. Defendants' lorry came on, struck his vehicle and knocked him round two or three yards, and then went into the wall. His story about stopping at the entrance of the other road, and of his second stopping is uncorroborated by any witness. On the other hand, Austerberry, E who was unconnected with either party, was standing at Lancaster Road, and he says from there he saw the plaintiffs' lorry coming up Stott Lane at a not unreasonable speed—he put it at 10 miles per hour. After seeing it approach the corner—it had not reached the corner—he turned round, having heard another motor lorry, which was the defendants' motor lorry, coming from the Manchester direction, and, at the time he could see the plaintiffs' motor lorry, the defendants' lorry was still some 20 yards away from Lancaster F Road. He says as soon as he saw the speed of the vehicle coming from Manchester, which he puts at 30 to 35 miles an hour, and saw the other vehicle coming out, he thought a collision was inevitable.

On the other hand, the driver of the defendants' motor lorry says he was proceeding along what is, admittedly, the major road. His speed was 28 to 30 miles per hour, and as he was approaching the junction, looking through G some trees, he saw the plaintiffs' lorry, on the correct side of the road, some 20 yards down the road. Being on the major road, he anticipated that the plaintiffs' lorry would stop at the corner or, at any rate, slow down sufficiently to give him the right of way. He proceeded on his way, and as he neared the corner he realised, when about 30 yards away, that the plaintiff would not stop. He thereupon applied his brakes and pulled to the other side of the road, but the plaintiffs' lorry came on and the impact took place, possibly on the nearside of H the tramlines. The result was his lorry bounced, according to him, against the kerb, and bounced again against the stone wall.

Austerberry's evidence at first sight, makes it difficult to think that the defendants' driver was so near to this turning as to be able to avoid the accident had he been keeping a proper look-out. On the other hand, I am satisfied, having taken Austerberry's evidence into account, that the plaintiffs' lorry coming out of the minor to the major road, if it had seen the other lorry, ought not to have tried to cross the main road as it did, and at the time it did. I am, therefore, of the opinion, that the driver of the plaintiffs' lorry was guilty of negligence in coming out at the time he did. I think the plaintiffs' lorry created the emergency here, but equally, I think the defendants' driver was not keeping as good a look-out as he ought to have done. I think probably he did see the lorry through the trees some distance away and anticipated it would stop, and for the time being lost interest in it. He saw, too late, that it was coming out, and therefore he put on his brakes, and swerved to the right in a last endeavour to avoid the accident.

In my view, both drivers were guilty of negligence and the negligence of each contributed to the accident. So far as last opportunity was concerned, they each put themselves into a position where they had not a last opportunity, because their negligence was contemporaneous and it was too late for either to avoid the accident. The plaintiffs' lorry, being angled across the road, obstructing the greater part of the roadway, could not do anything to avoid the accident. The result is that I find the drivers of both vehicles are to blame. When this accident happened on Aug. 24, 1945, the Law Reform (Contributory Negligence) Act, 1945, had come into force, so that the law which applied before this Act was passed (*i.e.*, that parties guilty of negligence had no claim) disappeared, and the result is that I am finding both parties entitled to succeed. The plaintiff is entitled to succeed on his claim to damages, notwithstanding his contributory negligence, and the defendant is entitled to succeed on his counterclaim notwithstanding his negligence.

First, under the Act, I have to assess what sum I would have awarded if each had succeeded in their claim without contributory negligence being proved. In this case I am saved that trouble. In the case of the claim, the amount of damages is agreed at £297 10*s.* ,for the plaintiff, and in the case of the counterclaim the sum, also by agreement, is £434 15*s.* 4*d.* Those are the sums for which I would have given judgment if there had been no contributory negligence on the part of the plaintiff and the defendant. I have now to consider what proportion I have to give. I have already indicated that I think the plaintiffs' driver ought to have the greatest share of blame. He was coming out of a side road, he ought to have exercised care and ought not to have come out into the main road. On the other hand, if the defendants' driver had been keeping a proper look-out he might have taken steps in time to avoid the accident. I can only go upon such knowledge as I may have as to what is done in the Admiralty Division in these cases, and I assess the blame as follows, that the plaintiffs' driver was two-thirds to blame and the defendants' driver was one-third to blame. That means that, so far as damages are concerned, the plaintiff will only be entitled to recover one-third of the sum of £297 10*s.* against the defendants, and the defendants will be entitled to recover two-thirds of £434 15*s.* 4*d.* from the plaintiffs. There will be judgment for the plaintiffs for £99 3*s.* 4*d.* against the defendants, and for the defendants against the plaintiffs for £289 16*s.* 9*d.*

Pritchard, K.C.: With regard to the question of costs, I know this is a matter entirely in your Lordship's discretion, but, in the exercise of that discretion, I submit your Lordship must consider this question: What is, nowadays, a successful plaintiff? Before the 1945 Act, a plaintiff could succeed by proving the whole of his allegations on negligence, or part of his allegations on damage. Either of those, if coupled together, would give him the verdict and make him a successful plaintiff. In these circumstances, his allegations as to damage could be defeated so far as costs were concerned, by payment into court, after which he went on at his own peril. Since the 1945 Act, in my submission, his allegations about damage can be defeated by the admission of some negligence on the part of the defence; but there was no admission in this case, so the plaintiff is still in the same position as before the 1945 Act. It might well be that the defendants might have said, in the same way, "We are liable here for one-third negligence," but there was a complete denial of negligence and, therefore, the plaintiff went on to try and prove whole negligence, and failed, but succeeded in one-third. The same principles should be applied as in the case of damage. The plaintiff has succeeded on both issues and, in those circumstances, he is entitled, subject to considerations which must arise on the counterclaim, to the costs of the action, because he has succeeded as a successful plaintiff.

This is an interesting point which arises in view of the recent legislation. I suppose it is right to say that, if the plaintiff gets the costs of the action and the defendants get the costs of the counterclaim, the net result, in money, would be favourable to the plaintiff rather more than to the defendant, and I suppose that that is a matter that has to be faced in the general circumstances here. Perhaps it is a little unfair to divide the action into claim and counterclaim very specifically and not to arrive at the general result which, in my submission, your Lordship has to arrive at. I ask your Lordship to remember that, in the sense I have indicated, the plaintiff is a successful plaintiff.

LYNSKEY, J. : That raises a very interesting point. In ordinary actions there is a set-off as to damages, and judgment is entered for the balance. If that applied to this case you would be an unsuccessful plaintiff.

Pritchard, K.C. : But it does not arise in this case.

LYNSKEY, J. : But have not I to consider, on balance, in this case the money payable by the plaintiff ?

Pritchard, K.C. : Yes, my Lord, I think you have.

LYNSKEY, J. : Does not everything you say about the plaintiff apply equally to the defendant ?

Pritchard, K.C. : Yes, my Lord, except that I am plaintiff.

LYNSKEY, J. : Except that you got in first—that is really the position.

Pritchard, K.C. : Yes, my Lord, there is some advantage in getting in first, and, it may be, in future it will be more so. I submit some order should be made which would, at any rate, leave the plaintiff in the position of having won something.

LYNSKEY, J. : There has been a recent decision in the Court of Appeal [*Cinema Press, Ltd.* v. *Pictures and Pleasures, Ltd.*, [1944] 1 All E.R. 440] an appeal from me in chambers. There the Court of Appeal said, very strongly, that it was undesirable to have double taxation ; that, as far as possible, the court, in exercising discretion as to costs where there was success by both parties, should not have a double taxation, but should order what the court thought was a probable result in money on the set-off of costs, in the form of giving one party an order for taxation on a proportional basis.

Pritchard, K.C. : Yes, my Lord. If your Lordship thinks the proper thing to do is to order both sides to have their costs taxed and then order the other side . . .

LYNSKEY, J. : No, that is what the court has to avoid. It was pointed out by GODDARD, L.J. [in *Cinema Press, Ltd.* v. *Pictures and Pleasures, Ltd.*] that it was an almost impossible task for the taxing master to separate items upon a double taxation. That was the real reason for it, and in order to avoid it, the Court of Appeal's decision was to order one taxation and give one party so much of the costs. I must exercise my discretion subject to the decision of the Court of Appeal.

Pritchard, K.C. : Naturally, my Lord. Even then I ask your Lordship to exercise your discretion so that the result to the plaintiff may not disguise his proper guise, which, in my submission, is that he has won his action to some extent.

Gerrard, K.C. : Your Lordship has taken, if I may put it that way, two points with my friend ; that payment into court applies equally to claim and counterclaim, and also that there is jurisdiction under the Rules of the Supreme Court, even in a case like this, to cover a set-off judgment. All I have to say about the matter is this. I understood that your Lordship's mind was working in this direction, if I may seek to interpret it : if your Lordship awarded costs to each party proportionate to the amount they had recovered, that would mean there would be double taxation and difficulties about apportionment. Your Lordship's object in awarding no costs to the plaintiff and one-third costs of the counterclaim to the defendant was to apply to the issues the Court of Appeal decision in *Cinema Press, Ltd.* v. *Pictures and Pleasures, Ltd.*, so that there would be a clean taxation and no difficulties about apportionments or anything of that kind. That principle I accept unreservedly.

Lynskey, J.: If I only gave costs on the counterclaim there would be the same difficulty in counterclaim taxation as there would be on the double taxation, so, subject to anything you and Mr. Pritchard may say, my mind was rather working on the view of giving you a quarter of the costs.

In this case, there will be judgment for the amounts indicated, with no costs for the plaintiff, but the defendants shall have one quarter of the costs of the claim and counterclaim and the taxation costs.

Judgment for the plaintiffs on the claim for one-third of the sum claimed. Judgment for the defendants on the counterclaim for two-thirds of the sum claimed. No costs for the plaintiffs; one quarter of the costs of the claim and counterclaim and the taxation costs for the defendants.

Solicitors: *H. J. Widdows & Son*, Leigh, Lancs. (for the plaintiffs); *A. W. Mawer & Co.*, Liverpool (for the defendants).

[*Reported by* M. D. Chorlton, *Barrister-at-Law.*]

ARTHUR REGINALD WILKIE *v.* LONDON PASSENGER TRANSPORT BOARD.

[King's Bench Division (Lord Goddard, L.C.J.), March 21, 26, 1946.]

Negligence—Employee of London Passenger Transport Board injured while mounting omnibus—Negligence of conductress—Employee using free pass—Pass issued subject to condition exempting Board from liability for injury however caused—Whether employee using pass at time of accident—Pass issued as a privilege—Pass-holder a licensee and not carried under a contract —Road Traffic Act, 1930 (*c.* 43), *s.* 97.

The London Passenger Transport Board give their employees a free pass for use on their railways or omnibuses. The passes are given as a privilege and not as a right, the employees being free to accept or refuse them. One of the conditions on which a pass is given was that neither the Board nor their servants were to be liable to the holder for injury however caused except in the case of an employee of the Board whilst using the pass in the course of his employment and on business of the Board. While on a holiday, W., an employee of the Board, was in the act of entering one of the Board's omnibuses at a recognised stopping place, with the intention of using his pass. Owing to the negligence of the conductress, the omnibus started before W. was fully on the footboard, with the result that he was thrown from the omnibus and sustained injuries. In an action against the Board for damages for negligence, it was contended by W. (i) that, as he had not got fully on the omnibus and had, therefore, not become legally liable to pay a fare, he was not using the pass when the accident happened and was, therefore, not bound by the condition; (ii) that the condition was void by reason of the Road Traffic Act, 1930, s. 97:—

Held: (i) since W. had begun to use the omnibus for the purpose of transport by virtue of his pass, which he had accepted of his own free will, he was bound by the conditions on the pass. The fact that W. was not fully on the omnibus when he met with the accident was immaterial. The omnibus being at a recognised stopping place, there was an invitation to W. to board it, and he was doing so, not as a fare-paying passenger, but as the holder of a pass.

(ii) the Road Traffic Act, 1930, s. 97, did not apply because the pass was issued as a privilege or licence, not as part of the contract of employment, and there was, therefore, no "contract for the conveyance of a passenger in a public service vehicle."

[**EDITORIAL NOTE.** It was held in *Brien* v. *Bennett* ((1839) 8 C. & P. 724) that the stopping of an omnibus in response to a signal from an intending passenger implies a consent to take as passenger. In the circumstances reported, therefore, the plaintiff had been accepted as a passenger and, since he intended to travel free, he was "using" his pass in the sense in which an ordinary passenger is "using" the money in his pocket with which he intends to pay his fare on request. The conditions of the pass were thereby brought into operation and the claim fails.

AS TO DUTY TO LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 609-612, paras. 859-863 ; and FOR CASES, see DIGEST, Vol. 36, pp. 45-49, Nos. 282-306.

FOR THE ROAD TRAFFIC ACT, 1930, s. 97, see HALSBURY'S STATUTES, Vol. 23, p. 674.]

Case referred to :

(1) *Rutter* v. *Palmer*, [1922] 2 K.B. 87 ; Digest Supp. ; 91 L.J.K.B. 657 ; 127 L.T. 419.

A ACTION for damages for negligence. The facts are fully stated in the judgment.

N. R. Fox-Andrews, K.C., and *S. R. Edgedale* for the plaintiff.

F. W. Beney, K.C., and *R. T. Monier-Williams* for the defendants.

Cur. adv. vult.

LORD GODDARD, L.C.J. : The plaintiff in this action is a solicitor's managing clerk, and in May, 1941, as work in the office at which he was employed had become somewhat slack owing to war conditions, he was thinking of getting employment B elsewhere. Meeting one Jones, with whom he was acquainted and who was one of the solicitors employed in the legal department of the defendants, he discussed with him taking an appointment in that department. Jones told him the salary he might expect if he was appointed and also told him that he would receive a free pass either on the defendants' railways or omnibuses, as he chose, suggesting that the latter would probably be the more advantageous C to him, and telling him that a pass would be worth some 5*s.* per week to him. Jones promised to recommend him for appointment, and in due course he was appointed. The terms of his employment are in writing, contained in an appointment form which he signed. He was appointed a special class law clerk at £380 per annum (plus £18 war increase) payable every four weeks, and subject to one month's notice. There is no mention in the agreement of any free pass, but he was given one, as, I understand, are other employees of the Board.

D The pass contains certain printed conditions, and it was not, and, indeed, could not be, suggested that the plaintiff was not bound by them so far as concerned the use of the pass. The two material conditions are 2 and 6. No 2 reads :

> It [*i.e.*, the pass] is the property of the Board and may be cancelled, suspended or withdrawn at any time the Board may think fit.

E No 6 which, for the purposes of this case, is the more important, reads :

> It is issued on condition that neither the Board not their servants are to be liable to the holder or his or her representative for loss of life, injury or delay or for any loss of or damage to property however caused. Provided that this condition shall not apply in the case of an employee of the Board whilst using this pass in the course of his or her employment and for the purposes of the business of the Board.

F On July 31, 1944, the plaintiff was actually on vacation, and, being minded to visit the office where he had formerly been employed, he went to board an omnibus at a stopping place in Victoria Street. He came up to the stop when the omnibus had already reached it and when others who had formed a queue were getting on, he being the last person in order. When he had hold of the rail and had put one foot on the board the conductress, who was on the top deck, with that lack of care with which everyone in recent times is unhappily G only too familiar, started the omnibus by ringing the bell without seeing that it was safe so to do. The plaintiff who is a big, heavy man, was unable to get fully on to the footboard, and, as the omnibus swerved out, he was thrown into the roadway and injured, fortunately not seriously, but badly enough still to cause him a good deal of pain. These facts were uncontested, and I have no hesitation in finding that the Board's servant was negligent. The plaintiff, with commendable frankness, told me that he had his pass with him H and intended using it, and, as I have already said, he was not on the defendants' business at the time. Accordingly they rely on condition 6 as exempting them from liability.

It was not contended that the condition did not apply if the damage was caused by negligence, and, as the Board could only be liable if negligence were proved, the condition does apply to exempt the Board from its consequences ; otherwise it would be meaningless. If authority is necessary, I need only refer to *Rutter* v. *Palmer* (1), and the cases therein cited. The plaintiff, however, contended that, in the circumstances I have detailed, this condition does not apply, the contention being, as I understand it, that, as he had not fully got on to the omnibus and had, therefore, as it was put, not become legally liable to pay a fare, he was not using the pass when the accident happened, and was therefore not bound by the condition.

It is clear that some limitation must be put on the wide words of condition 6. They would not apply, *e.g.*, where an employee to whom a pass had been granted was run over in the street by one of the Boards' vehicles when he was walking as an ordinary foot passenger, nor would they apply if an omnibus was so negligently driven that it ran into and injured the house of an employee or a motor-car that he happened to be using. The condition obviously only applies where the pass is being used for the purpose for which it was issued, to enable an employee to ride in one of the Board's vehicles for the purposes of transport. In the present case the plaintiff was intending to use, and, in my opinion, had begun to use, the omnibus for this purpose, and to use it by virtue of his pass. He was in the act of entering the omnibus to be carried in it. If he had got both feet on to the board, though he had not got inside or on to the steps leading to the upper deck, it could not, in my opinion, be said that the condition did not apply. I do not see, therefore, why it does not apply where the act of negligence occurs while the passenger is in the process of boarding. As the omnibus was at a recognised stopping place, there was an invitation to the plaintiff to board the omnibus. He accepted the invitation by starting to board it, and was doing so, not as a fare-paying passenger, but as the holder of a pass. The breach of duty on the part of the defendants was in disregarding the safety of one whom they had invited to enter their vehicle while he was entering. These conditions are contained in passes which are given as a privilege and not as a right, and which the holders are free to accept or refuse as they choose and which are in no way imposed on them. The employees, if they like, can travel as ordinary fare-paying passengers. If they accept free travel there is no reason to introduce subtle refinements for the purpose of nullifying the conditions on which the privilege is granted and to hold that, while the recipient is bound if he has got into a certain position in the omnibus, he is not if he has only got partly into it. As a matter of common sense it seems to me that the plaintiff was using his pass when this accident happened, and I must hold that the condition applies.

Counsel for the plaintiff, however, took a further point, namely that, by the Road Traffic Act, 1930, s. 97, the condition is rendered void. That depends upon whether there was here a contract for the conveyance of a passenger in a public service vehicle. The short answer to this point is that the pass was issued, in my opinion, as a mere privilege or licence. It was no part of the contract of employment that a pass should be issued. To save any question arising hereafter which might necessitate a new trial, I admitted evidence as to what Jones had said to the plaintiff about a pass, although his contract was in writing and it seemed to me that that evidence was not strictly admissible. At the highest, what was said was no more than that the plaintiff would obtain a privilege and thereby be saved some expense for daily journeys. Pass-holders are not, in my opinion, carried under a contract, but as licensees.

I must give judgment for the defendants, with costs. Had I found for the plaintiff I should have awarded him £200 in addition to the agreed special damage.

Judgment for the defendants with costs.

Solicitors: *William Charles Crocker* (for the plaintiff); *A. H. Grainger* (for the defendants).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

HENSON *v.* LONDON & NORTH EASTERN RY. CO. AND COOTE & WARREN LTD. (THIRD PARTY).

[COURT OF APPEAL (Scott, Tucker and Cohen, L.JJ.), January 30, 31, February 13, 1946.]

Railways and Canals—Repair of privately owned wagons on railway company's property—Walking pass to repairing company's employees to enter on railway company's property—Condition incorporated on pass relieving railway company of responsibility for injury by accident—No evidence of actual knowledge of condition—Reasonable notice of condition—Onus of proof.

Guarantee—Indemnity—Railway company granting privilege to employees of wagon repairing company to enter on railway company's property—Repairing company undertaking to indemnify railway company against damages, etc., for injury to repairing company's employees—Requisition of railways and wagons by Government during war—Whether indemnity undertaking still effective.

Landlord and Tenant—Lease of premises by railway company to wagon repairing company—Indemnity clause against damages, etc., for injury to repairing company's employees—Employee injured away from demised premises—Whether indemnity restricted to injury connected with demised premises—Construction.

The plaintiff, in June, 1943, suffered personal injuries on the defendant company's premises as result of the negligence of the defendant company's servants. The only issue as between the plaintiff and the defendant company, on appeal, was whether or not the railway company could escape responsibility for the negligence of their servants by reason of certain words written on the back of a card called a "walking pass," which had been issued by the railway company to the plaintiff's employers, the third party in the proceedings, and handed by them to the plaintiff. Before the war privately owned wagons on the railway company's lines were repaired when necessary by repairers appointed by the owners of the wagons and, in order to carry out such repairs on the railway company's sidings or other premises, permission was given by the railway company to certain repairers to come on to their premises for this purpose. It was the practice, at any rate from 1936 onwards, for the repairers to send to the railway company the names of their employees who would be likely to be coming on the railway company's premises and the railway company then made out "walking passes" for each of such men and sent them to the repairers for issue to the individual man. These cards were renewed each year. During the war the Government requisitioned 95 per cent. of the private wagons and undertook responsibility for the repairs thereto. The Government also took over the control of the railway company but did not requisition its property or premises. The practice thereafter was for the railway company, as agent for the Government, to give instructions, when necessary, to the repairers for the execution of repairs to any requisitioned wagon which was in need of repair. So far as practicable such instructions were given to the repairers who would normally have been entrusted with the work by the owners of the wagons. The practice as to the issue of walking passes continued as before. The plaintiff at the material time was the holder of a walking pass originally issued in 1940 and stamped across in red with the words "valid for 1943" which had been placed thereon by the railway company when the cards were returned for re-stamping at the end of 1942. The walking pass contained on one side a permit for the plaintiff to enter on the railway company's premises in a specified area and on its reverse side a statement to the effect that the railway company would not be responsible to the holder or his representatives in the event of an accident or inquiry, however caused, happening to him whilst upon the railway and the premises specified therein. As against the third party the railway company set up two written contracts of indemnity under each of which it claimed to be indemnified by the third party against both damages and costs in the action brought by the plaintiff. The first of these documents was a memorandum, dated May 15, 1925, from the third party to the railway company applying for a grant of the privilege to its representatives or employees of entering on the railway company's premises' in consideration of which the third party thereby agreed to indemnify the railway company against all costs, damages, expenses, claims, demands or liability which they might incur or sustain by reason or in consequence of injury to the persons or property of the representatives or employees whether caused by the negligence of the railway company or by the servants by reason of or in consequence of the exercise of the privilege. The second document was a tenancy agreement dated July 21, 1934, between the railway company and the third party in respect of a hut or shed which was situate within some 50 yards of the spot on the sidings where the plaintiff received his injuries. In the material clause, the third party agreed to bear the risk of and be responsible for all damage injury or loss whatsoever, howsoever and whensoever caused arising directly or indirectly out of or in connection with the use of the premises demised or sustained by it or its workmen, servants or agents, while working or being on the company's line of railway or sidings and whether such damage injury or loss was caused by the act neglect or default of the company or the company's servants or agents or otherwise, and the third party further agreed to keep the company freed and indemnified against all liabilities claims and demands whatsoever in respect of such damage injury or loss :—

HELD : (i) the railway company, having failed to prove actual knowledge of the existence of conditions on the pass, had failed to discharge the onus which was upon them to establish that, whether the plaintiff read the words or not, the delivery of the pass to him took place in such circumstances as to amount to reasonable notice that the writing on the pass contained conditions ; consequently the plaintiff was entitled to recover damages against the railway company.

(ii) on a true construction, the indemnity clause in the tenancy agreement of July 21, 1934, could not be restricted to damage connected with the demised premises ; the language of the clause was clear and unambiguous and covered the injury sustained by the plaintiff while working on the railway company's sidings, and the third party was thereby rendered liable to indemnify the railway company in respect thereof.

(iii) [SCOTT, L.J., dissenting] the servants of the third party were coming on the railway company's premises during the war by reason and in consequence of the privilege referred to in the document of May 15, 1925, despite the fact that they were executing repairs to requisitioned wagons on instructions given on behalf of the Government instead of on the orders of the owners of the wagons as before ; consequently the third party was rendered liable under that document also to indemnify the railway company.

[**EDITORIAL NOTE**. The railway company, in the circumstances reported, had made very elaborate arrangements to protect themselves against claims for injury to employees of repairers of wagons coming upon the railway premises. They had taken an indemnity from the employers, the " walking pass " issued to the employees contained conditions limiting their liability, and the tenancy agreement of a parcel of land near the sidings also contained an indemnity clause. So far as the " walking pass " is concerned, it is not a contract, but even if it were there was insufficient notice of the effect of the conditions under which it is used to protect the railway, in accordance with the decisions in *Parker* v. *S.E. Ry. Co.* (3) and *Suger* v. *L.M.S.* ([1941] 1 All E.R. 172). As regards the indemnity agreement, the relevant war legislation, reviewed in *Fox* v. *L.M.S.* (1) together with the Ministry of Transport Charter, are held, by the majority of the court, to leave unaffected the liability of the company to indemnify the railway, and by the whole court, to have no effect upon the tenancy agreement and the liability thereunder.

AS TO SPECIAL CONDITIONS IN CONTRACTS BY CARRIERS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 72, 73, para. 109 ; and FOR CASES, see DIGEST, Vol. 8, pp. 126-128, Nos. 849-858.]

Cases referred to :

*(1) *Fox* v. *London Midland & Scottish Ry. Co.* (1942), 194 L.T.Jo. 173.

(2) *Cricklewood Property & Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252 ; [1945] A.C. 221 ; 114 L.J.K.B. 110 ; 172 L.T. 140.

*(3) *Parker* v. *South Eastern Ry. Co., Gabell* v. *South Eastern Ry. Co.* (1877), 2 C.P.D. 416 ; 8 Digest 130, *866* ; 46 L.J.Q.B. 768 ; 36 L.T. 540.

APPEAL by the defendant railway company from a decision of MACNAGHTEN, J., given at Northampton Assizes and dated July 5, 1945. The facts are fully set out in the judgment of Scott, L.J.

P. E. Sandlands, K.C., and *Douglas Lowe* for the appellants, the London & North Eastern Ry. Co.

Norman Winning for the respondent Henson.

Phineas Quass for the respondent third party, Warren & Coote, Ltd.

Cur. adv. vult.

Scott, L.J. : This is an appeal from Macnaghten, J. in a case of personal injuries, received on the sidings at Peterborough East station, where the plaintiff was hurt by the negligence of servants of the defendant company. In the action the judgment was against the defendant company. There was also a claim by the defendant company against a third party for indemnity. Judgment was against the defendant company also on that. The defendant company appeals against both judgments.

I will discuss the main question first. Negligence was established before the judge, and on that issue of fact there is no appeal. But the defendant company set up a defence that the plaintiff's right of action against them was barred by the terms of a " walking pass " issued by them, which the plaintiff carried when on the premises of the defendant company in order to show that he was duly authorised to be there. He was a servant not of the defendant company but of a company, the third party, called Coote & Warren Ltd., whose business it was to repair railway wagons belonging to private owners, that is to say, all owners of wagons other than the railway company itself. There were many such wagon-repairing firms doing work on the defendant company's railway system. Coote & Warren Ltd., had their main local premises to the west of the large expanse of sidings lying on the south side of Peterborough East station, with a small additional area rented from the defendant company on the south side of the sidings.

I will deal with the issue raised by the action first. The plaintiff was a wagon repairer by trade and had been employed by the third party for many years. In pre-war years the maintenance and repair of privately owned wagons was the business of the private owners and not done by the railway company ; but, for the convenience of the owners, of repairing firms and the railway company itself, such repairs were habitually done on the railway sidings, unless the repairs were of such a character as to require the removal of the wagon by rail to a regular repair shop, possibly many miles away. The owner had no right to insist on that privilege ; nor had the repairing firm ; but it was a convenient practice. There were usually at any large set of sidings probably several, perhaps many, repairing firms who had an office or shop there, often with a considerable number of employees, and many of these firms had such local offices at many points on the railway company's system. This obviously made it important for the persons in their employ to carry passports, in order that if challenged by the railway company's servants they might prove that they were not trespassers. When at their job, that is, at the wagon during the work of repair, which was customarily in accordance with a specification of needed repairs previously attached to the side of the wagon, apparently no passport was deemed necessary : but for walking to and from the job, often a considerable distance, it was thought necessary ; hence a card entitled " Walking Pass " came into use. It was a " walking " not a " working " pass. I infer that each repairing firm each year gave the railway company a list of its servants and the railway company then issued to the firm a card for each named man on the list, changes in the list during the year being duly notified, and cards withdrawn or issued accordingly. Before the war the mere fact that a particular owner had one of his wagons on a particular siding would not entitle him as of right to traverse the railway company's private premises in order to go to it without prior permission. The repairing firm employed by him was in no better position. Hence the defendant company seem to have thought they might use that position to dictate terms to the repairing firms, which would protect the railway from all claims in tort by them or their work-people. This idea they embodied in the walking pass, a durable card, apparently intended to be carried for a long time ; it was re-indorsed annually. It is necessary to read the whole of it, front and back :

London and North Eastern Railway. Wagon Repairer's Walking Pass. Date issued 16.1.1940. No. 1134 R. Expires 31 Dec. 1940 (unless previously withdrawn by the company). Mr. H. Henson [that is the plaintiff] a wagon repairer employed by Coote & Warren, Ltd., is allowed to enter and be upon the company's premises between Sandy and Grantham Essendine and Bourne Peterboro' to Boston and Kings Lynn March to Brandon Ely to Whittlesford and the sidings connected therewith for the purpose of examining and repairing wagons. [That is signed] R. L. Wedgwood [in print] Chief General Manager. Examined by N.F.L. This pass must be returned to the Chief Mechanical Engineer, Doncaster immediately upon its expiration. It is issued subject to the conditions on the back hereof and is not available from station to station, nor through tunnels, but only from stations to sidings and *vice versa.*

Then on the back :

> This walking pass is issued on the understanding that the London and North Eastern Railway Company shall not be responsible to the holder, or to his representatives, in the event of any accident or injury, however caused, happening to him whilst upon the railway and the premises named herein. The right to use this pass terminates when the holder leaves the service of the employer named on the other side, and may be withdrawn by the company at any time.

The original defence contained no plea based on the pass, but a para. 5 was added by amendment reciting the first condition with the averment that " in any event the plaintiff was upon the defendants' premises upon the express terms of, and subject to " that condition. It is to be observed that the paragraph does not allege that the written document constituted any agreement to that effect by the plaintiff, made either personally or through Coote & Warren, Ltd., as his agent. Indeed the walking pass is not expressed in terms of contract. It contains no offer and invites no acceptance and permits of no refusal. A loose popular word is used to indicate some sort of relationship between the railway company and somebody else, the word " understanding " ; though I should have thought the word " misunderstanding " might have been more apt. *Prima facie* the word " understanding " seems more appropriate if applicable to Coote & Warrens, who had asked for the pass, and to whom the pass was in fact addressed, rather than to their servant who would have no choice in the matter. Anyhow the pass does not purport to be a bilateral agreement between the defendant company and the plaintiff. It does not call for the signature of either of them as parties to a written agreement. The subscription in print of the name of the chief general manager is obviously added for executive purposes, that is, to inform the inquiring servant of the railway company who has challenged the holder that he is present not as a trespasser but with the lawful authority of the highest executive officer of the company ; he is " allowed " to be there.

The pass is certainly not a written contract. With extrinsic oral evidence it might possibly have been regarded as containing a part of the term of an oral contract ; but the plea alleged no oral contract and there was no evidence to that effect. Still less was there either plea or evidence that Coote & Warrens received it from the defendant company in the capacity of agent for the plaintiff to make such a contract, or, if they did, that they had his authority so to do or that they purported so to act, so as to permit of ratification by the plaintiff. To me the very notion of imputing all these legal notions to the non-legal mind of an ordinary working-man trained in wagon repairing but not law is repugnant. But even if the document were treated as comparable to a cloak-room ticket, which it is not, as in those cases there is always indubitably some contract, the question of fact preliminary to the attempt of the defendant to rely on special conditions of immunity must always be " Did the defendant company take all reasonable steps to make the plaintiff realise that there were such conditions attaching to the defendants' offer " ? To the question in this case whether the plaintiff, a workman employed by Coote & Warrens and not by the railway Company, was contracting himself, and his widow and children if he was killed, out of all rights of action against the railway company, I am satisfied that a jury would certainly answer " No ! " If so, even if a contract could be spelt out of the pass, barring the plaintiff's claim, that defence would fail.

Theoretically it might be within para. 5 of the defence to argue alternatively that the plaintiff was an invitee, who had accepted an invitation to enter and be upon the defendant company's premises on an express condition, brought home to his mind that if he was hurt by the invitor's negligence he would have no right of action. But to this plea, the answer would be the same, namely, that the defendant company had not taken all the steps reasonably necessary to bring that astonishing surrender of his elementary rights home to his mind. Even if the above grounds for rejecting this defence are erroneous, TUCKER, L.J., makes a further point that in any event the defendant company has not satisfied the burden of proof which is upon them. I agree. The attempt made by the railway company in the pass to put on an ordinary working man employed by others the very burdensome term in question shocks my mind. The Workmen's Compensation Acts preserve an option to the workman to enforce his common law rights even against his own employer. It is such misuse of contract which makes the Legislature tend to substitute status.

A

The judge found an additional reason for deciding that the walking pass did not bar the plaintiff's claim in the radical change in the relationship of the parties to each other and the Government brought about by war legislation, Parliamentary and delegated. It will be convenient to postpone that aspect until after I have discussed the third party proceedings.

B

The above conclusion brings me to the defendant company's appeal as plaintiff in the third party proceedings. The defendant company there sets up two written contracts of indemnity under each of which it claims to be indemnified against both damages and costs in the action brought by the plaintiff on which he now retains his judgment. The defendant company's claim to indemnity was based on two distinct documents, each of which they contended conferred the right. The judge decided against them both. The first was dated May 15, 1925, and I add parenthetically that there was no evidence below of the system of walking passes having been introduced by the defendant company before 1936. I point this out because there seems to have been some impression below in the minds of both counsel and judge that the indemnity position was linked up with the walking pass, and even before us that tendency was not wholly absent. In my view there was no relevant inter-connection. The 1925 document is an application by Coote & Warrens to the defendant company. Its wording is not quite grammatical, and it is desirable to read the whole of it :

C

D

> We, Coote & Warren, Ltd., of Dashwood House, Old Broad Street, E.C.2, London and elsewhere hereby request you to grant to our representatives or employees the privilege of entering and being upon your railway and premises for the purpose of examining or repairing wagons and in consideration of your doing so, we hereby agree to indemnify you against all costs, damages, expenses, claims, demands or liability which you may at any time or from time to time incur or sustain by reason or in consequence of injury to the persons or property of the said representatives or employees, or to your servants or property, or to the persons or property of others lawfully upon your premises, whether caused by the negligence of yourselves or your servants or not, by reason or in consequence of the exercise of the privilege aforesaid.

E

Before the war when the repairing firms were instructed by an owner of a privately owned wagon to repair it where it lay on a railway siding, the repairing firm had no greater right of entry upon railway premises than the owner ; it stood in his shoes. The owner had no right to go there without leave, nor had the repairing firm. To ask for leave was, therefore, necessary. The leave when granted was not inaptly described as a privilege ; hence the use of that word in the application. To this privilege the railway company attached the stated condition of a promise to indemnify them against claims for damages whether due to the negligence of the railway company itself or its servants or otherwise, provided always that the claims arose " by reason or in consequence of the exercise of the privilege " so granted. That proviso made the insistence on indemnity in the circumstances I have stated not unreasonable. Had the accident to the plaintiff happened before the war, the indemnity would have attached. But I agree with the judge that it did not attach under war conditions. Coote & Warrens were there no longer seeking any privilege from the defendant company.

F

G

H

I adopt the whole of that part of the judgment of MORTON, J., in *Fox* v. *London Midland & Scottish Ry.* (1), which was read to us as containing a succinct statement of the relevant war legislation, Parliamentary and delegated ; and I accept the descriptive statement of law and practice during the war, accepted by all parties below and before us, contained in the exhibit entitled " Ministry of Transport Charter." Reading those two together in the light of the evidence of the manager of the defendant company's wagon shop at Doncaster, I summarise the legal position with its resultant practice as at June, 1943, as follows.

The Government was in complete control of all railways, managing them through the Railway Executive Committee for whom the several railway companies acted as agents; all privately owned wagons (except 5 per cent. of kinds not relevant to this appeal) had been requisitioned under Defence Reg. 53 by the Minister of Transport (in 1943 Ministry of War Transport) acting under Requisitioning Privately-owned Railway Wagons Notice, 1939. Under the Charter (cl. 1) the Government had undertaken at their own cost repairs and maintenance of all "privately-owned" wagons (other than the 5 per cent.); but (cl. 4) the Government were continuing to employ "existing private wagon-repairing facilities for this work," on certain conditions of which the most material one was (*e*):

> The wagon repairers to co-operate to the full extent with the railway companies in the administration of this scheme. Firms not willing to accept the schedule of charges and other necessary regulations, will be left out of the arrangement.

Under the above war conditions neither owner nor repairing firm were applicants to the railway companies for leave to execute repairs on railway sidings. The requisition of the wagons made the Government the repairing firm's customer in place of the owner: an instruction to the firm to repair came, it is true, through the railway company, but as a mere conduit pipe for transmitting what was in reality the order of the Railway Executive Committee to whom the whole management of the railways was deputed by the Government; and the cost was chargeable in account to the Government. I agree with the judge that there was no room in the new system for the operation of the instrument of 1925. The claim to indemnity of the defendant company on that footing fails.

Their claim however on the other footing on which they rely raises much less simple questions. It is based on cl. 8 of a tenancy agreement between the defendant company and Coote & Warren, Ltd., dated July 21, 1934. The parcel demised was the small piece of land coloured red on the attached plan, to which I have already referred, lying to the south of the sidings. I will call it "the red plot." The tenancy was to continue indefinitely until determined under cl. 8, *i.e.*, by one month's written notice. Under cl. 7 the tenant covenanted to abide by any regulation or order made by the railway company for the conduct of the railway company's business. Cl. 8 is the material clause:

> The tenant agrees to bear the risk of and be responsible for all damage injury or loss whatsoever howsoever and whensoever caused arising directly or indirectly out of or in connection with the use of the said premises or sustained by him or his workman servants or agents while working or being on the company's line of railway or sidings and whether such damage injury or loss be caused by the act neglect or default of the company or the company's servants or agents or otherwise and the tenant further agrees to keep the company and the managing committee of any accident fund formed for the benefit of the company's servants freed from and indemnified against all liabilities claims and demands whatsoever in respect of such damage injury or loss as aforesaid or in respect of any breach of any of the provisions of this agreement or of any of the before-mentioned regulations or orders or of any Statute.

The interpretation of this clause must be approached from two points of view: (1) its meaning when read in the light of the circumstances surrounding it when the tenancy agreement was entered into—that is, in peace-time, and (2) its applicability, as so construed, to the very different circumstances obtaining in June, 1943. The meaning in 1934 is not perfectly clear; and the first step, therefore, is to endeavour to construe it as under the surrounding circumstances then ruling. (1) I start with the presumption that the clause had some local attachment to the red plot, which was the parcel demised, and was not intended to apply to the whole of the London & North Eastern Ry. system. (2) This local connection of the clause's purview is, I think, reinforced by the fact that the railway company already possessed the very wide and complete indemnity granted to it by the still current instrument of 1925. (3) The word "wheresoever" is omitted from line 2. (4) As one would expect, the clause is primarily directed to "damage, etc., arising . . . out of or in connection with the use of" the red plot. (5) But at that point one is met with an almost inexplicable disjunctive "or" followed by the participle "sustained" which belongs grammatically to the preceding noun "damage, etc."; with the result that accidents throughout the whole of the "company's line of railway" in England and Scotland are brought in by the alternative limb. The first four reasons I have stated are sufficient to throw doubt upon that "or," and account for the suggestion thrown out during argument by Tucker, L.J., that the "or" should be read as "and"; but I do not think there is sufficient ground for regarding the word as a clerical error. It follows that full effect must be given to the separate provision introduced by the "or." If so, the indemnity would *prima facie* attach on the facts of the case.

The second question—whether the clause still operated under war conditions—is a difficult one to answer. There is no room for applying the doctrine of frustration, even although the decision of the House of Lords in *Cricklewood Property & Investment Trust, Ltd.* v. *Leighton's Investment Trust* (2) may have left open the question of applicability of that doctrine to a lease. The tenancy agreement was apparently not affected by the war as the Government did not purport to step into the shoes of the railway companies as landlords; at any rate no such argument was addressed to either court. It follows that cl. 8 cannot be treated as struck out of the agreement and that the only question is whether its particular subject-matter can be said to have been so affected by the changes in railway conditions effected by legislation, Parliamentary and delegated, and in practice as shown in the "Charter" and proved in evidence, as to make it in a business sense impossible to apply cl. 8. In this context the provision that "the tenant agrees to bear the risk" is merely introductory to his further agreement "to keep the company indemnified." The only features of the Government's war control which I think may be relevant are these: (1) The Government have completely taken the place of the owners of the privately owned wagons (except for the irrelevant 5 per cent.): (2) The Government alone contract with the repairing firms like Coote & Warrens, and pay them; (3) The Government alone order repairs to be executed; and they alone are responsible for the repairing firms sending their men on to the railway companies' premises: (4) The indemnity payable under cl. 8 is to the railway company; but in fact the beneficial recipient is the Government.

On the other hand, (1) the relationship between the railway company and Coote & Warrens, of landlord and tenant has apparently been allowed by the Government to remain unaltered, and (2) the further fact remains that the Government have left the railway companies in possession as agents for the Government, and have interfered as little as possible with their business arrangements. That being so it seems to me impossible to say as a matter of law that war conditions made it impracticable to apply cl. 8 in accordance with its tenor, even if the "or" be read as "and" as I think it should be in order to construe it correctly.

As between the defendant company and the third parties there must be judgment for the defendant company with costs here and below and a declaration accordingly.

Tucker, L.J.: the plaintiff suffered personal injuries as a result of the negligence of the defendant railway company's servants on June 25, 1943. The only issue as between the plaintiff and the defendant company in this appeal is whether or not the defendant company can escape responsibility for the negligence of their servants by reason of certain words written on the back of a card called a "walking pass" which had been issued by the railway company to Coote & Warren, Ltd., the plaintiff's employers, who are the third parties in these proceedings, and handed by them to the plaintiff. The card came to be issued in the following circumstances. Before the war privately owned wagons on the railway company's lines were repaired when necessary by repairers appointed by the owners of the wagons and in order to carry out such repairs on the railway company's sidings or other premises permission was given by the railway company to certain specified repairers to come on to their premises for this purpose. It was the practice at any rate from 1936 onwards for the repairers to send to the railway company the names of their employees who would be likely to be coming on the railway company's premises and the railway company then made out "walking passes" for each of such men and sent them to the repairers for issue to the individual men. These cards were renewed each year. After the war the Government requisitioned 95 per cent. of the private wagons and undertook responsibility for repairs thereto. The Government also took over the control of the railway company but did not requisition their property or premises. The practice thereafter was for the railway companies as agents for the Government to give instructions when necessary to the repairers for the execution of repairs to any requisitioned wagon which was in need of repair. So far as practicable such instructions were given to the repairers who would normally have been entrusted with the work by the owners of the wagons.

Under this war time arrangement it was, of course, still necessary for the repairers' men to go upon the railway company's premises as before to execute the required repairs and the practice with regard to the issue of walking passes continued as before. The plaintiff at the material time was the holder of a walking pass originally issued on Jan. 16, 1940, to expire on Dec. 31, 1940, and stamped across in red with the words "valid for 1943" which had been placed thereon by the railway company when the cards were returned for re-stamping at the end of 1942. The writing on the front and back of this pass has been already read by my Lord and I need not repeat it.

The defendant company contend that these words on the back of the card protect them from liability. They say that whether or not the plaintiff read the words is immaterial and the only question is whether the delivery of the pass to him took place in such circumstances as to amount to reasonable notice that the writing on the pass contained conditions. Now the onus is, of course, upon the defendants to establish this plea. At the trial very few questions were addressed to the plaintiff on this matter. He was asked in examination in chief whether he had ever read the document. He replied, "I cannot honestly say whether I did or not. It is such a long time ago." This is, I think, an important answer. I read it as referring to the first pass he received back in 1936 and meaning "I cannot remember whether I read it when I first got it but I have not read it since." No questions were asked in cross-examination for the purpose of elucidating this answer. It seems to me to be in accord with probability that a man receiving a pass of this kind might be inquisitive enough to read it when it was first issued to him and thereafter never look at it again except so far as would be necessary to put it in or take it out of the little bag in which he said he carried it. However this may be, the defendant company clearly failed to establish actual knowledge of the conditions on the ticket and are forced to rely upon what really amounts to constructive notice namely that they took all reasonable steps to give him notice that the pass contained conditions. The leading authority on this matter is the well known case of *Parker* v. *South Eastern Ry. Co.* (3). In the judgment of MELLISH, L.J., there is to be found an explanation of the foundation for the doctrine of such constructive notice. It is really based on the fact that in certain circumstances without such a doctrine business could not be carried on. The passage I refer to is as follows (2 C.P.D. 416, at p. 422):

> Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. For instance, if a person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exceptions contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading, is entitled to assume that the person shipping goods has that knowledge. It is, however, quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but in my opinion such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading

> was. Now the question we have to consider is whether the railway company were entitled to assume that a person depositing luggage, and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference.

The circumstances in which "people in general would in fact, and naturally, draw that inference" must greatly vary in different cases. The inference to be drawn in the case of a person taking a railway or cloakroom ticket and who is thereby entering into a contractual relationship may be very different from that to be drawn in the case of a workman who is sent by his employers in the course of his ordinary employment to do work on the premises of a third party and to whom a pass is issued to enable him to proceed to the place where he has to work. I can see no reason which compels me to infer that in such a case the workman must understand that the writing on the pass contains words which will put him in a contractual relationship with the person on whose premises he is going to work which may deprive him of his common law rights. It does not seem to me that it would be right to say that business cannot be carried on unless such an inference must be drawn. In my opinion, therefore, the railway company having failed to prove actual knowledge of the existence of conditions on the pass have not established the existence of circumstances which compels the court to infer such knowledge, in other words that in the circumstances of this case they have not proved that they gave reasonable notice to the plaintiff of the existence of the condition on which they rely. The trial judge did not decide this point as in his view the defendant company were not entitled for other reasons to rely on the walking pass. He dealt with it in these words:

> The defendants contend that this condition was binding on the plaintiff and precluded him from maintaining an action against them. It may, I think, be doubted whether this contention was well founded, but it is not necessary to consider that point, which was not fully argued before me, because counsel for the plaintiff took a further point, which seems to me to be established.

He then proceeded to deal with counsel's further point which appears to have been founded on para. 3 of the defence of the third party to the defendant company's claim against them for indemnity to which I shall refer hereafter.

It does not appear to me that the point relied upon by counsel and accepted by the judge was open to him on the pleadings, but in any event it would in my view still have necessitated consideration of the defendant company's defence based on the conditions of the walking pass which had been issued to and was at the material date in the possession of the plaintiff. In my opinion, for these reasons the plaintiff is entitled to recover the damages assessed by the judge against the defendant company.

The defendant company claimed indemnity from the third party in respect of such damages. This claim was based in the alternative on two separate documents. I will deal first with the claim under the memorandum of agreement of July 21, 1934. This was a tenancy agreement between the defendant company and the third party whereby the defendant company let to the third party, Coote & Warren, Ltd., certain premises on their railway system at Peterborough on a monthly tenancy at a rent of £16 per annum. The premises in question consisted of a hut or shed which was situate within some 50 yds. of the spot on the sidings where the plaintiff received his injuries. It was, however, common ground that the work being done by the plaintiff had nothing to do with the third party's user of the premises comprised in this agreement so that it could not be said to have been in any way incidental thereto. To return to the agreement. Cl. 8 has already been read and I need not repeat its terms. This clause is relied upon by the defendant company as affording them the right to be indemnified by the third party in respect of the damages awarded to the plaintiff in this action. The third party in para. 4 of their defence to the claim of the defendant company plead as follows:

> The third party admits the memorandum of agreement dated July 21, 1934, referred to in the defendant's statement of claim and will refer to the same for its full terms. The said agreement was a tenancy agreement relating to the premises therein specified. At the time of the accident the plaintiff was not on the defendants' premises under

any licence conferred on him or the third party by the said agreement nor was his presence on the defendants' premises in any way connected with nor did it arise out of the third party's tenancy or tenancy agreement. The third party will contend that the said agreement has no application to the facts of the present case and does not give to the defendants the right to the indemnity claimed.

The defendant company by their counsel say they do not suggest that the plaintiff was on their premises under any licence conferred by the tenancy agreement nor that his presence was in any way connected with or arose out of the tenancy or the tenancy agreement. They say that the words of cl. 8 are clear and unambiguous and cannot be construed in the limited sense suggested by the third party. They say the clause forms part of the consideration for the agreement and that it is no part of the duty of the court to inquire whether the terms of the indemnity are wider than reasonably necessary. In my view these submissions of the defendant company are well founded. In order to give to the language of cl. 8 the limited meaning desired by the third party it would in my view be necessary to transpose the words "arising directly or indirectly out of or in connection with the use of the said premises" from their present position and insert them after the word "sidings." I can see no justification for such a major operation except for the purpose of making for the parties a new and perhaps more reasonable contract. The language of cl. 8 is clear and unambiguous and covers the injury sustained by the plaintiff while working on the railway company's sidings and the third party are thereby rendered liable to indemnify the defendant company in respect thereof.

Having regard to my view as to the effect of cl. 8 of the tenancy agreement it is not necessary in my judgment to decide as to the applicability to the facts of this case of the other document relied upon by the defendant company as an indemnity. As, however, it was very fully argued before us and was the matter principally dealt with by the judge at the trial I think it is right that I should quite shortly state my views thereon. I need not read the document of May 15, 1925, which has been already read.

The privilege of entering and being upon the railway and premises for the purpose of examining or repairing wagons was given at a time when the privately owned wagons in question were at the disposal of their owners and could not be repaired on the railway company's premises without the company's permission. It was argued by the third party that the indemnity given in return for this privilege had no application to the facts of this case where the plaintiff was executing repairs to a requisitioned wagon pursuant to orders given to his employers by the railway company's checker, the execution of which required no licence or privilege. It was said that the change in circumstances resulting from the assumption by the Government of control of the railways and the requisitioning of 95 per cent. of privately owned wagons, of which the wagon is question was one, had put an end to the privilege conferred by the document of indemnity and that the injury to the plaintiff did not arise "by reason or in consequence of the exercise of the privilege aforesaid." In my opinion this argument, though not unattractive, is unsound.

The railway company at all material times remained in possession of their own premises and they could exclude therefrom such persons as they chose. After the war the railway company as agents for the Government issued orders for the repair of the privately owned wagons the cost of which was to be borne by the Government. The railway company, however, remained in possession of their property and could give or refuse permission to persons to come upon or to remain upon their premises for the execution of repairs or any other purpose. In my view the servants of the third party were coming upon the railway company's premises after the war by reason and in consequence of the privilege referred to in the document of May 15, 1925, despite the fact that they were executing repairs to requisitioned wagons on instructions given on behalf of the Government instead of on the orders of the owners of the wagons as before the war. For these reasons also I would hold the third party liable to indemnify the defendant company, but, as stated above, I prefer to base my judgment on cl. 8 of the tenancy agreement.

I would dismiss the defendant company's appeal from the judgment against them in favour of the plaintiff and allow their appeal against the dismissal of their claim against the third party.

Cohen, L.J.: I had prepared a full judgment in this case, but I have since had an opportunity of reading the judgments prepared by my brethren. I agree so entirely with the conclusions they have reached on the question of the liability of the defendant company to the plaintiff and with the reasons for those conclusions, that I desire to add only one observation on that part of the case.

I think that the relationship, whatever it may be, between the plaintiff and the defendant company and his right of access to the sidings of the defendant company must depend on the walking pass. That was by its terms only valid for one year. It was renewed in 1943 and re-issued to him in that year. I fail to see how the conditions then endorsed on it, if otherwise binding on the plaintiff, can have been rendered inoperative by an arrangement between the Government, the railway companies, the wagon owners, and the repairers made in 1939 or 1940.

I also agree that the appeal of the defendant company against the third party should be allowed, but as my brethren differ to some extent in their reasons for reaching this conclusion, I must state shortly my reasons for thinking that the defendant is entitled to succeed both on the document of May 15, 1925, and on cl. 8 of the tenancy agreement of July 21, 1934.

I am unable to agree with Scott, L.J., that under war conditions the repairing firms were not applicants to the railway companies for leave to execute repairs on the sidings. They would have no right apart from agreement to send their employees on to the sidings. The Ministry of Transport charter is not a contract, although it no doubt represents an arrangement to which the Government, the private wagon owners and the railway companies were willing to give effect and by which those repairers who accepted orders were prepared to abide. The wagons were still not the wagons of the railway companies and under the charter the railway company were giving orders not on their own behalf, but on behalf of the Government. The repairers still required access to the defendant company's sidings if they were to do the work there instead of in their own works and it made no difference to them whether they were doing the work for the account of the private owner or for the account of the Government. They and the defendant company must be taken to have been well aware of the terms of the document of May 15, 1925; if they had desired to determine it, it would have been easy to do so and I see no justification for inferring from the terms of the charter that it had been determined or had ceased to be applicable.

I agree with both my brethren that the defendant company is also entitled to succeed under cl. 8 of the tenancy agreement. Read literally the obligation to indemnify the defendant company against damage sustained by the tenant's employees while on the siding of the defendant company is unrestricted and the third party can only escape liability if the indemnity can be restricted as a matter of construction to damage connected with the demised premises. I do not think this construction is possible without some such distortion of the clause as was suggested by Tucker, L.J., and I see no justification for such a distortion.

In the result I agree that the defendant company's appeal from the judgment against them in favour of the plaintiff should be dismissed and their appeal against the dismissal of their claim against the third party should be allowed.

Appeal of defendant company from the judgment against them in favour of the plaintiff dismissed with costs; appeal of defendant company against the dismissal of their claim against the third party allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Miles Beevor* (for the London & North Eastern Ry. Co.); *Rowley, Ashworth & Co.* (for Henson); *Willis & Willis* (for Coote & Warren, Ltd.)

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ROWING *v.* MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), April 1, 1946.]

Royal Forces—Pension—Disability existing before war aggravated by war service —Burden of proof—Proper method of approach to consider matter—Royal Warrant concerning Retired Pay, Pensions, etc., 1943 (*Cmd.* 1943, *No.* 6489), *art.* 4 (2)—*Pensions Appeal Tribunals* (*England and Wales*) *Rules*, 1943 (*S.R. & O.*, 1943, *No.* 1757/*L.* 39), *r.* 12 (6).

The appellant was called up for military service in Sept., 1940. At his medical examination it was noted that he had a perforated ear drum and was receiving treatment for a discharging ear, from which he had suffered since infancy. He was nevertheless placed in grade I. During his service the ear trouble became much worse and, on Feb. 17, 1943, he was found to be unfit for any form of service, was placed in category E owing to the condition of his ear and eventually, on Feb. 28, 1944, was discharged from the service. In dismissing his claim for a pension the Pensions Appeal Tribunal gave as reasons for their decision that the disability which brought about his discharge from the army was liable to periods of exacerbation and remission and there were no conditions in his service that would render probable the contention that his service conditions aggravated his disability. Art. 4 (2) of the Royal Warrant provides that in no case shall there be an onus on any claimant under the warrant to prove the fulfilment of the conditions entitling him to an award and that the benefit of any reasonable doubt shall be given to the claimant :—

HELD : (i) if a man was accepted for service in a certain medical category there was a presumption that at the time of his acceptance he was fit for the kind of service demanded of a man in that category.

(ii) the Tribunal did not have proper regard to art. 4 (2) of the Warrant and did not approach the consideration of the matter in the proper way ; the question to be considered was not whether the appellant's contention was rendered probable, but whether it was rendered improbable and whether the evidence against him was such that there was a real preponderance of probability against him such as to exclude reasonable doubt.

(iii) if the question of burden had been approached in the proper way the evidence gave rise to a presumption in the appellant's favour and was supplemented by a specialist's opinion and there was nothing sufficient to overthrow it.

(iv) there was no evidence on which the Tribunal could come properly to a conclusion in favour of the respondent and the appeal should, therefore, be allowed.

[**EDITORIAL NOTE.** The court again considers the question of burden of proof in pensions claims, and finds that the Pensions Appeal Tribunal, not having proper regard to art. 4 (2) of the Warrant, fails to give effect to the presumption in favour of the applicant arising from the evidence. In the view of DENNING, J., there is a presumption that a man is fit for the kind of service for which he is accepted, and that there is, therefore, a presumption that any subsequent deterioration in his health is due to that service.

FOR THE PENSIONS APPEAL TRIBUNALS ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480 ; and FOR THE PENSIONS APPEAL TRIBUNALS (ENGLAND AND WALES) RULES, 1943, *see ibid*, p. 747.]

APPEAL by way of case stated from a decision of a Pensions Appeal Tribunal. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *T. J. Kelly* for the appellant.

Hon. H. L. Parker for the respondent.

DENNING, J. : When the appellant was called up for service in Sept., 1940, he was examined medically and it was noted that he had a perforated right ear drum and was receiving treatment for a discharging ear from which condition he had suffered since infancy. That was noted down at the time but he was nevertheless placed in grade I. During his service the ear trouble became much worse and on Feb. 17, 1943, he was found to be unfit for any form of service, was put in category E owing to the condition of his ear, and was eventually invalided out of the army under that category E and discharged from the service on Feb. 28, 1944. It is not, therefore, a case which falls within art. 4 (3) of the

Royal Warrant, because the disease which led to his discharge was noted in the initial medical report, but comes within art. 4 (2) of the Warrant. In my opinion if a man is accepted for service in a certain medical category there is a presumption that at the time of his acceptance he was fit for the kind of service demanded of a man in that category; and in the event of his discharge subsequently on medical grounds due to deterioration in his health, there is a presumption that the deterioration was due to his service. That presumption is not a compelling presumption but a provisional presumption arising from the fact that he was accepted for service in that category. So in this case when this man is discharged as being unfit for any further service on account of his ear there is a provisional presumption operating in his favour. In addition there was evidence of the conditions of his life in huts, under canvas and so forth which were unfavourable to his ear trouble; and there was the report of a civilian medical specialist, who had seen him for many years before service, and also saw him during his service and who reported on May 1, 1944, shortly after his discharge that "The life to which he was subjected in the army would tend to aggravate the ear condition." The matter was submitted to the Minister who rejected the claim of the appellant. There was an appeal to the Tribunal, who also rejected his claim. Now what was the evidence before this Tribunal? In order to defeat his claim, the evidence had to show a real preponderance of probability that the appellant's condition was not aggravated by war service. In the Minister's statement of the case there was no such evidence. The medical history did not contain any evidence to negative the claim. The reasons of the Minister were not evidence. At the hearing before the Tribunal there was apparently handed in a document signed by Dr. Sims. It was presented at the hearing by the Minister's representatives, but the counsel and the solicitor for the appellant said that it was not handed to them. If that is so then it was not made available to the appellant and did not conform to the requirements of the Pensions Appeal Tribunals (England and Wales) Rules, 1943, r. 12 (6), which requires that:

> . . . every document tendered in evidence or considered by the Tribunal for the purposes of the appeal shall be made available to the appellant or his representative (if any) and to the Minister or his representative in such manner as the Tribunal may direct.

As it is not quite clear in the case stated whether it was made available to the appellant, I am not going to pronounce any opinion on that particular aspect of this case, because when I come to study this document, even assuming it is authenticated by a medical man and admissible as evidence, nevertheless all it comes to is that it says:

> *Otitis media* is a condition which is liable to periods of exacerbation and remission.

It does not say what is the cause of the exacerbation and remission. It may be that exacerbation is due to external causes.

Then it goes on to say that:

> There was no acute exacerbation during service.

That statement is difficult to understand, having regard to the medical history which shows that during service the condition of the ear got very much worse. Then it finishes up:

> Any change during that period is considered to be due to the natural progress of this very chronic disease.

Now how far does that evidence go? Of course it is a matter for the Tribunal to consider, and the Tribunal considered it, but it seems to me that they did not approach the matter in the proper way. They gave the reasons for their decision, and they said:

> The disability which brought about the discharge of the appellant from the army is liable to periods of exacerbation and remission and there were no conditions in the service of the appellant that would render probable the contention that his service conditions aggravated the appellant's disability.

That very way of putting it shows that the Tribunal were not approaching the consideration of the matter in the proper way. They were not having proper regard to art. 4 (2). The question to be considered was not whether his contention was rendered probable, but whether it was rendered improbable. The question was whether the evidence against the claimant was such that there was a real preponderance of probability against him such as to exclude reasonable doubt, but they put the burden the other way round. If the question of burden had been approached in the proper way, the evidence gave rise to a presumption in the claimant's favour, and was supplemented by a specialist's opinion and there was nothing sufficient to overthrow it. The only evidence against him was that of Dr. Sims, which, even if admissible, did not exclude reasonable doubt.

There was no evidence on which the Tribunal could come properly to a conclusion in favour of the respondent. For that reason I allow the appeal and hold that there was an aggravation.

Appeal allowed.

Solicitors: *Perowne & Co.* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

POWELL DUFFRYN, LTD. *v.* RHODES.

[King's Bench Division (Lord Goddard, L.C.J., Croom-Johnson and Lynskey, JJ.), April 9, 1946.]

Emergency Legislation—Essential work—Reinstatement—Dismissal of employee for alleged serious misconduct—Direction to reinstate—Employee paid wages and offered similar employment at another colliery—"Reinstatement"—Defence (General) Regulations, 1939, *reg.* 58a*—Essential Work (Coalmining Industry) Order,* 1943 (*S.R. & O.*, 1943, *No.* 505), *art.* 5 (3).

The appellants, P.D.Ltd., carried on a coalmining undertaking which was scheduled under the Essential Work (Coalmining Industry) Order, 1943. They dismissed a collier for serious misconduct, but, after an inquiry into the matter by the local appeal board, they were ordered by a national service officer to reinstate him as from a given date. The appellants offered the collier work at the same wages and in the same grade but at a different colliery, and they paid him the guaranteed wage from the date of the reinstatement order. There was suitable work available for the collier at the colliery in which he had previously worked. The collier refused to work at a different colliery and claimed that "reinstatement" in the Essential Work (Coalmining Industry) Order, 1943, art. 5 (3), meant being put back into the same place as that in which he was working before he was dismissed:—

Held: upon the true construction of the Order, "reinstatement" meant putting the employee back in the same place as that in which he had been working before he was dismissed.

[**EDITORIAL NOTE.** It was held in *Adrema, Ltd.* v. *Jenkinson* (1) that "employment" in an Essential Work Order does not mean work in any particular grade, but Humphreys, J., pointed out that an alteration of position might be so great as to amount to termination of the employment. By parity of reasoning, it is held in the case reported that there is no "reinstatement" within an Essential Work Order where the employee is sent to a different place of work from that in which he was working before dismissal.

For the Essential Work (Coalmining Industry) Order, 1943, see BUTTERWORTH'S EMERGENCY LEGISLATION, [14] 166.]

Cases referred to:

(1) *Adrema, Ltd.* v. *Jenkinson*, [1945] 2 All E.R. 29; [1945] 1 K.B. 446; 114 L.J.K.B. 313; 173 L.T. 318.

(2) *Jackson* v. *Fisher's Foils, Ltd.*, [1944] 1 All E.R. 421; [1944] 1 K.B. 316; 113 L.J.K.B. 365; 171 L.T. 51.

Appeal by way of case stated from a decision of the justices of the peace for the county of Glamorgan, sitting at Bargoed, on Aug. 24, Sept. 14, 1945. On an information by the respondent, a national service officer, the justices found the appellants guilty of an offence against the Defence (General) Regulations, 1939, reg. 58a, in that they had failed to comply with a direction given under the Essential Work (Coalmining Industry) Order, 1943, art. 5 (3). The following facts were found by the justices:

(i) That the appellants carried on a coalmining undertaking at the Britannia Colliery Pengam and that the said undertaking was scheduled as an undertaking under the Essential Work (Coalmining Industry) Order, 1943 and 1944, with the result that both the appellants and the said Oliver Cromwell Cobley Cushing became subject to the provisions of that Order.

(ii) That the said Oliver Cromwell Cobley Cushing was employed by the appellants in the said Britannia Colliery undertaking and was on Apr. 4, 1945, dismissed from his said employment on the ground that he had been guilty of serious misconduct. That the said Cushing appealed against his dismissal to the local appeal board constituted under the Essential Work (Coalmining Industry) Order, 1943. The said board heard the appeal on Apr. 24, 1945, and was of opinion that the said dismissal was not justified.

(iii) That on Apr. 27, 1945, the respondent as national service officer gave to the appellants a notice pursuant to the said Order which directed the appellants to reinstate on Apr. 30, 1945, the said Cushing in the employment from which he was dismissed.

(iv) That the said Cushing duly presented himself for work at the said Britannia Colliery on Apr. 30, 1945, and on subsequent dates but the appellants refused to give him any work at the said colliery. The appellants offered to employ him as a collier at another of their collieries namely the Penallta coal mine at the same wages as theretofore. The appellants paid him the guaranteed wage during the whole of the time since the order of reinstatement was made.

(v) That there was ample work available for the said Cushing at the Britannia Colliery as a collier in the same grade at the same wages and upon the same conditions as he had worked prior to his dismissal.

(vi) That the Penallta coal mine is nearer the residence of Cushing than the Britannia Colliery.

(vii) That the appellant's offer to employ the said Cushing in their employment as aforesaid would result in Cushing being placed among new work fellows.

(viii) That Cushing refused to take the work offered as aforesaid at Penallta Colliery.

The appellants contended that they had sufficiently complied with the direction by offering Cushing work at the Penallta Colliery in the same grade, at the same wages and upon the same conditions as theretofore. The respondent contended that the appellants were under an obligation to reinstate Cushing at the Britannia Colliery in the employment from which he had been dismissed, and that, as they had not done so although such employment was available, they had failed to obey the directions of the national service officer.

Adrema, Ltd. v. *Jenkinson* (1) *and Jackson* v. *Fisher's Foils, Ltd.* (2) were cited.

Lionel Heald, K.C., and *Carey Evans* for the appellants.

W. Arthian Davies and *J. S. R. Abdela* for the respondent.

LORD GODDARD, L.C.J.: This case raises a very short point under the Essential Work (Coalmining Industry) Order, 1943. Powell Duffryn, Co., Ltd. being ordered by a national service officer to reinstate a collier whom they had dismissed for serious misconduct (the local appeal board having come to the conclusion that he had not been guilty of serious misconduct) offered him employment at the same wages in the same grade at another pit, and the man said that he would not work at the other pit. He claimed that he was entitled to be reinstated in his employment, and that that claim to reinstatement meant being put back into the same position as that in which he was when he was dismissed. I think that "position" means, not only the grade in which he was working, but the place at which he was working.

I do not think that it is the law that, if an employer engages a man to work for him at place A, he can at his own will and pleasure order the man to work at place B. The man may agree to work at place B, but if his employment is to work for a master at a particular place, it is a breach of contract on the part of the master if he orders the man to work at another place, and if the man refused to go to the other place and he was dismissed on that ground, it would be a wrongful dismissal of the man. In those circumstances, it seems to me that the word "reinstatement" must mean that, if the employers are ordered to reinstate the man, they must put him back at the same place as that in which he was working before. I think that the justices came to a right decision, and the appeal fails.

CROOM-JOHNSON, J.: I think that the word "reinstatement" means what it says. I agree.

LYNSKEY, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Wright & Bull*, agents for *W. H. F. Barklam*, Cardiff (for the appellants); *Solicitor to the Ministry of Labour* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

PONTYPRIDD AND RHONDDA JOINT WATER BOARD v. OSTIME (INSPECTOR OF TAXES).

[House of Lords (Viscount Simon, Lord Thankerton, Lord Wright, Lord Porter and Lord Simonds, January 25, 28, 29, March 29 1946.]

Income Tax—Trade receipt—Sums received by water board under precepts issued to constituent authorities—Sums provided out of general rate—Whether trade receipt—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I.*

Payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade or business are trading receipts, *i.e.*, are to be brought into account in arriving at the balance of profits or gains under the Income Tax Act, 1918, Sched. D. Case I ; but if the undertaker is a rating authority and the subsidy is the proceeds of rates imposed by it or comes from a fund belonging to the authority, the identity of the source with the recipient prevents any question of profits arising.

The appellant board was a joint water board which was authorised by a local Act to supply water direct to consumers in the districts of its two constituent authorities and to sell water in bulk to water undertakings in two more districts. In the event of an estimated deficit in its net revenue for any year the board was authorised to issue precepts to its two constituent authorities calling for lump sums to be contributed by them, which they might pay either from their respective district funds or by levying rates. If either authority made default in payment the board was empowered, by precept, to raise the necessary amount by levying a rate in place of the defaulting authority. In the exercise of its statutory powers the appellant board made an estimate which showed an estimated deficiency of £9,930 in the net revenue of the board for the period ending Mar. 31, 1939, and issued precepts on its constituent authorities for the respective sums apportioned to them out of that amount. The sums were duly paid by the constituent authorities and an appropriation account of the board for that year showed the amount of £9,930 as received under these precepts. The question at issue was whether the sums thus received under precept to meet an estimated deficiency in the result of what were admittedly trading activities fell to be taken into account in computing the profits and gains of the board's trade under the Income Tax Act, 1918, Sched. D, Case I :—

Held : (i) the appellant board was not entitled to the benefit of the principle of the exemption of public rating authorities from taxation in respect of the surplus of rates.

Re Glasgow Corpn. Waterworks (4) *distinguished.*

(ii) the sums in question were received as sums which went to make up the profits or gains of the board's trade.

(iii) the amount of the precepts were not in the same category as a local rate raised by a public body for the assistance of an undertaking carried on by that body, which was entitled to have such assistance ; the assistance in this case, was given for the purpose of being used in the business carried on by the appellant board so as to enable it to meet its trading obligations.

(iv) the sums received under precept were, therefore, trading receipts and fell to be taken into account in computing the profits and gains of the board's trade under Sched. D, Case I.

Decision of the Court of Appeal ([1944] 2 All E.R. 237), *affirmed.*

[**EDITORIAL NOTE.** Viscount Simon summarises the question at issue in this case in two propositions. Firstly, payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade are trading receipts. Secondly, this is subject to the exception that if the undertaker is a rating authority, and the subsidy is the proceeds of rates levied by the undertaker itself, there is no question of profits arising from trade, because there is no identity of source with the recipient. The House of Lords, in this case, applying these principles, affirm the Court of Appeal, holding that the sums considered in the present circumstances are trading receipts within the first of the foregoing propositions and as such may be brought into account for the purposes of Sched. D, Case I.

As to Profits Arising out of Trading Activities of Local Authorities, see HALSBURY, Hailsham Edn., Vol. 17, p. 105, para. 199 ; and for Cases, see DIGEST, Vol. 28, pp. 20, 21, Nos. 100-107.]

Cases referred to :

(*1) *Lincolnshire Sugar Co., Ltd.* v. *Smart*, [1937] 1 All E.R. 413 ; [1937] A.C. 697 ; Digest Supp. ; 106 L.J.K.B. 185 ; 156 L.T. 215 ; *sub nom. Smart* v. *Lincolnshire Sugar Co., Ltd.*, 20 Tax Cas. 643.

*(2) *Forth Conservancy Board* v. *Inland Revenue Comrs.*, [1931] A.C. 540 ; Digest Supp. ; 100 L.J.P.C. 193 ; 145 L.T. 121 ; *sub nom. Inland Revenue Comrs.* v. *Forth Conservancy Board*, 16 Tax Cas. 103.

(3) *Municipal Mutual Insurance, Ltd.* v. *Hills* (1932), 147 L.T. 62 ; Digest Supp. ; 16 Tax Cas. 430.

*(4) *Re Glasgow Corpn. Waterworks* (1875), 1 Tax Cas. 28 ; 28 Digest 21, *107 o* ; *sub nom. Glasgow Water Comrs.* v. *Inland Revenue*, 2 R. (Ct. of Sess.) 708.

*(5) *A.G.* v. *Black* (1871), L.R. 6 Exch. 308 ; 28 Digest 20, *100* ; 40 L.J.Ex. 194 ; 25 L.T. 207 ; 1 Tax Cas. 54, Ex. Ch. ; *affg.*, L.R. 6 Exch. 78.

(6) *A.G.* v. *Scott* (1873), 28 L.T. 302 ; 28 Digest 8, *34* ; 1 Tax Cas. 55.

*(7) *Glasgow Corpn. Water Comrs.* v. *Miller* (*Surveyor of Taxes*) (1886), 2 Tax Cas. 131 ; 28 Digest 21, *107m* ; 13 R. (Ct. of Sess.) 489.

*(8) *Mersey Docks and Harbour Board* v. *Lucas* (1883), 8 App. Cas. 891 ; 28 Digest 21, 104 ; 53 L.J.Q.B. 4 ; 49 L.T. 781 ; 2 Tax Cas. 25.

*(9) *Seaham Harbour Dock Co.* v. *Crook* (1931), 16 Tax Cas. 333 ; Digest Supp.

Appeal by the taxpayer from a decision of the Court of Appeal, given on July 24, 1944, and reported ([1944] 2 All E.R. 237). The facts are fully set out in the opinion of Lord Thankerton.

J. Millard Tucker, K.C., and *Terence Donovan* for the appellants.

Sir Patrick Hastings, K.C., and *Reginald P. Hills* for the respondent.

The House took time to consider its opinion.

Viscount Simon : My Lords, I have had the advantage of considering the opinion which Lord Thankerton is about to deliver, in which he has fully set out the facts in this case, and has examined and analysed the authorities. I agree with his conclusion and will limit myself to a brief statement of two contrasted propositions : the real question in the appeal seems to me to be under which of these two propositions the present case falls.

The first proposition is that, subject to the exception hereafter mentioned, payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade or business are trading receipts, *i.e.*, are to be brought into account in arriving at the balance of profits or gains under Sched. D, Case I. It is sufficient to cite the decision of this House in the sugar-beet case, *Smart* v. *Lincolnshire Sugar Co., Ltd.* (1), as an illustration.

The second proposition constitutes an exception. If the undertaker is a rating authority and the subsidy is the proceeds of rates imposed by it or comes from a fund belonging to the authority, the identity of the source with the recipient prevents any question of profits arising : see Lord Buckmaster's explanation in *Forth Conservancy Board* v. *I.R. Comrs.* (2) ([1931] A.C. 540, at p. 546), and compare what Lord Macmillan said in *Municipal Insurance* v. *Hills* (3) (16 Tax Cas. 430, at p. 448).

Lord Thankerton has conclusively demonstrated that the decision of the Lord President (Inglis) in the first Glasgow water case, *Glasgow Water Comrs.* v. *I.R.* (4) falls within this second proposition ; so interpreted, it was rightly decided, but it does not help the appellants. The precepts which the appellants issued called for lump sums to be contributed by the two urban district councils which they might pay either from their respective district funds or by levying rates. They were not agents for the appellants in finding the money, but distinct parties. It is true that if either of the councils did not provide the money, the appellants, instead of suing it, might itself by precept empower an officer of their own to raise the necessary amount by levying a rate in place of the defaulting authority, but the substance of the matter is that there is no such identity between contributors and recipients as removes the appellants from the application of the first proposition set out above.

I move that the appeal be dismissed with costs.

Lord Thankerton : My Lords, the subject-matter of this appeal arises upon an assessment made upon the appellant board under the Income Tax Act, 1918, Sched. D, Case I, in the estimated sum of £10,000 for the year 1939-1940 in respect of the profits of its trade, which was that of an undertaking for the supply of water. The only question argued before this House was whether certain sums paid, under precept, to the appellant board by the Pontypridd

Urban District Council and the Rhondda Urban District Council under the Pontypridd and Rhondda Water Act, 1910, s. 91, fall to be included as receipts in the computation of the appellant board's trade profits.

The Commissioners for General Purposes of the Income Tax for the Division of Miskin in the County of Glamorgan held that these sums received under precept were not trading receipts and should not be included, and, on the requisition of the Crown, stated a case for the opinion of the High Court of Justice. It may be mentioned that there was also a dispute as to whether a sum paid by the appellant board to the Taff Fechan Water Supply Board should be allowed as a deduction; the General Commissioners held that it should be so allowed, and this conclusion was affirmed in the King's Bench Division and in the Court of Appeal and the Crown did not press for its disallowance before this House. That point accordingly requires no further mention.

On appeal, the decision of the General Commissioners that the sums received under precept by the appellant board were not trading receipts and should not be included in the computation of profits was affirmed by MACNAGHTEN, J., but an appeal by the Crown to the Court of Appeal was allowed, and it was held that the sums in question were trading receipts and should enter into computation. Hence this appeal by the appellant board.

Counsel for the appellant board referred to reasons Nos. 6 and 7 of the appellant's case as embodying his main contentions. These are:

> (6) where a local authority carries on a commercial undertaking at a loss, and is permitted to make good that loss by a compulsory rate levied on the ratepayers, the amount of the rate so raised is not a receipt of the local authority's said trade, and (7) the board's position in respect of the sum raised by precept to meet its trading losses is similar to that of a local authority, its "ratepayers" being either the two councils, the Rhondda Urban District Council and the Pontypridd Urban District Council as its constituent authorities, or the individual ratepayers of those two districts.

The appellant board was established as a corporate body by a local Act, the Pontypridd and Rhondda Water Act, 1910, the board being constituted as follows: (*a*) The chairman for the time being of the Rhondda Urban Council; (*b*) the chairman for the time being of the Pontypridd Urban District Council; (*c*) six members to be appointed by the Rhondda Urban District Council; (*d*) four members to be appointed by the Pontypridd Urban District Council; and it was provided that no one was qualified to be a member of the board unless he was a member of either of these two urban district councils, these two councils being referred to in the Act as "the constituent authorities."

Under sects. 58 and 59 of the Act of 1910, as amended by sect. 25 (6) of the Pontypridd and Rhondda Water Act, 1913, the limits of supply within which the board are authorised to supply water direct to consumers are (1) the Pontypridd Urban District, and (2) part only of the Rhondda Urban District, but in addition the Board was authorised to sell water in bulk to the water uudertakers in (1) the Llantrisant and Llantwit Fardre Rural District, and (2) part of the Caerphilly Urban District. The maximum charges which may be made by the board for supplies taken by consumers within the limits of supply are fixed by sects. 61, 67 and 68 of the Act of 1910, sects. 26 and 27 of the Act of 1913, and sect. 18 of the Pontypridd and Rhondda Water Act, 1925. The maximum permitted charges have at all material times been charged by the board.

The payments received by the board from the persons to whom water is supplied consist of (*a*) payments made direct to the board by the consumers within the limits of supply, and (*b*) payments made by the water undertakers in the Llantrisant and Llantwit Fardre Rural District and part of the Caerphilly Urban District for water sold to them in bulk. It is admitted that both these classes of payments are trade receipts. In addition further sums are received by the board by virtue of sect. 91 of the Act of 1910, the material portion of which provides as follows:

> 91.—(1) Before the first day of April in each year or so soon thereafter as may be practicable the board shall make or cause to be made an estimate of the probable revenue and expenditure other than capital expenditure which will be received and incurred respectively during the year beginning on that day and if such estimate shows that there will be a deficiency in the net revenue of the board for the year the board are hereby authorised and required in every case forthwith to apportion the sum required to meet such deficiency between the constituent authorities in accordance with the provisions of this section.

> (2) The sum required to meet any deficiency whether for satisfying past or future liabilities shall be apportioned between and borne by the constituent authorities in the proportion which the assessable value of the Pontypridd District bears to the assessable value of that part of the Rhondda District which is within the limits of supply.
>
> (3) The board shall issue precepts to the constituent authorities for the amounts apportioned in pursuance of this section and the constituent authorities respectively shall within three months from the receipt of such precepts pay to the board the amount so apportioned to them respectively.
>
> (4) Such amounts respectively shall be paid by the constituent authorities out of their respective district funds and general district rates which funds and rates are hereby charged with the payment of the same accordingly and the constituent authorities respectively are hereby authorised and required to make and levy any rate that may be necessary for the purposes of this section.

Sect. 91 (5) provides that in default of payment by a constituent authority of the amount so apportioned to it, the board may sue the defaulting authority or itself cause a rate to be levied in the district of such authority, in order to secure payment.

Pursuant to sect. 91, the board made an estimate, which showed an estimated deficiency of £9,930 in the net revenue of the board for the period ending Mar. 31, 1939, and issued precepts on the constituent authorities for the respective sums apportioned to them out of the said amount. These sums were duly paid by the constituent authorities, and an appropriation account of the board for that year showed the amount of £9,930 as received under these precepts. The question at issue is whether the sums thus received under precept to meet an estimated deficiency in the result of what are admittedly trading activities, fall to be taken into account in computing the profits and gains of the board's trade under Sched. D, Case I.

Counsel for the appellant board, submitted, in the first place, that the amounts of the precepts were not to be included among its trade receipts, in view of the decision in the case usually referred to as the first *Glasgow* case, *Glasgow Water Comrs.* v. *Inland Revenue* (4), with which he maintained the present case was *in pari casu.* In the second place, counsel contended that the sums in question were not trade receipts (*a*) on general grounds, and (*b*) that they were in exactly the same category as a local rate raised by a public body for the assistance of an undertaking carried on by that body, which is entitled to have such assistance.

My Lords, the first of these contentions appears to me to involve the question, whether the appellant board is entitled to the benefit of the well recognised principle of the exemption of public rating authorities from taxation in respect of the surplus of rates, which is defined by LORD BUCKMASTER in *Forth Conservancy Board* v. *Inland Revenue Comrs.* (2) as follows ([1931] A.C. 540, at p. 546) :

> The principle of exemption for the surplus of rates is, I think, to be found in this, that the rating authority collects money from the inhabitants of the district for the purpose of application to the expenses incurred on behalf of the inhabitants, and that any surplus rightly belongs to the inhabitants themselves, who receive its benefits in case of any surplus, because it is carried forward towards the expenses of the ensuing year.

This principle had already been recognised before the first *Glasgow* case (4) in *A.-G.* v. *Black* (5), in which it was admitted by the Crown (L.R. 6 Ex. 78, at p. 83), that a tax imposed by the community on themselves did not involve liability to income tax, and, in the Exchequer Chamber, KEATING, J., said (L.R. 6 Ex. 308, at p. 311) :

> Mr. Manisty does not contend that harbour and port dues, and other revenues of that description, are not taxable ; and the Attorney-General admits that a district rate is not. The question then is, does the rate in question partake more of the nature of the one or of the other ? I am of opinion that it does not partake of the character of a district imposed by the inhabitants of a place upon themselves ; and that, on the other hand, it is very difficult to distinguish it from harbour dues.

It will be found that this same principle was applied in the first *Glasgow* case (4), which was decided four years later, and to which I will now return.

The Glasgow Water Commissioners were created as a statutory incorporation, according to the law of Scotland, by the local Act 18 and 19 Vict., cap. cxviii, by sect. 6 of which it was provided :

> The magistrates and council of the city of Glasgow and their successors in office

> for the time being, as representing and for and on behalf of the community of the said city, are hereby appointed commissioners for executing and carrying into effect the purposes of this Act.

They were required to furnish the City of Glasgow, *i.e.*, within the municipal boundaries, with a supply of water for domestic purposes, and to erect thirty-two public fountains within those boundaries which form the limits of compulsory supply. They were empowered also to deal with parties outside the compulsory limits. Within the limits of compulsory supply the water commissioners were entitled to levy two rates, (*a*) a domestic water rate, levied on the occupiers of all dwelling-houses within the area, according to their rents, and (*b*) a public water rate not exceeding a penny in the pound on the full annual value of all premises whatever within the same limits. Both these rates were payable irrespective of whether the ratepayers chose to use the water or not. After meeting the current expenses of the undertaking, interest on borrowed money and sinking fund charges, the water commissioners were required to apply any surplus in reduction of the domestic water rate for the following year. Having been assessed to income tax for the year 1872-1873 in respect of profits to the amount of £17,032 15*s*., arising upon their undertaking, the water commissioners' appeal was refused by the Commissioners of Property and Income Tax for the City of Glasgow, and a case stated by them came before the First Division of the Court of Session, which allowed the appeal. The LORD PRESIDENT (INGLIS) said (1 Tax Cas. 28, at p. 48) :

> Now, the sum of £17,032 15*s*., upon which the charge is made under Sched. D of the Income Tax Act, comprehends the whole portion of the revenue of the water commissioners which is applied towards the formation of the sinking fund, in redemption of the annuities and mortgages in the manner that I have already mentioned, and also the balance, if any, which is carried forward to the following year's account to be applied as the Act directs in reducing the domestic water rate ; and the question is, whether income arising from this assessment, which is appropriated to such purposes, is assessable for income tax under Sched. D as profits of this water undertaking. I am humbly of opinion that it is not. It seems to me that this is an Act of Parliament by which the citizens of Glasgow have undertaken, through this water corporation as their representatives, to assess themselves for a very important public purpose—a purpose very conducive to their own comfort and well-being—to obtain a good supply of water for the city. In so assessing themselves they had not in view certainly to make profit by the undertaking. On the contrary, what they have distinctly in view is to pay money in order to obtain this particular benefit. They are not therefore trading in any commodity, nor are they entering into any undertaking for the use of property that is to be attended by a resulting profit, or a beneficial interest accruing to any individuals, or to any corporation. The object of the assessment is to pay for bringing in the water, and when that is done the assessment and the authority to levy it come to an end.

The LORD PRESIDENT then distinguishes the case from *A.-G.* v. *Black* (5), and *A.-G.* v. *Scott* (6) (*ibid.*, at p. 49) :

> The case is entirely different from those that have been cited which have been decided in the Court of Exchequer in England, because in those cases the statute which gave the right to levy the assessment did not impose it upon the citizens of the particular burgh or locality which obtained the Act. It was not an authority to the citizens of a particular locality to assess themselves.

The LORD PRESIDENT then made the reservation which led to the second *Glasgow* case (7) (*ibid.*) :

> I have only further to say, that if any attempt had been made here to discriminate between that portion of the revenue which arises from the rates levied within the limits of compulsory supply and that portion of the revenue which is raised in the districts beyond the limits of compulsory supply, I should have been very glad to attend to any grounds which might have been urged for such a distinction.

The taxability of profits in respect of the extraneous sources of revenue was raised in *Glasgow Water Comrs.* v. *Miller* (7), in which it was held that, while the rates levied within the compulsory area were to be regarded as sums levied to defray the cost of the water supply within the district, so that any surplus remaining over could not be regarded as profit, any surplus of rates above outlay collected beyond the compulsory area, or from sales to manufacturers, was profit, which went to reduce the cost of water supply to these within the compulsory area, and was liable to assessment for income tax under Sched. D.

Referring to the decision in the earlier case the LORD PRESIDENT (INGLIS), in delivering the judgment of the court said (2 Tax Cas. 131, at pp. 140, 141):

> We are all of opinion that within the limits of compulsory supply the concern or undertaking as defined by the local Act was of this nature, that the citizens of Glasgow undertook to assess themselves for accomplishing the important public purpose of supplying the city (being the limits of compulsory supply) with a good supply of pure water, that in doing so they had and could have no view of making profit, for that would have been equivalent to paying out of one pocket and into another pocket of the same individual or class, that they paid these assessments for no other purpose than that of obtaining the particular contemplated benefit, and when that benefit is fully attained and secured for the future the assessment and the authority to levy it come to an end. I have re-considered that judgment, and have not seen any reason to doubt its soundness.

The significant features of the first *Glasgow* case (4) were that (1) the water commissioners were expressly appointed " as representing and for and on behalf of " the community of the City of Glasgow, which formed the area of compulsory supply; (2) the commissioners had the power of levying the domestic and public rates direct on the ratepayers within the compulsory area, and, *quoad* these rates, the ratepayers were ratepayers of the commissioners and not of the municipal corporation; (3) these rates were payable whether the particular ratepayer chose to use the water or not; (4) no price was paid by any domestic consumer for his particular supply and he did not enter into any trading transaction with the commissioners; (5) the rates thus levied were applied to the expenses incurred on behalf of the inhabitants, and any surplus rightly belonged to the ratepayers, and was carried forward and applied in reduction of the domestic rate in the next year, thus answering LORD BUCKMASTER'S definition of the principle. On the other hand, the present case is very different: the appellant board (1) are not directly representative of the inhabitants of the Rhondda and Pontypridd Urban District Councils; (2) their limits of supply do not include the whole of the Rhondda Urban District; (3) they have no power to levy a rate, except on default of a constituent authority; (4) the sums obtained by precepts under sect. 91 are not the expense of obtaining a benefit for the inhabitiants of the compulsory area, but are designed to meet a deficiency arising out of the insufficiency of their admitted trading receipts to cover their trading transactions with the individual consumers within the limits of supply, and their sales in bulk—in other words, to make good their loss in trading; (5) in view of sect. 91 (4) these sums are not necessarily paid out of the proceeds of any rate; and (6) there is no provision for a public rate, and it would appear that if a constituent authority needed water for any of the purposes usually covered by a public water rate, it would need to enter into a trading transaction with the board. In all these respects the present case is in strong contrast to the first *Glasgow* case (4).

It is true that in *Forth Conservancy Board* (2) LORD BUCKMASTER ([1931] A.C. 540, at p. 547), while finding it unnecessary for the purposes of that case to examine the soundness of the decision in the first *Glasgow* case (4), said it appeared difficult to reconcile it with the later decision in this House in *Mersey Docks* v. *Lucas* (8), and LORD DUNEDIN (*ibid.*, at p. 549) expressed a similar doubt. I did not share these doubts, and, as I pointed out (*ibid.*, at p. 555) the LORD PRESIDENT (INGLIS) had the *Mersey Docks* case (8) before him in the second *Glasgow* case (7), and reaffirmed his decision in the first case, and the judgment delivered by the LORD PRESIDENT (INGLIS) was the judgment of the court, and in the *Mersey Docks* case (8), two out of the three Lords who took part in the decision referred to the first *Glasgow* case (4): LORD BLACKBURN (8 App. Cas. 891, at p. 911) approved of the principle on which the Court of Session acted, though, not having the Glasgow Act before him, he was not able to say whether a proper construction had been put on it. LORD FITZGERALD (*ibid.*, at p. 913) clearly found no inconsistency between the decision in the *Glasgow* case (4) and the decision in the *Mersey Docks* case (8). Having again considered the matter, I am unable to find any inconsistency between the decisions in these two cases.

The claim of counsel for the appellant board to come within the principle of the first *Glasgow* case (4) not only fails, in my opinion, but in stating the various points of contrast between the provisions of the Glasgow Water Act and the provisions of the appellant board's Water Act, the various matters I have indicated in respect of the latter Act, go far to show that the amount of the precepts are not in the position claimed under head (*b*) of counsel's second contention, *viz.*, that they were in exactly the same category as a local rate raised by a public body for the assistance of an undertaking carried on by that body, which is entitled to have such assistance. But I will deal first with head (*a*) of counsel's second contention, by which he contended on general grounds that the sums in question were not trade receipts; in regard to this contention he cited two cases, the first of which was *Seaham Harbour Dock Co.* v. *Crook* (9), which was decided by this House in 1931. The harbour dock company had applied for and obtained grants from the unemployment grant committee, from funds appropriated by Parliament; these grants were paid as the work progressed and were equivalent to half the interest on approved expenditure met out of loans. The payments were made several times a year for some years. It was held that they were not to be brought into account in computing annual profits or gains. LORD BUCKMASTER said (16 Tax Cas. 333, at p. 353):

> It was a grant . . . by a government department with the idea that by its use men might be kept in employment . . . I find myself quite unable to see that it was a trade receipt or that it bore any resemblance to a trade receipt.

It was said by LORD ATKIN (*ibid.*):

> . . . when . . . received, they were received by the appropriate body not as part of their profits or gains or as a sum which went to make up the profits or gains of their trade.

I am unable to regard the sums here in question as falling into the same category as the unemployment grants; on the contrary, they were received "as a sum which went to make up the profits or gains of their trade."

The other case cited was *Lincolnshire Sugar Co.* v. *Smart* (1), in which advances made under the British Sugar Industry (Assistance) Act, 1931, to a company carrying on business as manufacturers of sugar beet were held to be trading receipts of the company and liable to income tax under Sched. D., Case I. The language of LORD MACMILLAN in describing the nature of these advances seems to be equally applicable to the sums in question in this appeal. LORD MACMILLAN, in whose opinion the other four Lords concurred, said ([1937] A.C. 697, at p. 704):

> It was with the very object of enabling them to meet their trading obligations that the "advances" were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency.

In my opinion, these two cases afford sufficient reason for rejection of the contention of counsel for the appellant board, that, on general grounds, the sums here in question are not trading receipts.

In addition to what I have already said as to head (*b*) of counsel's second contention, I will only add that the two cases last cited show that if, as in my opinion was the case here, the assistance is given for the purpose of being used in the business carried on by the appellant board, so as to enable them to meet their trading obligations, the amounts so given are trading receipts, and this contention also fails.

I have so far expressed my own opinion, but I would like to express my general agreement with the reasons given in the judgments in the Court of Appeal.

Accordingly I am of opinion that the appeal should be dismissed with costs, and that the order of the Court of Appeal should be affirmed.

My Lords, I have been asked by LORD PORTER to say that he concurs with the opinions which have been delivered.

LORD WRIGHT [read by LORD THANKERTON]: My Lords, I agree with the speech which has just been delivered by LORD SIMON and do not desire to add anything to it.

LORD SIMONDS: My Lords, I concur.

Appeal dismissed with costs.

Solicitors: *Theodore Goddard & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MACMILLAN AND CO., LTD. *v.* REES

[COURT OF APPEAL (Scott, and Tucker, L.JJ., and Evershed, J.), March 27, 28, April 11, 1946.]

Landlord and Tenant—Rent restriction—Standard rent—Premises let as dwelling-house in 1940*—Same premises let in* 1938*, at higher rent, as business offices with licence for tenant to sleep on premises—Claim by landlord to fix standard rent by reference to* 1938 *letting—"Dwelling-house"—*1938 *letting not as a dwelling-house—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (*c.* 17), *s.* 12 (1) (*a*)*—Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71).

In July, 1940, certain premises to which the Rent Restrictions Acts applied were let as a dwelling-house to the appellant, R., at a rent of £78 a year. By a previous lease, dated Mar. 24, 1938, the premises in question had been let to M. at a rent of £100 a year on condition that they were not to be used "for any other purpose than as offices for the tenant's business," but with a licence for the tenant or her partner to "sleep upon the premises should they so require." For the first 4 months of that tenancy, M.'s partner had slept on the premises and had also eaten some meals there. On Sept. 1, 1939, the premises had been occupied solely as offices. On June 5, 1945, the landlords served a notice on R., purporting to terminate his contractual tenancy and to increase the rent to £100 a year. They contended that that was the standard rent of the premises because the lease of 1938 constituted the last letting of the premises as a dwelling-house before Sept. 1, 1939. It was contended by R. (*a*) that the lease of 1938, properly construed, was a letting for business purposes only and not a letting of the premises as a dwelling-house; (*b*) that the fact that M.'s partner had for the first 4 months of the 1938 lease slept on the premises and had her meals there did not amount to user by the tenant of the premises as a dwelling-house so as to give rise to a letting of the premises as a dwelling-house during that time:—

HELD: (i) upon the true construction of the lease of 1938, the permission for the tenant or her partner to sleep on the premises did not contemplate the user of the premises as a dwelling-house, but was merely a proviso that the use of the premises for sleeping accommodation at night should not be regarded as a breach of the covenant against user save for business purposes.

(ii) sleeping on particular premises at night, or having meals on them, did not *ipso facto* have the effect in law of making those premises a dwelling-house. On the facts of the case, under the lease of 1938 there had not been a user of the premises as a dwelling-house.

(iii) the landlords could not refer back to the lease of 1938 to determine the standard rent of the premises because that lease had been for business purposes and was not a letting of the premises as a dwelling-house.

[**EDITORIAL NOTE.** The word "dwelling-house" imports something more than merely sleeping or taking meals on premises. This may in some circumstances be sufficient to take premises out of the category of business premises, as in the case of rooms occupied as sleeping apartments by a hotel staff, in *Richmond (Duke)* v. *Dewar & Cadogan Hotel Co.* (1921), 38 T.L.R. 151, but in general the test is that laid down in *Greig* v. *Francis & Campion, Ltd.* ((1922) 38 T.L.R. 519): "What has to be determined, as a question of fact, is what was the real, main and substantial purpose of the premises."

AS TO BUSINESS PREMISES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 315, 316, para. 371; and FOR CASES, see DIGEST, Vol. 31, pp. 558, 559, Nos. 7055-7067.]

Cases referred to:

(1) *Phillips* v. *Barnett*, [1922] 1 K.B. 222; 31 Digest 566, *7132*; 91 L.J.K.B. 198; 126 L.T. 173.

*(2) *Haskins* v. *Lewis*, [1931] 2 K.B. 1; Digest Supp.; 100 L.J.K.B. 180; 144 L.T. 378.

APPEAL by the defendant from an order of His Honour JUDGE DRUCQUER, made at Westminster County Court, and dated Dec. 3, 1945. The facts are fully set out in the judgment of the court delivered by EVERSHED, J.

Roy Wilson for the appellant, the tenant.

C. J. Salkeld Green for the defendants, the landlords.

Cur. adv. vult.

SCOTT, L.J.: I will ask EVERSHED, J., to read the judgment of the court.

EVERSHED, J. [delivering the judgment of the court]: This is an appeal from a judgment of the county court judge of the Westminster County Court in favour of the plaintiffs for a sum of £7 9*s.* 1*d.*, being (save for a sum of 6*s.* in respect of an electric meter rent) the amount of alleged arrears of the rent of certain premises known as suite No. 8, 22, 24, Orange Street, Haymarket, London, of which the defendant is in occupation. This amount (less the sum of 6*s.*) represents in fact the difference over a period of seventeen weeks between rent at the rate of 30*s.* per week or £78 per annum (at which the premises were let to the defendant by the plaintiffs' predecessor in title, in July, 1940) and rent at the rate of £1 18*s.* 5*d.* per week or £100 per annum, which the plaintiffs allege to be the "standard rent" under the Rent Restrictions Acts; the plaintiffs having on June 5, 1945, served upon the defendant a notice purporting to terminate the contractual tenancy of the defendant and to increase the rent to the alleged standard rent of £100 per annum from July 7, 1945. It is common ground that the premises, which have been occupied by the defendant as a dwelling-house since July, 1940, came within the scope of the Rent Restrictions Acts by virtue of the Act of 1939, and that they constitute accordingly a "1939 Act house." The "standard rent" of the premises is therefore to be determined according to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*a*), as amended by the 1939 Act:

> . . . "standard rent" means the rent at which the dwelling-house was let on Sept. 1, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Sept. 1, the rent at which it was first let.

The sole question in the action and on this appeal is whether the plaintiffs (the respondents to the appeal) can make good their claim to fix the standard rent by reference to a lease of the premises by their predecessor in title in 1938, which they claim constituted the last letting of the premises as a dwelling-house before Sept. 1, 1939, the premises being on that date occupied in fact solely as offices. It will be necessary to refer later to the terms of the lease of 1938.

The argument of the defendant (the appellant before this court), which has been presented to us with great care and skill, is of a three-fold character. First, it is said that the lease of 1938, to which the respondents claim to have recourse, was upon its proper interpretation a letting of the premises for business purposes only, and did not therefore amount to a letting of the premises as a dwelling-house. Secondly, it is said that, assuming the terms of the lease to be "neutral," *i.e.*, such as to entitle the tenant to use them either as a dwelling-house or for business purposes or both, the facts proved (*viz.*, that the then lessee's business partner, during a period of four months after the commencement of the 1938 lease, slept and had her meals upon the premises) did not amount to user by the tenant of the premises as a dwelling-house so as to give rise to a letting of the premises as a dwelling-house during those four months: on one or both of the grounds that the mere acts of sleeping and eating meals in the circumstances of the present case fell short of the attributes required to constitute an abode or home, or that such activities were not in any case those of the tenant but of a third party, a stranger to the lease, albeit with the permission both of the landlord and the tenant. Thirdly, it was argued that if there was a user, and therefore a letting, of the premises as a dwelling-house for the first four months of the term of the 1938 lease, the premises were, during the remainder of that term, indubitably used exclusively for business purposes: with the result that the premises wholly ceased to exist as a dwelling-house and that the landlord accordingly cannot now identify the premises which were let as a dwelling-house to the appellant in 1940 with the subject-matter of any letting as a dwelling-house prior to their user for business premises, and cannot therefore have recourse to any such earlier letting for the purposes of fixing the standard rent. The last branch of the appellant's argument is founded on a principle which counsel for the appellant seeks to establish from a number of decisions of this court and of the High Court, of which the first is *Phillips* v. *Barnett* (1).

We now turn to the terms of the 1938 lease. It is dated Mar. 24, 1938, and made between one Edgar Dudley, (therein called "the landlord"), and Phyllis Manger (therein called "the tenant"), the expressions "landlord" and "tenant" being defined as including " where the context admits " their respective successors in title. The subject-matter is described as :

> . . . all that tenement or suite of rooms . . . being suite No. 8, in the messuage or block of flats known as 22, 24, Orange Street, Haymarket, in the county of London.

The term of the lease was one year certain from Mar. 25, 1938, and thereafter until determined by three calendar months' notice on either side. The rent was £100 per annum, plus a further sum (which appears never to have become payable) in respect of increased rates. The most important provision is that contained in cl. 2 (5) which comprises the tenant's covenants, and which was as follows :

> Not to use the said suite for any other purpose than as offices for the tenant's business of travel and buying service . . . The tenant and Mrs. Mittler may however, sleep upon the premises should they so require.

Cl. 2 (6) imposed upon the tenant the obligation to see that the street door of the building was closed between the hours of 7 p.m. (1 p.m. on Saturday) and 7 a.m. on each week day and all day on Sundays, bank and general holidays. Para. 13 contained a covenant against assignment or underletting without the landlord's written consent, in more or less common form.

We were informed that the suite consisted of two rooms plus a bathroom and lavatory, there being also some cooking equipment in one or other of the rooms. The facts proved in evidence by a member of the firm of estate agents who managed the premises at all material times, and by Miss Manger, were that Mrs. Mittler (Miss Manger's partner in the travel business) slept and had her meals on the premises from the end of March to Aug. 2, 1938 ; but there was no evidence of any further use of the premises by the tenant or Mrs. Mittler as a home or residence.

The county court judge was of opinion that, having regard to the terms of cl. 2 (5) of the lease of 1938, the suite was let to be used as a dwelling-house and that Mrs. Mittler's use of it for sleeping (and eating) as contemplated by the lease amounted to its use in fact as a dwelling-house. The material part of his judgment was as follows :

> It is, of course, clear that, but for the permission given in cl. 2 (5) of the lease to the tenant and Mrs. Mittler to sleep upon the premises, the tenancy would not have been controlled by the Rent Restrictions Acts, which do not apply to business premises. But, in my opinion, having regard to the said permission, the flat was let to be used as a dwelling-house by the tenant and Mrs. Mittler and in accordance with that permission Mrs. Mittler in fact used it as a dwelling-house.

In our judgment, the county court judge was wrong in his conclusion that the permission given by cl. 2 (5) of the lease contemplated the user of the premises as a dwelling-house : and, since the user of the premises by Mrs. Mittler was (as found by the judge) in accordance with, and not in excess of, the permission given by the lease, it follows that in our judgment the judge was wrong also in holding that such user amounted in the circumstances of the case to user of the premises in fact as a dwelling-house.

It is, no doubt, true that the acts of sleeping upon premises at night and having meals upon them by day are acts which may be described as " residential " in character. But the use of premises as a dwelling-house is by no means necessarily confined to their use by the tenant for sleeping and eating. The experience of great numbers of Englishmen during the last six years provides many instances of sleeping and eating upon premises which could by no fair use of language on that account be described as dwelling-houses. In other words, to sleep on particular premises at night, or to have one's meals upon them by day, or both, ought not *ipso facto* to have the effect in law of making those premises a dwelling-house ; nor, in the light of the facts of *Haskins* v. *Lewis* (2) should the reference by SCRUTTON, L.J., ([1931] 2 K.B. 1, at p. 11), to the residential character of the act of sleeping on the premises in question, be interpreted as an authority for a contrary proposition.

In the present case, we cannot, upon the fair interpretation of the permission granted by cl. 2 (5) of the lease of 1938 to the tenant or her partner to sleep on the premises, infer that user of the premises as a dwelling-house in any true sense of the term was contemplated. The contrary view would necessarily involve repugnance in the clause itself, since the user of the premises as a dwelling-house must have involved a breach of the covenant on the part of the tenant, not to use them for any other purposes than as offices. And this conclusion is emphasised if regard is had to the small size of the premises. Properly construed, therefore, we think that the permission at the end of the clause in question is equivalent to a proviso that the use of the premises by the tenant or her partner as a matter of convenience for sleeping accommodation at night should not be regarded as a breach of the tenant's covenant against user save for business premises. Although our conclusion on construction would not thereby be affected, we think that in the context of para. 5, the word " tenant " ought to be confined to Miss Manger herself.

As regards the meals had on the premises (to which no reference is made in the covenant), it is, we think, clear that such a use of office premises could not of itself be said to convert the premises into a dwelling-house : and, on the particular facts of this case, no different result follows, we think, from the addition of this activity on the part of Mrs. Mittler to her activity of sleeping on the premises pursuant to the licence given. We observe finally, that there is in the present case no suggestion that the form of the lease was designed as a subterfuge to evade the Rent Restrictions Acts. If such had been the case, other considerations would have to have been taken into account.

Having regard to our conclusion upon the first two heads of the appellant's argument, it is unnecessary for us to express any opinion upon the difficult point raised by the third head, save to observe that none of the cases cited is a direct authority upon it. The question was stated by Greer, L.J. ([1931] 2 K.B. 1, at p. 16), in *Haskins* v. *Lewis* (2) to be undecided : and it remains undecided to-day. The result is that the respondents have, in our judgment, failed to make good their claim to refer back to the 1938 lease for the determination of the standard rent of the premises : and, since their claim in the action was necessarily founded solely on that lease, they fail to justify their demand for the arrears of rent. As regards the small sum of 6*s*. for meter rent, no evidence was given at the hearing to support that part of the claim.

In our judgment, therefore, the appeal must be allowed and the judgment of the county court judge must be set aside.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors : *Arbeid & Co.* (for the appellant) ; *Parker, Garrett & Co.* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

MILLENIUM PRODUCTIONS, LTD. *v.* WINTER GARDEN THEATRE (LONDON), LTD.

[Court of Appeal (Lord Greene, M.R., Somervell and Cohen, L.JJ.), April 10, 11, 12, 1946.]

Landlord and Tenant—Licence—Revocation—Licence for use of theatre—Express term entitling licencee to determine licence—No provision for determination by licensor—No right in licensor to revoke licence.

Injunction—Breach of contract—Grant of irrevocable licence to use theatre—Negative covenant by licensor not to revoke implied in grant—Right of licencees to injunction to restrain licensor from acting on purported revocation.

The respondents, Winter Garden Theatre (London), Ltd., granted a licence of their theatre to the appellants, Millenium Productions, Ltd., for the purpose of producing stage plays, concerts or ballets. By the terms of the agreement, the licence was for 6 months from July 6, 1942, at £80 a week with an option to continue for a further period of 6 months at an enhanced rent. On the expiration of the two periods of 6 months, the licencees were " to have the option of further continuing the licence of the theatre " at a rent of £300 a week, and they were to give to the licensors one month's notice of their intention of then terminating the licence. They were to give 6 weeks' notice of their intention to exercise the first option and similar notice of their intention to exercise their " option to continue thereafter." The agreement provided for payments in advance. It further provided (*inter* *alia*) that the licensors should retain the bars, cloakrooms and right to sell programmes, etc., but that the licencees were to participate equally in the net profits and losses thereof; that the licencees were not to grant a sub-licence of the theatre without the consent of the licensors, but that such consent would not be unreasonably withheld; and that the licencees were to leave the theatre in the same state and condition as then existed, reasonable wear and tear, etc., excepted. On Apr. 24, 1943, the licencees exercised their option to prolong the licence beyond the end of the 12 months from July 6, 1942. On Sept. 11, 1945, the licensors purported to determine the licence. It was contended by the licencees that the licensors could not revoke the licence because the contract contained no term enabling them to do so, and, on the true construction of the contract, such a term could not be implied. On behalf of the licensors it was contended that a licence was distinct from the contract which created it, and, under a rule of law, was determinable at will:—

Held: (i) the question whether or not a licence is revocable cannot be segregated from the rest of the contract which created it; the nature of the licence depends on the terms of the contract which must be construed according to ordinary principles.

(ii) upon the true construction of the terms of the contract in question, the licensors had no power to revoke the licence.

(iii) the grant of an irrevocable licence implied a negative undertaking by the licensors not to revoke it. An injunction could, therefore, be granted to restrain the licensors from acting upon the purported revocation, which was a breach of contract.

[**EDITORIAL NOTE.** The court rejects the view that a licence is something having a separate existence independent of the contract by which it is created. Such a licence therefore, and particularly the question of its revocability, is to be construed by considering the contract as a whole. In view of all the surrounding circumstances of the case reported the court holds that there is no ground for implying a power of immediate revocation by the licensor.

As to Revocation of Licence, see HALSBURY, Hailsham Edn., Vol. 20, pp. 10-12, para. 6; and for Cases, see DIGEST, Vol. 30, pp. 512-514, Nos. 1669-1700. As to Implied Negative Covenants, see HALSBURY, Hailsham Edn., Vol. 18, pp. 63-68, paras. 87-91; and for Cases, see DIGEST, Vol. 28, p. 454, Nos. 717-719.]

Cases referred to:

*(1) *Minister of Health* v. *Bellotti, Minister of Health* v. *Holliday*, [1944] 1 All E.R. 238; [1944] 1 K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146.

(2) *Canadian Pacific Ry. Co.* v. *R.*, [1931] A.C. 414; Digest Supp.; 100 L.J.P.C. 129; 145 L.T. 129.

(3) *Kerrison* v. *Smith*, [1897] 2 Q.B. 445; 30 Digest 512, *1675*; 66 L.J.Q.B. 762; 77 L.T. 344.

*(4) *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K.B. 1; 30 Digest 513, *1682*; 83 L.J.K.B. 1837; 111 L.T. 972.

Appeal by the plaintiffs from an order of Roxburgh, J., dated March 6, 1946. By two letters dated June 10, 1942, the defendants, Winter Garden Theatre (London), Ltd., granted a licence of their theatre to Countess de la Marr, "for the purpose of producing stage plays, concerts or ballets." The terms on which the licence was granted were set out in one of these letters. By an agreement dated Oct. 1, 1942, which was made between the defendants of the first part, the Countess de la Marr of the second part, and the plaintiffs of the third part, and which referred to the two letters of June 10, 1942, the defendants granted a licence to the original licensee to assign the licence to the plaintiffs and they granted a licence to the plaintiffs to grant a sub-licence of the theatre to Tom Arnold and Jack Hylton. Except for certain immaterial variations, the agreement of Oct. 1, 1942, confirmed the terms of the licence of June 10, 1942. On Sept. 11, 1945, the defendants purported to determine the licence. The plaintiffs brought an action claiming (i) a declaration that the licence was not revocable by the defendants except upon breach by the plaintiffs of the terms of the licence; (ii) alternatively, a declaration that the licence if revocable at the option of the defendants was valid and effective until after the expiration of a reasonable notice or alternatively after the expiration of a reasonable period from the receipt by the plaintiffs—of notice of revocation. The defendants, in a counterclaim, claimed: (i) a declaration that the plaintiffs' licence to use the theatre had been determined and that after the lapse of a time reasonably sufficient to vacate the theatre they had no right to use the theatre; (ii) an injunction to prevent the plaintiffs from using the theatre; (iii) damages for trespass. Roxburgh, J., dismissed the action, and on the counterclaim declared that the plaintiffs' licence to use the theatre had been determined, and that after the lapse of a time reasonably sufficient to vacate the theatre, they had no right to use the theatre. The relevant terms of the licence and the arguments are fully set out in the judgment of Lord Greene, M.R.

Gilbert Beyfus, K.C., and Michael Albery for the appellants.

Valentine Holmes, K.C., and *Hon. T. G. Roche* for the respondents

Lord Greene, M.R.: The hearing of this appeal was advanced at the request of the parties, who were anxious to have a speedy decision. The subject-matter with which the appeal is concerned is one on which the law can scarcely be said to be clear in every particular. It may be that, by taking time to consider my judgment, I could have expressed my reasons in a more satisfactory way; but, having regard to the fact that the parties wish a speedy decision and the fact that we have come to a conclusion on the argument submitted to us, we feel justified in delivering judgment at once.

The only matter which we have heard argued arises on the claim in the action. The substantial question raised was whether or not the defendants, the present respondents, had power under the contract between the parties to determine the licence of the Winter Garden Theatre. They have purported to determine it and that was the occasion on which the question arose. But we have had to consider, not the particular circumstances relating to that purported determination, but the general question whether or not there is a power to determine. The counterclaim raised a number of questions. It was based primarily on the view that the notice which purported to determine the licence was an effective notice for the purpose and carried with it certain legal consequences. The nature of those consequences is something we are not concerned to consider now, because on the view that we take the appellants succeed in the action. That being so, the ascertainment of the rights of the parties, which would have been necessary if the notice to determine had been effective, does not fall for consideration.

Before I come to examine the actual language of the relevant documents it may, I think, be helpful to state, in as few sentences as I can, certain propositions which appear to govern part of the subject-matter with which we are concerned. Counsel for the respondents put in the forefront of his argument a proposition of this nature. There is a thing called a licence, which is something which, so to speak, has a separate existence, distinct from the contract which creates it; and there is a rule of law governing that particular thing which says that a licence is determinable at will. That seems to me to be putting the matter on the wrong footing. A licence created by a contract is not an interest. It creates a contractual right to do certain things which otherwise would be a trespass. It seems to me that, in considering the nature of such a licence and the mutual rights and obligations which arise under it, the first thing to do is to construe the contract according to ordinary principles. There is the question whether or not the particular licence is revocable at all and, if so, whether by both parties or by only one. There is the question whether it is revocable immediately or only after the giving of some notice. Those are questions of construction of the contract. It seems to me quite inadmissible to say that the question whether a licence is revocable at all can be, so to speak, segregated and treated by itself, leaving only the other questions to be decided by reference to the true construction of the contract. As I understand the law, rightly or wrongly, the answers to all these questions must depend on the terms of the contract when properly construed in the light of any relevant and admissible circumstances.

I do not pause to examine the cases to which we were referred, but it seems to me that none of them lay down any proposition contrary to what I have said. Indeed, they appear to me to affirm it. In *Minister of Health* v. *Bellotti* (1), in which the facts were peculiar, I ventured to quote ([1944] 1 All E.R. 238, at p. 242), a passage from the judgment of the Privy Council in *Canadian Pacific Ry. Co.* v. *R.* (2), which says this ([1931] A.C. 414, at p. 432):

> Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case.

Even if it is said that a licence is a thing which, if artificially taken by itself and in isolation, is in its nature revocable, the contract must be examined to see whether that rule applies to the particular licence under consideration. I do not mind the law being stated in that way, and that may be what was meant by the passage which I have quoted. However, that does not get one very far but simply leads one back to the construction of the agreement as a whole. Fortunately, we are not concerned in this case with the question which may arise in appropriate circumstances as to what the rights of a licensee are when his licence has been determined. That matter does arise incidentally, in a way which I will explain in a moment but it is of no direct importance in this appeal.

There is one further matter which I might refer to and that is this. One is often tempted, in construing a commercial document, to say: "Well, if the parties had meant such and such a thing, they would very naturally have provided for it." Another thing that one is sometimes tempted to say is: "Here is the sort of clause which you would expect in an agreement like this. It is almost impossible to suppose that the parties would have done what it is said they did without providing such and such a clause by way of safeguard." I am far from saying that those are the sort of considerations which one must put out of one's mind. But they are considerations to which I think undue weight is very often given, because whether you would expect a particular clause in a particular contract between particular parties must depend, as a commercial matter, very largely on the bargaining position of the parties. A party who may be keen on what he conceives to be a good bargain will refrain from insisting on some clause which might be to his advantage. I am far from saying that the circumstances of this case would justify us in inferring that the licensors were, so to speak, in a commercial situation which would induce them to accept something which people in a more prosperous position might have rebelled against. All I am doing is to enter a *caveat* against assuming that parties entering into a transaction of this kind are necessarily doing so, as one may call it, commercially at arm's length.

In this case the theatre, the subject-matter of the licence, had been closed for six years. The first effective licence granted was dated Oct. 1, 1942, at a serious period of the war. The actual date of the original document, which was only a preliminary document, was June 10, but that was not a licence granted to these particular plaintiffs.

The licence was for the purpose of "producing stage plays, concerts or ballets." These are varied types of performance, and, if one is entitled to use one's ordinary common knowledge of such matters, there is required for any particular performance a good deal of preliminary preparation, the incurring of expense, and the making of contracts. You cannot produce a stage play without providing yourself with the necessary paraphernalia and the painting of your scenery; you must make contracts not merely with the artistes but with the orchestra, and so forth. To put on a stage play is an elaborate matter, which may take a considerable time in preparation and will involve expense and the incurring of liabilities. Therefore, we are not dealing with a type of licence which you would expect to be terminable at a moment's notice, such as a licence to walk in somebody's park. We are dealing with something which is only cast, we are told, in the form of a licence instead of in the form of a lease, because of some requirements of the Lord Chamberlain's department. That is the subject-matter of this licence.

There are three periods with which the licence is concerned. The first one is a period of six months commencing on July 6, 1942, at £80 a week [cl. 1]. The next period is one obtainable by an option. The licensees are given an option at the expiration of the 6 months to continue for a further period of 6 months at a rental of £100 a week plus 10 per cent. of the gross weekly receipts in excess of £500; but the maximum rental was to be £200 [cl. 2]. That is the second period. Then comes cl. 2 (2) which has given rise to the present difficulty:

> On the expiration of the two periods of 6 months before mentioned you are to have the option of further continuing the licence of the theatre on the payment each week

> of a flat rental of £300 per week and you will give us one month's notice of your intention of then terminating the licence. You are to give us previous 6 weeks' notice of your intention to exercise your option to continue the licence for the further period of 6 months and 6 weeks' notice of your intention to exercise your option to continue thereafter.

The licensees, therefore, are being given what is described as an option of further continuing the licence of the theatre after the expiration of the second period of six months, an option which is described at the end of the paragraph as "your option to continue thereafter." A supplemental term of the agreement provided for payments in advance. In the event of the second option being exercised, the payment in advance was to be raised to the sum of £1,200. What the licensors wanted was to have in hand a sum of money equal to the last four weeks' payment which was to become due—a very reasonable form of security. As the amount payable under the licence was a rising amount, rising finally to £300 a week during the period covered by the second option, the necessary sum had to be raised to £1,200. That involved an addition to the existing deposit of a further £400, bringing it up to £1,200.

It is to be observed that the language used in relation to this second option does not in terms impose any limit upon the time for which the licence may endure. Secondly, the clause contains a right to the licensee at one month's notice to terminate the licence; but it gives no corresponding right to the licensor. I will come back to that presently.

The next clause to which I must refer is cl. 4 under which the licensors retain:

> . . . the bars, cloakrooms and right to sell programmes, books of words and music and the receipts and takings but you are to participate to the extent of 50 per cent. in the net profits or losses thereof—which shall be calculated and paid each week.

Some reliance was placed on that clause because it was said that, if the licensors cannot determine the licence, they would be practically saddled with the management of the bars, etc., in perpetuity. The answer to that, I think, is a short one. Cl. 4 does not—and admittedly does not—impose on them any obligation to keep the bars or cloakrooms open, and, if they found it was not profitable to do so, they would be perfectly entitled to close them.

Then cl. 6 says:

> You are not to enter into a sub-licence of the theatre without consent of the company, but this consent would not be unreasonably withheld provided a mutual arrangement is made between us for our company to participate in any profit on any sub-licence to be entered into by you.

I am not attaching excessive importance to it, but it is worth pointing out that, if the respondents are right in saying that they have the right to terminate the licence under the second option at any moment that they please, it might be made impossible for the licensees to grant a sub-licence which extended into the period of the second option, because if they went to the licensors and said: "Please grant us a sub-licence to continue into the second period," the licensors would be entitled to say: "We shall do nothing of the kind because as soon as that period begins we are going to terminate your licence." That, they say, they would be entitled to do. It is not by any means conclusive one way or the other, but it would have the effect of cutting down the appellants' right to grant a sub-licence which cl. 6 clearly contemplates the licensees should enjoy, subject to the conditions there stated. But, as I say, that consideration would have to yield to other parts of the contract, if they pointed in another direction. You cannot give conclusive force to any term in a contract until you have read the whole of it, and until you have, so to speak, put the whole of it together, giving each paragraph such weight as in the whole context it deserves to have.

Then cl. 6 (*c*) provides that the licensors are to be liable for the payment "of all rates, taxes and assessments." It was suggested that at some future date the rates and taxes might well exceed the £300 a week payable, but that seems to me, with all respect, a fantastic conception which no business man would have had in his head for one moment. Later on in the clause, there is an obligation on the licensees to leave the theatre:

> . . . in the same state and condition as now exists, reasonable wear and tear and damage by fire, storm, tempest and King's enemy excepted.

Then there is what may be construed as an obligation on the licensors "for external and structural repairs, external painting, decoration," and so on.

Coming back to the contentions of the parties, counsel for the appellants says, reading this contract as a whole and having regard to the particular subject-matter with which it was concerned, involving, as it does, a certain security of tenure if it is to be successful, there is no reason for construing the terms of this licence in a way which the language does not expressly provide. The language does not provide for any right in the licensor to determine the licence. *Per contra*, counsel for the appellants says, it does in terms provide a right for the licensee to determine the licence. How then, he says, on any principle of construction, are you to imply into that clause a right in the licensors to determine it, and that without any notice at all ? It is important to observe that the argument of counsel for the respondents was based entirely on the proposition, which he quite frankly admitted, that there is here no half-way house between a licence irrevocable by the licensor and a licence revocable by the licensor at any time without any notice. Counsel for the appellants pointed out that such a power in the licensor might put the licensee to great expense and loss and might have the effect of making this so-called second option valueless and nugatory. The licensee has been asked, said counsel for the appellants, to pay £400 down when he exercised the option, but, according to the argument, the moment, or a week after, or a fortnight after, or a month after, he has exercised it, the licence could be cancelled. The £400 would have to be repaid but, as counsel for the appellants said, that would not affect the circumstance that the licensee had had to raise it and pay it over. Can it be contemplated, says counsel for the appellants, that a right obtained in those circumstances should be liable to be cancelled at a moment's notice without any warning by the licensor ?

On the other hand, counsel for the respondents says that a licence is a thing in its nature revocable. You must, therefore, find something in the contract which you can fairly construe as preventing it from being revocable. When you look at this contract, the matter specially relied on, *viz.*, the express right in the licensee to determine, was, he says, merely put in for the purpose of protecting the licensor, and did not operate to exclude by implication the power of the licensor to exercise that right of revocation of the licence which, he says, is inherent in the very nature of a licence.

Counsel for the appellants points out (with, I think, some justice) that there is no real justification for regarding the provision giving the licensee power to determine as being put in solely for the benefit of the licensor. It was obviously important that the licensee should know, if he wanted to determine the licence, exactly what his rights were. If the period of notice were not specified, he might find himself in a difficulty as to whether he ought, if he wished to determine the licence, to give a month's notice, or six months' notice, or some other notice. It is put in, therefore, for a purpose which, I should have thought, one could not say was exclusively for the benefit of the licensor.

There is a further consideration which I think one must not forget, although one is not entitled to draw any particular inference from it by itself. The circumstances in which this contract came to be made were certainly unusual. The theatre had been closed for six years, even for three years before the war. Here was a licensee willing to take it and open it in war-time, with an option of continuance (which we are now concerned with) involving a payment of £300 a week, which was considerably in excess of the amount payable in the early periods. It may very well be—I have formed no opinion one way or the other — that the licensors said to themselves : " If we can get £300 a week in perpetuity we are not concerned with determining this licence at all. Why should we ? £300 a week is a magnificent sum." They may have thought that. It may well have been worth their while to do it. On the other hand, they may have thought : " If the licensee does not make a success of it, he will not be able to pay his £300 a week and he then will terminate the licence." In other words, though there was not any legal safeguard to the licensors against the running of this arrangement in perpetuity, they may nevertheless have thought it was a business certainty that, if the licencees could not make £300 a week, they would put an end to the licence. One cannot suppose that those matters were not present to the minds of the parties. I refer to them as an element which the parties may well have had in mind in the circumstances.

Counsel for the respondents, while claiming that he was entitled to determine at a moment's notice, when asked why the licensors should have a safeguard put in in terms and the licensees should have no safeguards, replied that the safeguard of the licensees, if the licensors determined without notice, lies in their rights under the general law. He says that under the general law they would have had time given to them before they could be expelled, and he referred to the *Bellotti* case (1). But we have to consider what the position of these licensees would be in this particular business, and what sort of protection we should expect they would require as business people. They would undoubtedly want (and the law would give them) time to remove themselves and their possessions from the theatre when the licence was determined. Counsel for the respondents said that the law might very well also give them the right, for instance, to finish the run of a play even if it lasted for three years. I think he even went so far as to say that the law might very well entitle them, notwithstanding the revocation of the licence, to put on a play which was in preparation and let that run. All I can say about that is this. No case has ever suggested that the period of grace, so to speak, allowed to a licensee after determination of his licence extends to the conduct of operations merely because they would be profitable to him. The highest that I think it has been put is that it entitles him to remove himself and his goods, as in the *Bellotti* case (1). Removing them does not merely mean removing them into the street, but removing them to some reasonable place for their accommodation. No case has ever gone so far as to say that the licensee would be entitled to a further period of grace, which, as counsel for the respondents admitted, might last for 3 years, in order that he might run off some profitable contract which he had entered into, or carry out some enterprise for which he had made preparations but which he had not actually begun at the time. If a licensee is to rely on the general law for his protection when the licensor determines without notice, those would be the sort of doubts and difficulties in which he would find himself involved.

A further matter would be this. A licensee could very well spend a large sum of money in re-decorating the theatre. When he had done that, the licensor could immediately revoke the licence. By no possible argument could it be said that the licensor, if he did that, would have to recoup the licensee for his expense. That is another respect in which the absence of some sort of protection to the licensee, if the licensor had the power to determine in the way suggested, would have been gravely unreasonable.

Taking all those matters into consideration and paying particular attention to the fact that the matter of the determination of this licence was quite clearly present to the minds of the parties when this agreement was entered into—they considered the matter of determining the licence and they gave power to determine expressly to the licensee but they refrained from giving any such power to the licensor—should we be justified in reading this provision of the contract as containing something in addition to the express words, *i.e.*, that the licensor is to have the power of immediate revocation ? Counsel for the respondents says that it is wrong to talk about reading in such a power because it is implied by law. I cannot take that view of the problem. I think that our duty is to construe this document and find out what it means. The rule of law that is applicable to the case is the general rule applicable to the construction of all instruments, that they must be construed as a whole in relation to their subject-matter and to any other relevant surrounding circumstances. Giving the best attention that I can to the matter, and giving weight to the various considerations that I have mentioned, it seems to me that the argument of the appellants is right, and that there is no power of revocation on the part of the licensors.

The next question which I must mention is this. The respondents have purported to determine the licence. If I have correctly construed the contract their doing so was a breach of contract. It may well be that, in the old days, that would only have given rise to a right to sue for damages. The licence would have stood revoked, but after the expiration of what was the appropriate period of grace the licensees would have been trespassers and could have been expelled, and their right would have been to sue for damages for breach of contract, as was said in *Kerrison* v. *Smith* (3). But the matter requires to be considered further, because the power of equity to grant an injunction to restrain a breach of contract is, of course, a power exercisable in any court. The general rule is that, before equity will grant such an injunction, there must be, on the construction of the contract, a negative clause express or implied. In the present case it seems to me that the grant of an option which, if I am right, is an irrevocable option, must imply a negative undertaking by the licensor not to revoke it. That being so, in my opinion, such a contract could be enforced in equity by an injunction. Then the question would arise, at what time can equity interfere ? If the licensor were threatening to revoke, equity, I apprehend, would grant an injunction to restrain him from carrying out that threat. But supposing he has in fact purported to revoke, is equity then to say : " We are now powerless. We cannot stop you from doing anything to carry into effect your wrongful revocation ? " I apprehend not. I apprehend equity would say : " You have revoked and the licensee had no opportunity of stopping you doing so by an injunction ; but what the court of equity can do is to prevent you from carrying that revocation into effect and restrain you from doing anything under it." In the present case, nothing has been done. The appellants are still there. I can see no reason at all why, on general principles, equity should not interfere to restrain the licensors from acting upon the purported revocation, that revocation being, as I consider, a breach of contract.

Looking at it in that rather simple way, one is not concerned with the difficulties which are suggested to arise from the decision of this court in *Hurst* v. *Picture Theatres, Ltd.* (4). Counsel for the respondents agreed that in this court he could not ask us to take a different view to the view there taken. It is a decision which has not satisfied everybody, but, quite apart from that decision, the simple propositions which I have just enunciated, which I cannot help thinking are right, would appear to me to get round any difficulties which might be felt as to the reasoning in *Hurst* v. *Picture Theatres, Ltd.* (4). We are not concerned here with a licence coupled with a grant. Nothing of that kind is suggested. It is not suggested that that type of licence is in question here. It is a pure licence and nothing else, and the breach of the licence contract by the licensor could be restrained by a court of equity, and a court of equity would interfere to prevent the licensor taking steps pursuant to his wrongful revocation. That seems to me to put the matter right so far as this case is concerned.

I do not take up time by looking at the other cases referred to. In my opinion the appellants are entitled to the relief they claim in the first declaration in their prayer, subject to a modification which can be discussed presently.

SOMERVELL, L.J. : I agree and have nothing to add.

COHEN, L.J. : I agree, but, as we are differing from the judge below, I will add a few words.

The judge states the problem he has to deal with where he says, in reference to the paragraph of the letter containing the second option :

> In my judgment that passage is ambiguous. It may mean, as the plaintiffs contend, that the licence was to continue until determinable by the plaintiffs by one month's notice. I leave out of account the question of breach of conditions. It may mean that the licence was to continue until revoked by either party and the plaintiff was to give one month's notice of revocation.

After considering the arguments, he comes to the conclusion that the second is the right interpretation. It seems to me that, in the conclusion which he reached, the judge went wrong in two main respects. In the first place, he treated the words as equally capable of both of his two alternative meanings. In my view, for the reasons given by the Master of the Rolls, I think that, reading the document as a whole, and cl. 2 (2) by itself, the more natural meaning of the words is that the plaintiffs had the option of continuing the licence of the theatre so long as they paid £300 a week ; but they were not to cease to pay that £300 a week without giving one month's notice of their intention so to do.

I do not propose to go through the other clauses of the agreement or to repeat what the Master of the Rolls has said as to the surrounding circumstances which confirm the construction he has placed on the agreement. I would only conclude by pointing out that, as it seems to me, the reasons which the judge gave, or at any rate two of them, for favouring the construction contended for by the defendants are not really valid. He dismissed what seems to me the most convincing argument put by counsel for the plaintiffs, *viz.*, that the second option would be valueless if the defendants' construction were adopted, by saying:

> The option was certainly not valueless, because, in my judgment, the defendants could not have determined the licence during the subsistence of the sub-licence [*i.e.*, the licence to Hylton and Arnold] which was due to last at least until Sept. 7, 1943, and might have lasted several years longer; and if the defendants revoked the licence after that sub-licence expired, the plaintiffs would have been entitled to a reasonable A time to remove themselves and their possessions.

In my view, it cannot be right to construe the relevant clause of the agreement of June 10, 1942, by referring to the terms of a sub-licence which did not then exist, and which, so far as the evidence goes, there was no reason to assume was then in contemplation. Therefore, it seems to me that that sub-licence has no bearing on the matter.

Then the judge laid stress on the fact that no power was reserved to the licensor B after the expiry of the sub-licence to determine the licence for breach of its terms. There again, it seems to me, there is nothing so very strange in that. There was no power in the licensor to determine in that event during the original period or during the period covered by an exercise of the first option. The parties were content to leave it to depend on the general law under which, in the event of a breach going to the root of the contract, the licensor would have had power to determine. C It seems to me not unreasonable to suppose that they were content, so long as they got £300 a week, to rest on that right as regards any other breach of the agreement. Finally, the judge laid stress on elements of mutual confidence. It seems to me there is very little in this agreement really to establish elements of mutual confidence. But, there again, if there were a breach of any obligation of mutual confidence which went to the root of the matter, the parties would have had their remedy. D

Those are only comments on certain of the reasons given by the judge. I am unable to agree with his conclusion or to attribute the same force which he does to the points which I have mentioned. For the reasons given by the Master of the Rolls, I agree that this appeal should be allowed.

Appeal allowed. Liberty to apply for an injunction in the Chancery Division. Leave to appeal to the House of Lords granted.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the appellants); E *Richards, Butler & Co.* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

WINTER *v.* WINTER.

[Court of Appeal (Lord Greene, M.R., Morton and Somervell, L.JJ.), March F 25, April 12, 1946.]

Revenue—National Savings certificates—Jurisdiction of county court—Savings Certificates Regulations, 1933 (*S.R. & O.*, 1933, *No.* 1149), *r.* 27 (1).

The appellant made an application in the county court for a declaration that 500 units of national savings certificates, standing in the name of the respondent, his wife, were his property, and for an order that the respondent G should transfer them into his name. The respondent took a preliminary point that the county court had no jurisdiction. The county court judge held that he had no jurisdiction. The merits were not investigated, but it was admitted that, apart from the objection, the application was in proper form under the Married Women's Property Act, 1882. The objection to the jurisdiction was based on the Savings Certificates Regulations, 1933, r. 27 (1), which provides that if any dispute arises between the Postmaster- H General and the holder of any certificate or any person claiming to be entitled to or to be interested in any certificate, the matter in dispute shall be referred in writing to the Chief Registrar of Friendly Societies:—

Held: on the issues raised in the plaint, there being no actual, inevitable or likely dispute with the Postmaster-General, the regulation did not apply; the county court judge therefore had jurisdiction and the action should be remitted to him for trial.

Bailey v. *Bailey* (2) *distinguished.*

[**EDITORIAL NOTE.** The basis of this decision is that the dispute has nothing to do with the fact that the property involved is national savings certificates. The Postmaster-General is not concerned in the dispute and, therefore, the regulation giving jurisdiction to the Registrar of Friendly Societies does not come into operation.

As to Legal Proceedings Between Husband and Wife as to Property, see HALSBURY, Hailsham Edn., Vol. 16, p. 740, para. 1211; and for Cases see DIGEST, Vol. 27, pp. 260, 261, Nos. 2296-2303.]

A Cases referred to:

(1) *Crisp* v. *Bunbury* (1832), 8 Bing. 394; 3 Digest 135, *98*; 1 Moo. & S. 646; 1 L.J.C.P. 112.

*(2) *Bailey* v. *Bailey*, [1926] Ch. 758; Digest Supp.; 95 L.J.Ch. 470; 135 L.T. 431.

(3) *Lewis* v. *Paulton and Others* (1907), 14 S.L.T. 818.

Appeal by the applicant from an order of His Honour Deputy Judge Ritson, made at Bloomsbury County Court and dated Dec. 30, 1945. The facts are
B fully set out in the judgment of the court delivered by Somervell, L.J.

Sir Hubert Houldsworth, K.C., and *J. A. Petrie* for the appellant.

H. J. Astell Burt for the respondent.

Cur. adv. vult.

Somervell, L.J. [delivering the judgment of the court]: the appellant made an application in the Bloomsbury County Court for a declaration that 500 units of national savings certificates, standing in the name of his wife,
C were his property, and for an order that his wife, the respondent in the county court and before us, should transfer them into his name. The respondent took a preliminary point that the county court had no jurisdiction. The deputy county court judge held that he had no jurisdiction, and this appeal is brought against his order. The merits were not investigated, but it is admitted that apart from the objection, the application was in proper form under the
D Married Women's Property Act, 1882.

The objection to the jurisdiction was based on the Savings Certificates Regulations, 1933, r. 27 (1). These regulations were made under the Finance Act, 1923, s. 33, which extended the regulation making power conferred by the War Loan (Supplemental Provisions) Act, 1915, s. 5, as amended, to the making of regulations covering, *inter alia*, the savings certificates in question in this appeal. The operative words are:

E . . . the Treasury may make regulations as to the manner in which and conditions under which the money may be raised . . .

Reg. 27 (1) reads as follows:

> If any dispute arises between the Postmaster-General and the holder of any certificate or any person claiming to be entitled to or to be interested in any certificate the matter in dispute shall be referred in writing to the Chief Registrar of Friendly
> F Societies.

It was said that these words apply to the present dispute and confer exclusive jurisdiction on the Registrar of Friendly Societies. Counsel for the appellant submitted (1) that the words did not apply to the proceedings before the county court in this case and (2) alternatively if they did apply the jurisdiction was concurrent and not exclusive. After hearing his argument on the first point
G we called on counsel for the respondent and having come to the conclusion that the regulation did not apply to these proceedings we did not hear argument on the alternative submission. Counsel for the respondent contended that the words of the regulation expressly covered a dispute between "the holder of any certificate" and "any person claiming to be entitled to or interested in any certificate." We agree that if this were the construction, it would apply in this case, but it is in our view impossible so to construe it. A provision covering
H a dispute between A and B or C does not expressly cover a dispute between B and C. There must be a dispute to which A is a party. For the proposition that the jurisdiction if it existed was exclusive he relied on *Crisp* v. *Bunbury* (1) where the provision, though differently worded, was, he submitted, the same in effect so far as this point was concerned. He then argued that the position of the Postmaster-General in relation to savings certificates brought about the result for which he contended and that this was laid down in a decision of this court in *Bailey* v. *Bailey* (2). Under reg. 11 the Postmaster-General keeps a record of holders of savings certificates and effects transfers by causing

the name of the transferee to be recorded as holder. In *Bailey* v. *Bailey* (2) the plaintiff alleged in the statement of claim that she kept house for her father, who had died intestate. She had deposited in the Post Office Savings Bank savings from sums which her father had given her for her services. These sums were claimed by the defendant, a son of the deceased, to whom letters of administration had been granted, as part of his father's estate. The court decided that on the facts as alleged in the pleadings the dispute was within the jurisdiction of the Registrar-General of Friendly Societies under the relevant provisions of the various Acts. The decision is one which we should be reluctant to extend to the statutes and regulations with which we are concerned dealing with national savings certificates. Counsel for the respondent argued that the legal effect on the question of the jurisdiction conferred was the same as in the present case. Assuming that this is so, we do not think the decision covers the present case. When the case is carefully examined it does not, in our view, justify the unqualified statement in the headnote "that a dispute between a depositor and a person claiming adversely to him was a dispute" within the meaning of the relevant statutory provisions conferring jurisdiction on the Registrar. The case was argued on the pleadings as a preliminary point of law. In order to see what was decided it is necessary to consider how the facts as pleaded were understood by the court. This appears most clearly from the judgment of WARRINGTON, L.J. ([1926] 1 Ch. 758, at pp. 769, 770):

> The plaintiff in this case deposited with the Post Office Savings Bank considerable sums of money; in the year 1920 she deposited a sum of £100, and in three months of the year 1924 she deposited sums amounting altogether to £300. The defendant is the administrator of the deceased father of himself and the plaintiff, and as such he claimed that at all events the £300 deposited by the plaintiff after the death of their father formed part of the father's estate. He applied to the Post Office for payment of the sums so deposited, and his demand was refused. Ultimately the matter was referred to the Registrar of Friendly Societies appointed under the Friendly Societies Act of 1875, who made an award in favour of the claimant, and ordered that something over the £300 part of the total deposited—I suppose the £300 with interest—should be paid out to the father's administrator, the claimant. The plaintiff has brought this action, alleging that the award of the Registrar of Friendly Societies was made without jurisdiction and was, therefore, void, and the question so raised has, by an order made in chambers, been directed to be heard as a question of law preliminary to the trial of the action.

The plaintiff in fact received notice from the Registrar of the proceedings before him but did not attend. Then WARRINGTON, L.J., said this (*ibid.*, at p. 772):

> Then it is said that here there is no dispute between the bank and the outsider. With all respect to the learned judge who has expressed a contrary opinion, I cannot conceive where a dispute arises unless this be a dispute. The claimant calls upon the bank to transfer the money to him and the bank says: "No, I will not transfer the money to you. I will help you to some extent, because I will put a stop on it, but I will not transfer the money to you, because I may afterwards have to pay it to the depositor." The claimant repeats: "I am entitled to that money and ought to have it transferred to me." It seems to me there is plainly a dispute there, a dispute between the bank and the claimant.

Then SARGANT, L.J., says this (*ibid.*, at p. 775):

> If the matter had come before us in the shape in which it came before RUSSELL, J., I should have seen no reason for altering or varying his order, but as it is, and applying my mind to a question different from that which was before him, I feel satisfied that the words of sect. 14 of the Act of 1844 are sufficiently wide to enable the Registrar who has now been substituted for the barrister, to decide a claim not only as between the bank and a depositor, or person claiming through or under the depositor, but also as between the bank and the depositor and persons claiming by title adverse to the depositor.

It seems, therefore, clear to us that those two members of the court based their decision on the existence of an actual dispute between the bank and the defendant. The decision therefore comes to this. The jurisdiction of the Registrar to decide a dispute between the bank and "a person claiming to be entitled to the money"—to take the words from the statutory provision—"exists, although the attitude taken up by the bank is the result of a dispute between the person claiming to be entitled and the individual depositor." Further, that the dispute having arisen between the bank and the defendant, the Registrar was entitled, having served notice of the proceedings on the plaintiff, to adjudicate on the issue as between plaintiff and defendant and finally to determine that issue by his award.

We have difficulty in following the reasoning upon which this latter conclusion was based, but we should have felt bound to follow the decision in *Bailey* v. *Bailey* (2) if there were no good grounds for distinguishing it from the present case.

Counsel for the appellant sought to draw a distinction between the present case and that case, based on the fact that the Postmaster-General has merely administrative functions in regard to savings certificates. It is, in our view, unnecessary to consider this point. In our opinion the decision in *Bailey* v. *Bailey* (2) does not apply to the present case, where no dispute has arisen with the Postmaster-General. Nor on the issues raised in the plaint is any dispute inevitable or likely. There being no dispute with the Postmaster-General, we have already stated our opinion that the words of the regulations do not apply.

We were referred to *Lewis* v. *Paulton* (3). In that case the complainer, who was executrix of the deceased, sought against (1) creditors of the deceased, (2) the Registrar of Friendly Societies, (3) the Postmaster-General suspension of and interdict against arbitration proceedings taken or threatened by the respondents under the Post Office Savings Banks Acts to determine whether a sum deposited in the Post Office Savings Bank by the deceased was payable to her as executrix or to the creditors. The Lord Ordinary held that the question at issue involved a dispute falling to be decided by the arbitration proceedings as laid down in the provisions of the Act. The provisions were similar to those in *Bailey* v. *Bailey* (2). The judgment was on the basis that the Postmaster-General had no interest in the merits of the dispute. The complainer had never claimed the money from the Postmaster-General and if the respondent creditors or any of them had made such a claim the Lord Ordinary does not rely on this. He says) :

> At the present moment the Postmaster-General is in the position of refusing to pay the sum deposited with him at Cambeltown to either of the parties claiming it.

That case is not binding upon us and we doubt whether the Lord Ordinary is right when he says that not to give exclusive jurisdiction to the Registrar would " be contrary to the obvious intention of the legislature." We think it is at any rate doubtful whether the legislature intended to preclude parties from resorting to the courts for the decision of issues of property arising under the general law. In that case it was clear that the fact that the money was in the Post Office Savings Bank had nothing to do with the dispute to be decided. In the present case the dispute has nothing whatever to do with the fact that the form of property happens to be national savings certificates. Such property with other property might be involved in proceedings under a will or a settlement and it would at least be inconvenient if, no dispute having arisen with the Postmaster-General, the courts were deprived of jurisdiction *qua* this item of the property involved.

We therefore decide that the appeal should be allowed with costs and the action remitted to the county court for trial.

Appeal allowed with costs. Leave to appeal to the House of Lords refused

Solicitors : *Robinson & Bradley* (for the appellant) ; *D. B. Levinson & Shane* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re AMES' SETTLEMENT, DINWIDDY *v.* AMES AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), March 15, 1946.]

Settlements—Marriage settlement—Covenant to pay if marriage " solemnised "—Ultimate trust for husband's next of kin—Marriage subsequently annulled—Total failure of consideration—Rights of beneficiaries defeated—Trust fund to be repaid to settlor's estate.

By a settlement made in contemplation of the marriage of his son, J.A., to Miss H., the settlor covenanted to pay £10,000 to the trustees of the settlement " in case the intended marriage shall be solemnised." The ultimate trust in default of issue was for the persons who would have been entitled to J.A.'s estate had J.A. died intestate and unmarried. The marriage ceremony took place and the settlor paid the £10,000 to the trustees. The marriage was subsequently annulled on the petition of Miss H, who had, by deed, released all her interests under the settlement. The income of the trust fund was paid to J.A. until his death on Jan. 20, 1945. The question to be determined was whether, in the events which had happened, the capital of the trust fund was payable to J.A.'s next of kin as the ultimate beneficiaries under the settlement, or whether it formed part of the settlor's estate and should be repaid to his personal representatives :—

Held : since there had been no valid marriage, the capital of the trust formed part of the settlor's estate and should be repaid to his personal representatives, because it was money paid upon a consideration which had failed. In the events which had happened, J.A.'s next of kin had no interest in the fund.

[**EDITORIAL NOTE.** The effect of a decree of nullity is that the parties are not only no longer married, but never have been. It follows that in such circumstances a settlement of which marriage is the consideration completely fails.

As to Effect of Nullity Decree, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937 ; and for Cases, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2326—2345.

As to Failure of Consideration, see HALSBURY, Hailsham Edn., Vol. 29, pp. 589, 590, para. 859 ; and for Cases, see DIGEST, Vol. 40, pp. 529-531, Nos. 732-748.]

Cases referred to :

(1) *Dormer* (*otherwise Ward*) v. *Ward*, [1901] P. 20 ; 27 Digest 521, *5629* ; 69 L.J.P. 144 ; 83 L.T. 556.

(2) *Re Garnett, Richardson* v. *Greenep* (1905), 74 L.J.Ch. 570 ; 40 Digest 530, *744* ; 93 L.T. 117.

(3) *Dunbar* (*otherwise White*) v. *Dunbar*, [1909] P. 90 ; 27 Digest 501, *5365* ; 78 L.J.P. 35 ; 100 L.T. 380.

(4) *Re Wombwell's Settlement, Clerke* v. *Menzies*, [1922] 2 Ch. 298 ; 40 Digest 530, *740* ; 92 L.J.Ch. 18 ; 127 L.T. 295.

(5) *Dodworth* v. *Dale*, [1936] 2 All E.R. 440 ; [1936] 2 K.B. 503 ; Digest Supp. ; 105 L.J.K.B. 586 ; 155 L.T. 290 ; 20 Tax Cas. 285.

(6) *Re Eaves, Eaves* v. *Eaves*, [1939] 4 All E.R. 260 ; [1940] Ch. 109 ; 109 L.J.Ch. 97 ; 162 L.T. 8.

Adjourned Summons to determine whether in the events which had happened, the trust fund comprised in a marriage settlement should be repaid to the settlor's estate. The facts are fully set out in the judgment.

E. G. Wright for the trustees of the settlement.

S. Pascoe Hayward for the husband's next of kin (the ultimate beneficiaries under the settlement).

C. V. Rawlence for the settlor's executors.

Vaisey, J. : I am asked by this summons to decide whether, in the events which have happened, the trustees of a deed of settlement, dated Apr. 22, 1908, ought to pay over the funds in their hands in accordance with the ultimate trust in default of issue contained in that settlement, or ought to transfer them to the legal personal representatives of the settlor. The settlement in question is in the usual form of a marriage settlement, and the parties to it were John Louis Metcalfe Ames (to whom I will refer as John Ames), who was the intended husband, of the first part, Miss Hamilton, who was the intended wife, of the second part, the father of the intended husband, Louis Eric Ames (who was the settlor), of the third part, and certain persons, as trustees, of the fourth part. The settlement recites that a marriage had been agreed and was intended to be solemnised between John Ames and Miss Hamilton, and that with a view to the settlement intended thereby to be made the settlor (*i.e.*, the intended husband's father) had agreed to settle £10,000 in the manner thereinafter appearing. The witnessing part of the indenture is in these words :

> In pursuance of the said agreement and in consideration of the said intended marriage the settlor covenants . . . that in case the intended marriage shall be solemnised he the settlor will within one year after the date of solemnisation of the said intended marriage pay to the trustees [for the time being of the settlement the sum of £10,000.]

There is then a provision that, until payment, that sum should carry interest, and the trustees of the fund are to stand possessed of that sum for investment ; secondly, to pay the income to John Ames during his life, and, after his death, to pay such income to Miss Hamilton during the residue of her life or until she shall marry again. Then there are certain trusts for the issue of the intended marriage, to which I need not more particularly refer.

Then the ultimate trust is in these words:

> If there should not be any child of the said intended marriage who attains a vested interest under the trust hereinbefore declared in default of appointment then subject to the trusts and powers hereinbefore contained the trust fund and the income and statutory accumulations (if any) of the income thereof or so much thereof as shall A not have become vested or been applied under any of the trusts or powers affecting the same shall after the death of Miss Hamilton and such failure of children as aforesaid be held in trust for the person or persons who under the statutes for the distribution of the estates of intestates would have become entitled thereto at his death if he the said John Ames had died possessed thereof intestate and without ever having been married such persons if more than one to take as tenants in common in the shares in which they would have taken under the same statutes.

B There is a further witnessing part, that in further pursuance of the agreement and in consideration of the intended marriage the settlor covenanted with the trustees and also separately with the intended husband and the intended wife, as before, that in case the said intended marriage should be solemnised the executors would within six months after his death pay to the trustees of the settlement fund already existing a further sum of £10,000, which was similarly as before to carry interest from the due date until payment; and the trusts of C that second £10,000 are referentially declared on similar lines to the trusts applicable to the first sum of £10,000.

The ceremony of marriage between John Ames and Miss Hamilton was gone through upon the following day, namely, Apr. 23, 1908. Shortly thereafter, the settlor paid the first sum of £10,000 to the trustees of the settlement, who invested it, and the income from those investments was paid to John Ames D from that time right down to the time of his death. It is now represented by investments of an approximate market value of £9,176. John Ames and Miss Hamilton (who was, after her marriage, of course, known as Mrs. Ames) lived together in England for some seven years, and then they went to Kenya. There was no issue of their union, and by a decree of the Supreme Court of Kenya, at Nairobi, dated July 8, 1926, their marriage was:

> . . . pronounced and declared to have been and to be absolutely null and void E to all intents and purposes in the law whatsoever . . .

The ground being the incapacity of the husband to consummate the marriage. That decree was made absolute on Jan. 11, 1927. In 1927, the lady who was formerly Miss Hamilton contracted a marriage with one Giffard, and by a deed dated Nov. 1, 1927, under her new name Giffard, she released all her interests under the settlement, with the result that such interests were extinguished.

F The next point which I have to mention is that the settlor made his will on June 28, 1933, and after reciting that he had covenanted to pay £10,000 under this settlement he put his son John to his election and said that he must surrender his interests, which were the only interests then remaining, except those of the hypothetical next of kin, if there were such interests, as a condition of taking any benefit under his father's will. The father, the settlor, died on Dec. 3, 1933, and his will was duly proved. Shortly afterwards, on Feb. 20, G 1934, there was a deed executed by John Ames whereby, in order to comply with the directions in his father's will, he released his father's executors from any obligation in regard to the provision of the second sum of £10,000.

John Ames died on Jan. 20, 1945, and, as I have said, down to that date he received the income from the investments representing the first sum of £10,000. The question now is: What has to be done with the capital funds representing that sum, including the income which has been earned by such investments H since the death of John Ames? On the one hand, it is said by the first two defendants, who are the persons who constitute the class of hypothetical next of kin mentioned in the settlement as the ultimate beneficiaries, that they are the persons to whom the fund should be paid. On the other hand, it is said by the legal personal representatives of the settlor that the fund formed part of their estate and ought to be transferred to them by the trustees who now hold it. I have to decide between those two alternative claims.

The question of a marriage which is not void but voidable is not the least perplexing of the legal principles and hypotheses with which this court is concerned. A marriage which holds good until it is challenged—and which can only be challenged—by one of the parties to it, and the retrospective effect of a decree of nullity declaring the marriage to have been void from the beginning, are ideas which involve some very curious considerations. I only propose to deal with the matter so far as it is, in my judgment, necessary to do so for the purpose of deciding this case. There are a very considerable number of judicial authorities which have some bearing, and are more or less apposite, upon the problem which I have now to solve. I will mention those which have been brought to my notice during the argument. First, in *Dormer* v. *Ward* (1) the question was as to the jurisdiction of the court, under the Matrimonial Causes Acts, to vary a settlement, not on the occasion of a divorce, but on the occasion of a degree of nullity. It was held that, although the marriage had been declared void and although a certain covenant no longer took effect, the court had jurisdiction under the Act of 1859 to vary the settlement on the application of the petitioner. There, however, the settlor was none other than the respondent husband himself, and I do not pause to investigate what might be a somewhat difficult question, as to how far the power to vary can be exercised either in the absence of, or contrary to, the wishes of a settlor who is not one of the parties to the marriage. In *Dormer* v. *Ward* (1) VAUGHAN WILLIAMS, L.J., said ([1901] P. 20, at p. 33) ;

> I do not find that the settlement continued in force after the decree. In my opinion this settlement did not do so.

That is a statement which may not be of quite such general application as appears at first sight, but it does state that, when the marriage has been annulled, the settlement, as a marriage settlement, can no longer be considered, for some purposes at any rate, to be in existence.

Then there was *Re Garnett* (2) which dealt, in circumstances that were extremely peculiar, with the significance of the word which we have in the present case—"solemnised." I get this amount of assistance from that case, that KEKEWICH, J., who decided it, held that a marriage which had been subsequently declared null *ab initio* had never been "solemnised" in the proper sense of that term. KEKEWICH, J., said (74 L.J.Ch. 570, at pp. 573, 574) :

> . . . there never was a marriage, although the ceremony was gone through, and the parties lived together as man and wife after that date. The marriage is pronounced null and void *ab initio*. Not only are they not now married, but they never were.

Then he quoted from an earlier case [*Chapman* v. *Bradley*] :

> . . . there has never been any valid marriage.

It was held in *Re Garnett* (2) that money that had been paid in ignorance of the fact that a decree of nullity had been pronounced and made absolute could be recovered.

The next case cited to me was *Dunbar* v. *Dunbar* (3), to which I need not, I think, more particularly refer. There followed *Re Wombwell's Settlement* (4), decided by RUSSELL, J. That case does not seem to me to be of much assistance in the present case because it turned upon the fact that there the document contained an express trust for the settlor (who was, also in that case, the father of one of the parties) until the intended marriage, and thereafter upon trusts appropriate to the usual marriage settlement. There it was sufficient for the father and his representatives to claim under the express trust in his favour, and the document only became a marriage settlement after the first trust, which was a simple trust for the settlor himself, had come to an end. Here we have no such express preliminary trust, and therefore I do not consider that that decision is of much assistance.

Dodworth v. *Dale* (5) was a tax case, and I do not think there again I get very much guidance, though LAWRENCE, J., pointed out ([1936] 2 All E.R. 440, at p. 447) :

> . . . that what has been done during the continuance of the *de facto* marriage cannot be undone, cannot be overturned by the operation of law.

Let me say at once that that proposition seems to me to be completely sound provided that a proper understanding is had of what is meant by "what has been done during the continuance of the *de facto* marriage" and provided that that is not supposed to include things which are not done during the continuance of the marriage but which might flow from things which were done during the continuance of the marriage.

Lastly, there is *Re Eaves* (6). There, again, it was held that a transaction completed during the time when the husband and the wife continued to be ostensibly man and wife could not be undone when the retrospective decree of nullity was subsequently pronounced. There are some general propositions laid down by SIR WILFRID GREENE, M.R. ([1939] 4 All E.R. 260, at pp. 262, 263), which are extremely helpful, but I cannot see that they have any direct bearing upon the present case. There is no question here of undoing anything which has been done. I regard the contest as merely this : the plaintiffs hold certain funds in their hands, and they ask to which of the alternative claimants they ought to make those funds over. I think it would not be incorrect to say that the problem is really as to which of those parties has the better equity. The persons who constitute the hypothetical next of kin claim to have the better equity, because they say : " Look at the deed of settlement. We are the persons there designated to take the fund, and there is no reason why we should not do so." On the other hand, it is said by the settlor's representatives : " But that trust was based on the consideration and contemplation of a valid marriage, and now that it has been judicially decided that there never was a marriage that trust cannot possibly form the foundation of a good equitable right." The settlor's representatives say, that theirs is the better equity because the money was only parted with by their testator upon a consideration which was expressed but which in fact completely failed.

It seems to me that the claim of the executors of the settlor must succeed. Having regard to the wording of the settlement, I think that this is a simple case of money paid upon a consideration which failed. I do not think that that hypothetical class of next of kin (who were only brought in, so to speak, and given an interest in the fund upon the basis and footing that there was going to be a valid marriage between John Ames and Miss Hamilton) have really any merits in equity, and I do not see how they can claim under the express terms of a document which, so far as regards the persons with whom the marriage consideration was concerned, has utterly and completely failed. If their claim be good, it is difficult to see at what precise period of time their interest became an interest in possession. But I hold that their claim is not good, and that they have not been able to establish it.

One further point I ought to mention, namely, as to what effect, if any, the condition in the settlor's will putting John Ames to his election has upon the problem which I am deciding. It is said that, by directing the release of the covenant, the settlor recognised the settlement as subsisting and must be deemed in some way to have approbated it or confirmed it, and that by so doing he gave rights to the relatives who constitute the class of next of kin which they would not otherwise have possessed. I cannot see how that could be so. The settlor it is true, did not make any claim to the first £10,000 during his lifetime, as he might well have done ; nor did his representatives make any such claim during the life of Ames. But it may well have been his own intention, so far as the life interest in the sum was concerned, that John Ames should have the benefit of it. However that may be, I do not think there is anything in the will, or in the course of dealing by the settlor, or his refraining from asserting his rights at an earlier stage, that can operate to defeat the rights which are now asserted by his personal representatives.

The result is that I will declare that, in the events which have happened, the trustees ought to pay and transfer the fund in their hand to the two defendants Baron Belhaven and Stenton and Mr. Ellis, as executors of the settlor ; and the costs of all parties to this application will have to be taxed as between solicitor and client and raised out of the capital of the fund. I do not mention the charges and expenses of the trustees over and above the costs of this application, because they have an absolute right to deduct those from the investments in their hands.

Declaration accordingly.

Solicitors : *Frere, Cholmeley & Co.* (for the trustees of the settlement) ; *Lawrence, Graham & Co.* (for the husband's next of kin) ; *Cunliffe & Airy*, agents for *Dickson, Archer & Thorp*, Alnwick (for the settlor's executors).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

JOHN EDWARD PRESTON *v.* COVENTRY AND DISTRICT CO-OPERATIVE SOCIETY, LTD.

[King's Bench Division (Humphreys, Lewis and Henn Collins, JJ.), January 21, 1946.]

Weights and Measures—Sale of bacon—Weight—" Misrepresentation "—Sale of Food (Weights and Measures) Act, 1926 (*c.* 63), *s.* 3.

The C. co-operative society owned a grocer's shop which was in the charge of a manager. In the back of the shop the manager had kept some parcels of groceries ready for delivery to customers. On each parcel was a book containing a list of articles ordered by the customer. It was found in regard to some parcels of bacon that the weight of the bacon was less than the weight entered in the customer's book and for which it was proposed to charge the customer. The society was charged with the offence under the Sale of Food (Weights and Measures) Act, 1926, s. 3, of having made a " misrepresentation either by word of mouth or otherwise " " in connection with the sale of an article of food " :—

Held : upon the facts of the case, there was no evidence that there was a " misrepresentation " within the meaning of sect. 3 of the 1926 Act. " Misrepresentation either by word of mouth or otherwise " required more than a mere entry in a book by the person who was alleged to have made the misrepresentation.

[**EDITORIAL NOTE.** This is a case of preparation falling short of an offence. It raises several points as to misrepresentation of weight on sale of food, but the decision rests upon the narrow ground that " misrepresentation " connotes something more than a mere intention to make a false statement, whether formed in the mind or written down. Something which has no opportunity of affecting the mind of another person is foreign to the usual conception of a " misrepresentation."

As to the Misrepresentation of Weight on Sale of Food, see HALSBURY, Hailsham Edn., Vol. 33, pp. 665, 666, para. 1178 ; and for Case, see DIGEST, Supplement, Weights and Measures, No. 119a.]

Appeal by way of case stated from a decision of the justices for the petty sessional division of Kenilworth, dismissing informations under the Sale of Food (Weights and Measures) Act, 1926, s. 3. The facts are fully set out in the judgment of Humphreys, J.

Vernon Gattie for the appellant.

John W. Russell for the respondents.

Humphreys, J. : This is a case stated by magistrates, who dismissed a summons against the respondents, the Coventry and District Co-operative Society, Ltd., which charged them with the offence under the Sale of Food (Weights and Measures) Act, 1926, s. 3, of having in connection with the sale of an article of food made a misrepresentation either by word of mouth or otherwise.

The facts were that the Coventry and District Co-operative Society, Ltd., owned a shop which was in the charge of a manager and at which, amongst other things, bacon was sold. On Feb. 6, 1945, a number of parcels of groceries, in three of which was bacon, were tied up with string ready for delivery to customers, and the place where they were is described as " the back premises of the shop." The case then found :

> Placed upon each parcel kept in place by the string was a book containing a list of articles ordered by the customer. The manager had written by the side of each entry of " bacon " made in each book by the customer the weight supplied and the price.

It was then further found in regard to three separate parcels—there were in fact three separate summonses—that the weight of bacon entered in the book of the person whom I will describe as the prospective purchaser, the lady to whom the book belonged, had been entered at an incorrect figure. When the bacon was weighed there was found to be less than that which had been entered in the book and which was, no doubt, the amount of bacon for which it was proposed to charge that lady. The question is whether the manager, who had improperly stated the weights of those three parcels of bacon, committed the particular offence which was charged against him, which was merely that he had made a misrepresentation as to the weight of that bacon, and that he had done it in connection with the sale of an article of food.

Two points were taken before the magistrates, who dismissed the three informations : (i) that there was no evidence that what was done, assuming it to be a misrepresentation, was done, " in connection with the sale of any article of food " ; (ii) that there was no misrepresentation at all within the meaning of sect. 3, because there had been no misrepresentation in any shape or way communicated to the prospective purchaser.

I pause to observe that the view which I have formed upon this matter leaves undecided altogether, so far as I am concerned, whether the manager or the company might not have been summoned for a different offence which is created by that same section, because the section goes on to say that a person shall not " commit any other act calculated to mislead the purchaser or prospective purchaser " either (as I read it) " in connection with the sale of any article of food, or in exposing or offering any article of food for sale." I confine my judgment to the question of whether he made " in connection with the sale any misrepresentation," which is the one thing that was charged against him. Although the magistrates took a different view—their view being that, as delivery of the goods had not taken place, the act of the manager was not in connection with the sale of any article of food—I think it is very doubtful whether there was not a sale in this case having regard to the language of the Sale of Goods Act, 1893, s. 18, r. 5 (1). I would also observe, without deciding, that it may be that the words " a person shall not on or in connection with the sale of any article of food " are sufficiently strong to include the question of a prospective sale of an article of food. But whether that be so or not, I base my judgment upon the view which I hold that there was no evidence in this case that there was any misrepresentation by the company, who were the persons summoned, in what they did. Misrepresentation, either by word of mouth or otherwise, in my opinion requires something more than a mere entry in a book by the person who is alleged to have made the misrepresentation. I think the expression " make any misrepresentation " is equivalent to " misrepresenting " and, using the word as an ordinary English word and giving to it the ordinary meaning, one does not speak of a person " misrepresenting " something if all that he has done is to conceive in his mind an intention to misrepresent to somebody. It seems to me that the manager here was merely proved to have conceived such an intention and to have done something in pursuance of that intention—but something far short of misrepresenting anything to anybody. I do not think a person can be said to misrepresent to himself something when he makes an entry which is untrue, although he may intend subsequently to make a misrepresentation to somebody else. It is upon that ground, and that ground alone, that I think the magistrates were right in dismissing these informations, and I observe that they did so upon that ground. They put their judgment upon both grounds :

> We were of the opinion that there was no misrepresentation as there had been no communication to any purchaser or prospective purchaser of the statements in the customers' books . . .

Then follow the words to which I have already referred, as to which I have expressed no opinion as to whether they are right or wrong. I would not myself go so far as the magistrates seem to have done in saying that there could be no misrepresentation because there was no actual communication to the purchaser. I do not put it as high as that. I go no further than saying that, on the facts of this case, I think there was no evidence that there was any misrepresentation by the manager within the section. For that reason, I think this appeal should be dismissed.

Lewis, J. : I agree. This case arises under three summonses under the Sale of Food (Weights and Measures) Act, 1926, s. 3, which were brought by an inspector under that Act against the respondents. In each case the summons alleged that in connection with the sale of a certain article of food, *viz.*, bacon, they unlawfully did " make a certain misrepresentation as to the weight of the said bacon." It then set out how the alleged misrepresentation was suggested, in that it was deficient of the represented weight.

Sect. 3 is not, in my opinion, an easy section to construe. It reads :

> A person shall not on or in connection with the sale of any article of food, or in exposing or offering any article of food for sale, make any misrepresentation either by

word of mouth or otherwise, or commit any other act calculated to mislead the purchaser or prospective purchaser, as to the weight or measure of the article, or, if any articles are being sold or offered for sale by number, as to the number of articles sold or offered for sale.

I can see a great many difficulties that might arise in construing that section and, amongst other things, it has been suggested that on the facts of this case there was no sale. The magistrates have stated the question for the opinion of the court whether they came to a correct determination in holding :

> . . . that there was no misrepresentation as there had been no communication to any purchaser or prospective purchaser of the statements in the customers' books and that as the delivery had not taken place of the goods the act of the manager was not "in connection with the sale of any article of food."

My Lord has referred to the fact that, in his view, the magistrates were right in that they decided there was no misrepresentation as there had been no communication to any purchaser or prospective purchaser, and has said that he is not expressing any definite view with regard to the second limb of the magistrates' finding. With respect, I entirely agree with him. It may be that the question of a sale, or "in connection with" a sale, depends on what is the meaning of the word "sale" in that section, but, in my view, this case falls to be decided upon the question as to whether or not there was "any misrepresentation either by word of mouth or otherwise." It is true that the section does not state any misrepresentation to the purchaser or prospective purchaser, but in my view it would be a violence to the English language to say that anybody can make a representation when all he or she does is to form the intention to do so or even write down the misrepresentation alleged without communicating it to anybody at all. In my view, the magistrates were right in this case in deciding on the facts of the case that there was no misrepresentation either by word of mouth or otherwise so as to entitle the magistrates to find that the respondents were guilty of the offence with which they were charged. Whether or not they may not have been guilty of some other offence under this section is not a matter for us to discuss, and I agree with the judgment my Lord has delivered.

HENN COLLINS, J. : I agree, and for the same reasons. The view I have formed about the first part of the section is this : The misrepresentation has to be made "on or in connection with" a sale. That seems to me to postulate a sale of some kind. It is perfectly true that the misrepresentation may be made before or on the sale. I am forming no opinion about the other alternative, *i.e.*, after the sale, and whether that would be considered in connection with the sale. But I am clearly of opinion that the misrepresentation must be in relation to what is at the moment, or eventually becomes a sale. I should like a good deal more evidence than the case affords us about the customary dealing between the buyer and seller in this case before I could conclude whether the bacon, as it lay in the back of the shop, belonged to the seller or the buyer —before, in other words, I could answer the question whether the seller would commit conversion if he opened the parcel and substituted different slices from those already in the parcels ; so that I am not prepared on the materials before us in this case to say whether there was, or was not, a sale. But that seems to me to be immaterial, because I agree that there was no "misrepresentation" because it seems to me to be inherent in that expression that there must be something which affects the mind of the buyer or prospective buyer. Something which is in the mind of the seller, or on a piece of paper in his pocket, or under the counter, or on the counter in his shop, and never affects the mind of anyone, is not, in my view, a misrepresentation. Of course, I do not indicate that, if he put up in his shop window some representation that was false in fact, that that would not be a misrepresentation, merely because I could not lay my finger on any particular person who had read it. It is there for all to read and to affect their minds.

For those reasons and those given by my Lords, I agree with this result.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *R. M. Willis*, Warwick (for the appellant) ; *Collyer-Bristow & Co.*, agents for *Band, Hatton & Co.*, Coventry (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

p. 701, *not followed.* R. *v.* HALL. [1952] 1 All E.R. 66.

Dictum of LORD GODDARD, C.J., at 701, *doubted.* NOOR MOHAMED *v.* [1949] 1 All E.R. 365.

R. *v.* SIMS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, L.C.J., Oliver, Croom-Johnson, Denning and Lynskey, JJ.), April 1, May 13, 1946.]

Criminal Law—Separate trials—Several counts alleging buggery with separate persons—Evidence admissible on one count but inadmissible on another—Evidence tending to show accused of bad disposition—Limits of exception—Interests of justice—Corroboration—Functions of judge and jury—Indictments Act, 1915 (*c.* 90), *s.* 5 (3), *Sched. I, r.* 3.

The appellant was charged on an indictment containing ten counts, three of which alleged buggery with three men, three, as an alternative, gross indecency with the same men, one gross indecency with a fourth man, and the remaining three indecent assaults on three boys. An application for separate trials in respect of each separate man or boy involved was refused in so far as the charges against the four men were concerned and they were tried together. The appellant was found guilty of buggery with the three men, but acquitted of gross indecency with the fourth man. The main point involved on appeal was whether the judge ought to have ordered separate trials in respect of each man. The counts were properly included in one indictment by virtue of the Indictments Act, 1915, Sched. I, r. 3, but sect. 5 (3) of that Act confers a discretion on the trial judge to order a separate trial on any count or counts, a discretion with which the Court of Appeal will not interfere unless justice has not been done. It was contended that justice had not been done in this case, because, on the trial on the counts in respect of one man, evidence in respect of the other men was not admissible, and the appellant had, therefore, been improperly prejudiced by the joint trial. A further point raised was in respect of the functions of the judge and jury with regard to corroborative evidence:—

HELD (i) the mere fact that evidence was admissible on one count and inadmissible on another was not, by itself, a ground for separate trials, because often the matter could be made clear in the summing up without prejudice to the accused.

(ii) the general principle was that evidence was admissible if it was logically probative, *i.e.*, logically relevant to the issue whether the accused had committed the act charged.

(iii) the exception to that principle—that evidence that the accused had a bad reputation or a bad disposition was not admissible unless the accused himself gave evidence of good character or otherwise under the Criminal Evidence Act, 1898—did not extend further than the interests of justice demanded.

(iv) evidence was not to be excluded merely because it tended to show the accused to be of bad disposition, but only if it showed nothing more; evidence of specific acts or circumstances connecting the accused with specific features of the crime was admissible even though it tended to show him to be of bad disposition.

(v) in regard to the crime of sodomy the repetition of the acts was itself a specific feature connecting the accused with the crime and evidence of that kind was admissible to show the nature of the act done by the accused.

(vi) the correct method of approach to the subject was to start with the general proposition that all evidence that was logically probative was admissible unless excluded; then evidence of this kind did not have to seek a justification, but was admissible irrespective of the issues raised by the defence.

(vii) applying the above principles, on the trial of one of the counts in this case, the evidence on the others was admissible; and although it would be in the interests of the accused that each case should be considered separately without the evidence of the others, the interests of justice required that on each case the evidence on the others should be considered, and, even apart from the defence raised by the accused, the evidence would be admissible.

(viii) in the result, there was nothing in the authorities to compel the court to hold, in the present case, that the counts should have been tried separately, or that the jury should have been directed, when considering each charge, to disregard the evidence on the others.

(ix) on the question of corroboration, it was for the judge to say whether a particular piece of evidence, if accepted, was capable of being corroborative, and then for the jury to act on it or not as they thought right.

Per cur.: where an indictment contained counts for indecent offences against both male and female persons, it would not ordinarily be right to try the counts together, but where the persons assaulted were children, the mere fact that one was a small boy and the other a little girl would not make it improper to try both cases together, because the facts would indicate perverted lust on the part of the accused.

[**EDITORIAL NOTE.** In this case the court reviews in detail the principles underlying the rule that a judge may order separate trial of different counts charged in the same indictment. The general proposition which provides a starting point is that all evidence which is logically probative is admissible unless it is excluded, and separate trials should not therefore be ordered unless the evidence on one count merely prejudices the prisoner in respect of another, without connecting him with the crime. Evidence which shows bad disposition alone is inadmissible, but where it shows something more, e.g., design, intent, system, it is admissible. In the case reported, upon those grounds, it is held that there was no duty to order separate trials of counts relating to sodomy with different men, since the repetition shown by sich evidence constituted a specific feature connecting the accused with the crime. It was in the interests of justice that this feature should be proved and the question of granting separate trials should be determined on this ground and not on the question of prejudice.

Great care is necessary in the application of the principle laid down, and fine distinctions may arise. For example, the court points out that counts for sexual offences against male and female adults should not be tried together *prima facie*, since the evidence on one count would not be admissible as evidence on the other; on the other hand, where they were children such evidence would be admissible as evidence of perversion connecting the accused with the crime. The necessity of warning the jury on the question of corroboration is also to be considered where the evidence of accomplices is involved in a joint trial.

AS TO JOINDER OF OFFENCES IN ONE INDICTMENT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 137, 138, paras. 179, 180; and FOR CASES, see DIGEST, Vol. 14, pp. 226-231, Nos. 2111-2174.]

Cases referred to

*(1) *R.* v. *Grondkowski & Malinowski*, [1946] 1 All E.R. 559.
(2) *Castro* v. *R.* (1881), 6 App. Cas. 229; 14 Digest 230, *2150*; 50 L.J.Q.B. 497; 44 L.T. 350.
(3) *R.* v. *Norman*, [1915] 1 K.B. 341; 14 Digest 230, *2154*; 84 L.J.K.B. 440; 112 L.T. 784; 11 Cr. App. Rep. 58.
*(4) *R.* v. *Southern* (1930), 142 L.T. 383; Digest Supp.; 22 Cr. App. Rep. 6.
(5) *R.* v. *Rowton* (1865), Le. & Ca. 520; 14 Digest 289, *3051*; 5 New Rep. 428; 34 L.J.M.C. 57; 11 L.T.745.
*(6) *Thompson* v. *R.*, [1918] A.C. 221; 14 Digest 360, *3810*; 87 L.J.K.B. 478; 118 L.T. 418; 13 Cr. App. Rep. 61; *affg.* S.C. *sub nom. R.* v. *Thompson*, [1917] 2 K.B. 630.
(7) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 14 Digest 371, *3924*; 63 L.J.P.C. 41; 69 L.T. 778.
(8) *R.* v. *Ball, R.* v. *Ball*, [1911] A.C. 47; 14 Digest 375, *3959*; *sub nom. Public Prosecutions Director* v. *Ball* (No. 2), 80 L.J.K.B. 691; 103 L.T. 738; 6 Cr. App. Rep. 31.
*(9) *R.* v. *Twiss*, [1918] 2 K.B. 853; 14 Digest 403, *4232*; 88 L.J.K.B. 20; 119 L.T. 680; 13 Cr. App. Rep. 177.
*(10) *R.* v. *Gillingham*, [1939] 4 All E.R. 122; 27 Cr. App. Rep. 143.
(11) *R.* v. *Cole* (1941), 165 L.T. 125; 28 Cr. App. Rep. 43.
(12) *R.* v. *Armstrong*, [1922] 2 K.B. 555; 14 Digest 378, *3988*; 91 L.J.K.B. 904; 127 L.T. 221; 16 Cr. App. Rep. 149.
*(13) *R.* v. *Cole* (1810), 1 Phillips on Evidence, 10th Edn., p. 508; Russell on Crime, 9th Edn., p. 653; Stephen on Evidence, 11th Edn., art. 10; 14 Digest 363, *3848*.
*(14) *R.* v. *Egerton* (1819), Russ & Ry. 375; 15 Digest 943, *10427*.
*(15) *R.* v. *Ailes* (1918), 13 Cr. App. Rep. 173; 14 Digest 227, *2116*.
*(16) *R.* v. *Bailey*, [1924] 2 K.B. 300; Digest Supp.; 93 L.J.K.B. 989; 132 L.T. 349; 18 Cr. App. Rep. 42.

APPEAL against a conviction for buggery before WROTTESLEY, J., at Dorchester Assizes, dated Jan. 25, 1946. On the application for leave to appeal LORD GODDARD, L.C.J., intimated that in the opinion of the court there was at least one point of great importance and that he would arrange for a court of at least five judges to hear the appeal. The facts are sufficiently set out in the judgment of the court, delivered by LORD GODDARD, L.C.J.

J. D. Casswell, K.C., and Raymond Stock for the appellant.

Rt. Hon. H. U. Willink, K.C., Anthony Hawke, and *N. J. Skelhorn* for the Crown.

Cur. adv. vult.

LORD GODDARD, L.C.J. [delivering the judgment of the court]: The judgment I am about to read was largely prepared by DENNING, J. Sims was charged on an indictment containing ten counts; three alleged buggery with three different men; three alleged, as an alternative, gross indecency with the same three men; one alleged gross indecency with a fourth man; the remaining three counts alleged indecent assaults with three boys. The accused by his counsel applied for separate trials in respect of each separate man or boy involved. The judge refused that application so far as the charges against the four men were concerned, and they were tried together. The jury found the accused guilty of buggery with each of the three men but acquitted him of gross indecency with the fourth man. He was sentenced to penal servitude for five years. This court have already dismissed the appeal and now proceed to give their reasons for so doing.

The important point involved in this appeal is whether the judge ought to have ordered separate trials in respect of each man involved. There is no doubt that the counts were properly included in one indictment, because by the Indictments Act, 1915, Sched. I, r. 3:

> Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.

The joinder in one indictment does not, however, decide the point because the Indictments Act, 1915, s. 5 (3) provides:

> Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

That section confers a discretion on the judge with which this court will not interfere unless it sees that justice has not been done: see *R.* v. *Grondkowski and Malinowski* (1) recently before this court.

The appellant here says that justice has not been done because on a trial of the accused on the counts in respect of one man, evidence of offences in respect of the other men would not be admissible, and that the accused was therefore improperly prejudiced by the joint trial. We agree with the contention to this extent, that if such evidence was not admissible, the accused would be prejudiced in his defence and it would be desirable to direct separate trials. We do not think that the mere fact that evidence is admissible on one count and inadmissible on another is by itself a ground for separate trials; because often the matter can be made clear in the summing up without prejudice to the accused. In such a case as the present, however, it is asking too much to expect any jury when considering one charge, to disregard the evidence on the others, and if such evidence is inadmissible, the prejudice created by it would be improper and would be too great for any direction to overcome. It was for reasons of this kind that before the Act of 1915 the court would order separate trials of separate counts for misdemeanours: see *Castro* v. *R.* (2) and *R.* v. *Norman* (3); and since the Act the same principles apply in this respect to felonies as to misdemeanours, *cf. R.* v. *Southern* (4).

The question, therefore, is whether the evidence was admissible. There are observations of this court each way and we have felt it necessary, therefore, to consider the matter afresh. Much depends on the proper approach. We start with the general principle that evidence is admissible if it is logically probative, that is, if it is logically relevant to the issue whether the prisoner has committed the act charged. To this principle there are exceptions. One of the most important exceptions is this: evidence that the accused has a bad reputation or has a bad disposition is not admissible unless he himself opens the door to it by giving evidence of good character or otherwise under the Criminal Evidence Act, 1898. The reason for excluding evidence of bad character was said by Willes, J., to be policy and humanity. He thought that evidence of bad character was just as relevant as evidence of good character, but the unfair prejudice created by it was so great that more injustice would be done by admitting it than by excluding it: see *R.* v. *Rowton* (5). Lord Sumner, however, thought it was irrelevant: see *Thompson* v. *R.* (6) ([1918] A.C. 221, at p. 232). We do not stay to consider which view is correct. The exception is well settled. The question is what are its limits. In our opinion it does not extend further than the interests of justice demand. Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more. There are many cases where evidence of specific acts or circumstances connecting the accused with specific features of the crime has been held admissible, even though it also tends to show him to be of bad disposition. The most familiar example is when there is an issue whether the act of the accused was designed or accidental or done with guilty knowledge, in which case evidence is admissible of a series of similar acts by the accused on other occasions, because a series of acts with the self-same characteristics is unlikely to be produced by accident or inadvertence: see *Makin* v. *Attorney General for N.S. Wales* (7). Another example is where there is an issue as to the nature of an act done by the accused with, or to another person, in which case evidence is admissible of a series of similar acts between them, because human nature has a propensity to repetition and a series of acts are likely to bear the same characteristics: see *R.* v. *Ball* (8). So also where there is an issue as to the identity of the accused, we think that evidence is admissible of a series of similar acts done by him to other persons, because, while one witness to one act might be mistaken in identifying him, it is unlikely that a number of witnesses identifying the same person in relation to a series of acts with the self-same characteristics would all be mistaken. In all these cases the evidence of other acts may tend to show the accused to be of bad disposition, but it also shows something more. The other acts have specific features connecting him with the crime charged and are on that account admissible. A similar distinction exists in respect of articles found in possession of the accused. If they have no connection with the crime except to show that the accused has a bad disposition, the evidence is not admissible; but if there are any circumstances in the crime tending to show a specific connection between it and the articles, the evidence is admissible: see *Thompson* v. *R.* (6), *per* Lord Sumner ([1918] A.C. 221, at p. 236). Thus, in the case of burglary, evidence is admissible that housebreaking implements such as might have been used in the crime were found in the possession of the accused. In the case of abortion, evidence is admissible that the apparatus of an abortionist such as might have been used in the crime were found in the possession of the accused. The admissibility does not, however, depend on the circumstance that the articles might have been used in the crime. If there is any other specific feature connecting the articles with the crime, it will suffice. Thus, in the case of *Thompson* (6) there was no suggestion that the photographs were used in the crime charged, but the House of Lords found a connection between the crime and the photographs in that the criminal on the 16th showed a propensity to unnatural practices by making an appointment for the 19th and the accused showed a like propensity by the photographs found in his possession. In the case of *Twiss* (9) and *Gillingham* (10) there was also no suggestion that the photographs were used in the crime charged, but the court found a connection between the two in that the crime itself showed a propensity to unnatural practices and the photographs showed a like propensity. The specific feature in such cases lies in the abnormal and perverted propensity which stamps the individual as clearly as if marked by a physical deformity. We think that in all the cases where evidence has been admitted there have been specific features connecting the evidence with the crime charged as distinct from evidence that he is of a bad disposition. This is illustrated by the cases on false pretences where evidence can be given of other transactions when similar false pretences were used, because they have that specific feature in common; but not of different transactions which only show that the accused was of a generally fraudulent disposition.

It has often been said that the admissibility of evidence of this kind depends on the nature of the defence raised by the accused : see, for instance, the observations of LORD SUMNER in *Thompson* v. *R.* (6) ([1918] A.C. 221, at p. 232), and of this court in *R.* v. *Lewis Cole* (11). We think that that view is the result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused ; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view. It is plainly the sensible view. It is only fair to the prosecution, because the depositions have often to be taken and the evidence called before the nature of the defence is known. It is also only fair to the accused, so that he should have notice beforehand of the case he has to meet. In any event, whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent. The accused should not be able, by confining himself at the trial to one issue, to exclude evidence that would be admissible and fatal if he ran two defences ; for that would make the astuteness of the accused or his advisers prevail over the interests of justice. An attempt was made by the defence in *R.* v. *Armstrong* (12) to exclude evidence in that way but it did not succeed.

Applying these principles, we are of opinion that on the trial of one of the counts in this case, the evidence on the others would be admissible. The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence ; but we think it should be put on a broader basis. Sodomy is a crime in a special category because, as LORD SUMNER said in *Thompson* v. *R.* (6) ([1918] A.C. 221, at p. 235) :

> Persons . . . who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hallmark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity.

On this account, in regard to this crime we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused. The probative force of all the acts together is much greater than one alone ; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming. Whilst it would no doubt be in the interests of the prisoner that each case should be considered separately without the evidence on the others, we think that the interests of justice require that on each case the evidence on the others should be considered, and that even apart from the defence raised by him, the evidence would be admissible.

In this case the matter can be put in another and very simple way ; the visits of the men to the prisoner's house were either for a guilty or innocent purpose ; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls ; that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust.

If we are right in thinking that the evidence was admissible, it is plain that the accused would not be prejudiced or embarrassed by reason of all the counts being tried together, and there was no reason for the judge to direct the jury that, in considering whether a particular charge was proved, they were to shut out other charges from their minds.

So much for the matter on principle. We must now turn to four particular authorities. The first is *R.* v. *Cole* (13) which was decided in Michaelmas Term, 1810. It has never been reported, but it has frequently been cited in the text books for the proposition that it is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted ; thus, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that he had a tendency to such practices ought not to be received in evidence : see PHILLIPS ON EVIDENCE 10th Edn., p. 508, RUSSELL ON CRIME, 9th Edn., p. 653, STEPHENS ON EVIDENCE, 11th Edn., art 10. We have found a note of the case, however, in the judges' note books on Crown cases. The note shows that Cole was tried on three indictments for sodomy on three boys. Each indictment was presumably tried separately. On the trial of Cole for sodomy on James Mcfier, evidence was given by John Cathie, the father of another boy, that he arrested Cole and that on arrest Cole, in effect, admitted that he had committed sodomy with Cathie's son and said that sodomy was his natural inclination. Cole was found guilty but the judges were of opinion that the conviction was wrong on account of receiving Cathie's evidence. We in no way dissent from that decision, as, in accordance with the practice then prevailing, there were separate indictments in respect of each boy and the prisoner was being tried on one only. Even in 1810 the charges might have been included as three separate counts in the same indictment, but, being charges of felony, the prosecution would have been called on to elect on which they would proceed and so the counts would in effect become separated : see *Castro* v. *R.* (2). Hence the usual pracrice was to include only one felony in each indictment. Nowadays, however, the charges would, as a matter of course, be included in one indictment. Moreover, the law as to giving evidence of other offences was not developed in the year 1810.

Only nine years later the judges met to consider *R.* v. *Egerton* (14). Egerton was indicted for robbery of a man of his coat by threatening to accuse the prosecutor of an unnatural offence. On the trial evidence was tendered that on the next evening Egerton made an attempt to obtain money from the prosecutor by similar threats. Holroyd, J., admitted the evidence on the ground of its being confirmatory of the truth of the prosecutor's evidence as to the transactions of the former day, and as to the nature of those transactions. He reserved the case for the opinion of the judges, who held him to have been right. The two offences had specific features in common and the evidence would without hesitation be held admissible today. The fact that the admissibility was reserved for the opinion of the judges shows that the law was only then in process of development. In the *Cole* case (13), if the three counts had been tried together, there could have been no possible objection to the evidence of what Cole had said on his arrest. His admission that he had a natural inclination to sodomy would be clearly admissible.

The second case is *R.* v. *Ailes* (15). There the indictments against Ailes contained three counts, two for indecent assault on a girl named Day, aged 10, and the third for indecent assault on another girl named Broomfield, aged 12. In all three cases it was alleged that Ailes committed the assault in a cinema where he was an attendant. The two counts in respect of the girl Day were tried together, separately from thei count in respect of the girl Broomfield. At the trial in respect of Day, the girl Broomfield was called to give evidence of the assault on her. The court, which consisted of DARLING, ROWLATT and SHEARMAN, JJ. said (13 Cr. App. Rep. 173, at p. 173) :

> . . . the child Broomfield was called quite rightly, to show that Ailes was a man with distorted sexual passions and that he was addicted to such acts of indecency.

The court were so clearly convinced of this that they did not grant Ailes leave to appeal. In addition, the court indicated that a better course would have been to have tried all three counts together. That case fully supports the views we have expressed earlier in this judgment, and is to be noticed because it places offences with young girls on the same footing as unnatural offences with men or boys.

The third case is *R.* v. *Bailey* (16). In that case, Bailey was charged on an indictment containing nineteen counts, sixteen for indecent assaults on sixteen different boys and three for gross indecency with three of the boys. The case was tried before ROWLATT, J. The charges were all tried together. On one of the counts no evidence at all was given as the boy was so frightened that he could not give evidence, but this seems to have been overlooked at the trial. The jury returned a general verdict of guilty on all counts for indecent assault and acquitted on the charges of gross indecency. The Court of Criminal Appeal quashed the conviction on the ground that the verdict should have been taken separately on each count and that the general verdict could not in the circumstances be upheld. Thus far the decision calls for no comment and does not affect the present discussion ; but the court in the course of its judgment said that if counsel for the defence had objected to the cases being tried together, the objection might have been upheld, and that the judge should have directed the jury not to supplement the evidence on any one charge by evidence on the other charges. We find ourselves unable to agree with those observations, which were plainly *obiter*. We think that ROWLATT, J., was in substance following *R.* v. *Ailes* (15) to which he had been a party. He tried the cases together and allowed the evidence on each count to be supplemented by evidence in the others. The only mistake he made was in directing the jury to consider the case as a whole because that led to the general verdict. Each count should have been considered separately. Apparently *R.* v. *Ailes* (15) was not cited to the Court of Criminal Appeal in *R.* v. *Bailey* (16). If it had been, we doubt whether the observations would have been made.

The fourth case is *R.* v. *Southern* (4). There the indictment against Southern contained two counts, one for gross indecency with a boy aged 13, on June 14, 1929, and the other for indecent assault on a little girl aged 5, on Nov. 2, 1929. The charges were tried together, but the Court of Criminal Appeal thought that if an application for separate trials had been made, it would probably have been granted. TALBOT, J., said (22 Cr. App. Rep. 6, at p. 9) :

> . . . they, [the offences] were not the same in law nor were they in fact connected except by the circumstances that the same man was accused of both.

On that footing the case is in accord with the principles we have stated. Where an indictment contains counts for indecent offences against both male and female persons, it would not ordinarily be right to try the counts together, but where the persons are assaulted are children, the mere fact that one is a small boy and the other a little girl would not in our opinion make it improper to try both cases together because the facts would indicate perverted lust on the part of the prisoner. If the court in *Southern's* case (4) intended to go the length of saying that because one count related to a little boy and another to a little girl separate trials should have been granted, we are not disposed to follow the decision.

In the result, we think that there is nothing in the authorities which compels us to hold in the present case that the counts should have been tried separately or that the jury should have been directed, when considering each charge, to disregard the evidence on the others.

That disposes of the two main points argued by counsel for the appellant in this appeal. Two other points raised deal with corroboration. We do not think that the evidence of the men can be considered as corroborating one another, because each may be said to be an accomplice in the act to which he speaks and his evidence is to be viewed with caution ; but the judge gave the jury ample warning as to acting on the evidence of an accomplice, and no objection can be taken to the summing up on that account. In some passages of the summing up, however, the judge did use expressions which seem to convey that it was for the jury to say whether there was corroboration or not. That, of course, is not the case. It is for the judge to say whether a particular piece of evidence, if accepted, is capable of being corroboration, and then for the jury to act on it or not as they think right. No injustice has, however, been done on that account here, because there was ample corroboration on which the jury might act not only in the pots of vaseline found in the house of the accused, but also in the accused's own evidence. We see no reason for interfering with the verdict of the jury on that account.

In the result, therefore, we are of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Treasury Solicitor* (for the Crown).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Re CASSEL'S WILL TRUSTS, PUBLIC TRUSTEE *v.* H.M. ATTORNEY-GENERAL.

[Chancery Division (Romer, J.), February 25, 26, March 15, 1946.]

Estate Duty—Cesser of annuity—Annuity bequeathed by will—Annuity to annuitant and on her death to her daughters—How burden of duty to be borne—Finance Act, 1894 (*c.* 30), *ss.* 2 (1) (*b*), 7 (7), 8 (4), 9 (1), 14 (1).

By his will, dated July 9, 1920, a testator gave certain annuities including to J., an annuity of £5,000 and after her death or if she predeceased him then, from the date of his death, an annuity of £5,000 to her two daughters and to the survivor of them. The testator authorised his trustees to appropriate, if necessary, a fund sufficient by its income to answer the several annuities given by his will or such of them as were for the time being payable, and he declared that, if the income of the appropriated fund should at the time of the appropriation be sufficient to satisfy the said annuities, such appropriation should be a complete satisfaction of the trusts to provide for such annuities (the annuities being charged on the capital and income of the appropriated fund). No fund was, however, appropriated (except with regard to certain annuities payable in foreign currency) and the annuities were paid out of the income of the residuary estate. The testator died on Sept. 21, 1921, and J. died on June 11, 1944, leaving the two daughters mentioned in the will. Romer, J., decided (see p. 32, *ante*), that upon the death of J. estate duty became payable upon the capital value of the slice of the testator's estate required to produce an annuity of £5,000 under the Finance Act, 1894, s. 2 (1) (*b*). The question now to be determined was how the burden of that duty should be borne. Three alternatives seemed possible and were argued (1) that the residuary estate of the testator should bear the whole burden of the duty without any contribution being made from any other source ; (2) that a rateable contribution to the burden should be made at the expense of all the annuities presently payable and of the future amounts when they became payable ; and (3) that some contribution should be made, but that it should be limited to the annuity which, by reason of J.'s death, now became payable to her daughters :—

Held : the estate duty which became payable in respect of the cesser of J.'s annuity ought to be paid out of the testator's estate other than such part thereof as was required to secure the other subsisting annuities, including the £5,000 annuity which was now payable to J.'s daughters.

[**EDITORIAL NOTE.** In this case no appropriation of funds to answer annuities had been made by the trustees, but in view of the size of the estate there was no difficulty in dividing the estate notionally into two parts, one of which would ensure payment of annuities, and the other would represent the residue. On cesser of one of the annuities a " slice " of the first fund sinks into residue without any benefit accruing to the remaining annuitants. Such annuitants, therefore, are held to be under no liability to contribute to the estate duty payable upon the capital sum so sinking. *Re Palmer* (4) is distinguishable, since there the annuity was payable solely out of the " settled residue " which thus benefited by the cesser of the annuity.

As to the Finance Act, 1894, ss. 2 (1) (*b*), 7 (7), 8 (4), 9 (1), 14 (1), see HALSBURY'S STATUTES, Vol. 8, pp. 121, 130, 131, 134, 139.]

Cases referred to :

(1) *Re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643 ; 21 Digest 41, *261* ; 67 L.J.Ch. 682 ; 79 L.T. 403.

*(2) *Berry* v. *Gaukroger*, [1903] 2 Ch. 116 ; 21 Digest 27, *155* ; 72 L.J.Ch. 435 ; 88 L.T. 521.

(3) *Re Hicklin, Public Trustee* v. *Hoare*, [1914] 2 Ch. 278 ; 21 Digest 28, *157* ; 86 L.J.Ch. 740 ; 117 L.T. 403.

*(4) *Re Palmer, Palmer* v. *Palmer*, [1916] 2 Ch. 391 ; 21 Digest 35, *220* ; 85 L.J.Ch. 577 ; 115 L.T. 57.

*(5) *Re White, Skinner* v. *A.-G.*, [1939] 3 All E.R. 187 ; [1940] A.C. 350 ; Digest Supp. ; 108 L.J.Ch. 330 ; 161 L.T. 169.

(6) *Harbin* v. *Masterman*, [1896] 1 Ch. 351 ; 23 Digest 400, *4714* ; 65 L.J.Ch. 195 ; 73 L.T. 591.

Adjourned Summons to determine how the burden of estate duty, payable on the death of annuitant in respect of an annuity given to her under the testator's will, should be borne. Romer, J., had previously decided (see p. 32, *ante*) where the facts and the relevant portions of the will are fully set out), that on the death of the annuitant, estate duty became payable upon the capital value of the slice of the testator's estate required, to produce an annuity of that amount under the Finance Act, 1894, s. 2 (1) (*b*).

Wilfred Hunt for the trustees.
Raymond Jennings, K.C., and *M.J. Albery* for Mrs. Joshua's daughters.
H. H. King for the other annuitants.
G. R. Upjohn, K.C., and *M. G. Hewins* for the residuary legatees.

Cur. adv. vult.

ROMER, J.: Having sufficiently stated most of the relevant facts relating to this summons in the judgment which I delivered on Question 1 (see p. 32 *ante*), I need not refer to them again. On this question I decided that upon the death of Mrs. Joshua, who had enjoyed an annuity of £5,000 under the will of the testator during her life, estate duty became payable upon the capital value of the slice of the testator's estate required to produce an annuity of that amount under the Finance Act, 1894, s. 2 (1) (*b*). The question which I now have to determine is how the burden of that duty should be borne. Three alternative views seem possible and were argued before me. The first is that the residuary estate of the testator should bear the whole burden of the duty without any contribution being made from any other source. The second is that a rateable contribution to the burden should be made at the expense of all the annuities presently payable and of the future annuities when they become payable; and the third is that some contribution should be made, but that it should be limited to the annuity which, by reason of Mrs. Joshua's death, has now become payable to her two daughters. The question as to which of these alternatives provides the true answer is partly one of authority, but principally one of construction, both of the testator's will and of the Finance Act, 1894.

In my previous judgment I set out the bequest of the various annuities which the testator gave, some of which were immediate and some future. After sundry other devises and bequests, the testator disposed of the remainder of his estate in the following words:

> I devise and bequeath all the real and personal estate whatsoever and wheresoever of or to which I shall at my death be possessed or entitled or which I shall at my death have a general power to appoint by will and which shall not by this my will or any codicil hereto have been otherwise effectually disposed of unto and to the use of my trustees upon the trusts and subject to the powers and provisions hereinafter declared and contained concerning the same that is to say upon trust that my trustees shall sell call in collect and convert into money the said trust premises or such parts thereof as shall not consist of money [followed by the usual powers of postponement and of retaining investments] and I direct that my trustees shall out of my ready money and the proceeds of such collection and conversion pay my funeral and testamentary expenses and debts and the legacies and annuities bequeathed and given by this my will or any codicil hereto (the annuities nevertheless to be payable primarily out of income and the legacies and annuities to be paid primarily out of my personal estate) and also the Public Trustee's fees on the capital of my estate and all estate duty and other death legacy or succession duties which shall at my death be ascertainable and payable in respect of my estate and the devises gifts bequests legacies annuities and properties given absolutely or settled and the gifts and settlements of my residuary estate made by or contained in this my will or any codicil hereto to the intent that the same shall be held and enjoyed by the persons who at my death shall become beneficially interested free of all such duties which are to be borne by the capital of my residuary estate and shall be paid thereout.

And "subject thereto" the testator directed his trustees to invest the proceeds of sale and to divide such proceeds and any retained properties and investments (all of which he described sometimes as "the said trust premises" and sometimes as "my residuary estate") into eight equal parts, which he dealt with as therein mentioned. There then followed an appropriation clause in the following form:

> I authorise my trustees in case at any time with a view to the due administration or distribution of my estate it shall be deemed convenient so to do to appropriate and retain a sufficient part of my estate or of the investments representing the same for answering by the annual income thereof the several annuities hereinbefore bequeathed or such of them as shall for the time being be payable but without prejudice to the powers of sale and investment and transposing investments herein contained and I declare that

> in case the income of the appropriated fund shall at the time of appropriation be sufficient to satisfy the said annuities such appropriation shall be a complete satisfaction of the trusts to provide for such annuities and that in case the income of the appropriated fund shall at any time and from any cause whatever prove insufficient for payment in full of the said annuities resort may be had to the capital thereof respectively from time to time to make good such deficiency and the surplus income (if any) of the said fund from time to time remaining after payment of the said annuities shall be applicable as income of my residuary estate and I declare that as and when any of the said annuities shall cease a corresponding part of the appropriated fund shall sink into my residuary estate.

As I stated in my former judgment, the trustees have never made any appropriation to answer the annuities (except those payable in French and Swiss francs), but have paid them out of the income of the general estate. I understand that all the annuities payable in francs have determined.

I must now refer to the following provisions of the Finance Act, 1894:

> Sect. 2 (1) (*b*)—Property passing on the death of the deceased shall be deemed to include the property following that is to say: . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole.

I have already held that it was under this subsection that estate duty became leviable on Mrs. Joshua's death in respect of her £5,000 life annuity.

> Sect. 7 (7)—The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall (*a*) if the interest extended to the whole income of the property, be the principal value of that property; and (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended. Sect. 8 (4)—Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property. Sect. 9 (1)—A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable, provided that the property shall not be so chargeable as against a *bona fide* purchaser thereof for valuable consideration without notice. Sect. 14 (1)—In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise), under a disposition not containing any express provision to the contrary.

In the present case Mrs. Joshua had an interest in "property" which ceased upon her death and duty became payable as on the passing of property, but only to the extent to which a benefit accrued or arose by reason of the cesser of her interest. A benefit did in fact accrue inasmuch as the burden of the annuity was removed from the testator's estate. As Mrs. Joshua's interest did not extend to the whole income of the estate, the valuation of the benefit so accruing is, in the words of sect. 7 (7) (*b*), to be taken as "the principal value of an addition to the property equal to the income to which the interest extended." The obscurity of this provision has been commented upon judicially more than once, but under it there has been adopted what is familiarly known as the "slice" principle, and, in accordance with it, duty has become payable in the present case on a slice of the testator's estate amounting to about £118,483.

Counsel on behalf of those interested in residue, argued that by reason of sect. 14 (1) of the 1894 Act the annuitants must make a contribution to this burden on the lines laid down in *Re Parker-Jarvis*, (1). Alternatively, he contended that such a contribution ought to be exacted in accordance with ordinary principles of equity. As to this alternative contention, I am unable to see that any principle of equity requires that an annuitant, who acquires no benefit from the death of a fellow annuitant, should have to contribute towards the duties to which that death gives rise. It is said that the death of an annuitant enhances the security available to the surviving annuitants and that they obtain a benefit in that sense. Whilst that might be true in some cases and under some circumstances, the magnitude of the testator's estate in the present case is such that I am unable to accord this element any more than theoretical recognition. In my judgment, the contention of the residuary legatees in so far as it is based purely upon the practice of equity, cannot be established and must succeed, if it is to succeed at all, upon the joint effect of the relevant sections of the Finance Act 1894, and the provisions of the testator's Will. As to the latter, counsel says, and rightly, that if the Act requires contribution from the annuitants, there is nothing in the will to which they can point as freeing them from it, for the only duties which the testator has expressly thrown upon residue, in exoneration of the annuitants, are those which should at his death be "ascertainable and payable" as distinct from those payable *in futuro*, such as the duty which is now in question. There can be no doubt in general but that if a fund passes, or is deemed to pass, on a death but it does not pass to the executor of the deceased as such, the duty which becomes leviable by reason of the death has to be borne rateably by those who succeed to the fund. Vaughan Williams, L.J., in *Berry* v. *Gaukroger* (2) said ([1903] 2 Ch. 116, at p. 129):

> . . . in respect of such property the scheme of the Act is to tax, not the interest which ceased with the death, but the property out of which the interest was enjoyed.

In cases where the fund passes for a beneficial interest in possession, those who succeed are subjected to a personal liability by sect. 8 (4) of the Act. In addition to this, however, the Revenue is safeguarded by the charging provisions of sect. 9 (1). The effect of this latter subsection is not, however, confined to creating a charge for the benefit of the Revenue, but extends also to apportioning the burden of the duty rateably among those who succeed to the property (*Berry* v. *Gaukroger* (2); *Re Hicklin* (3)). Counsel, whilst admitting that no property passed in the present case to the annuitants "for any beneficial interest in possession" so as to attract the operation of sect. 8 (4) of the Act, argued that nevertheless a charge arises under sect. 9 (1). He did not contend that the duty is charged solely upon the notional slice of the estate which forms the measure of the duty payable and that that slice has passed to Mrs. Joshua's children, for this view was not open to him having regard to the decision of the Court of Appeal in *Re Palmer* (4)—a case to which I will refer again—but he contended that the charge extended to the whole of the general estate and should be borne rateably by all those (including the annuitants) who are beneficially interested in such estate. This, he said, is the result of sect. 9 (1), and sect. 14 (1) of the Act when applied to the circumstances of the present case. It seems to me that, in order for counsel's argument to succeed, it is necessary for him to establish that the annuities are charged upon the property which has benefited from the cesser of the annuity, that is to say, the fund into which the notional slice, by reason of such cesser, has fallen and of which it now forms part.

As to this, counsel pointed out that there has been no appropriation to answer the annuities from which he is seeking to levy contribution, which were and are accordingly payable out of the whole of the testator's general estate, and it is that estate which has benefited by the cesser of Mrs. Joshua's annuity. In that connection he referred to the opinion of Lord Russell of Killowen in *Skinner* v. *Attorney-General* (5) ([1940] A.C. 350, at p. 358) where he said:

> It appears to me to be beyond question that an annuitant, whose annuity is payable out of a testator's estate and who is, therefore, interested in the whole estate, is necessarily also interested in all the parts which compose the whole; and that her right to take proceedings (if necessary) to have the estate administered for the purpose of providing her annuity, is merely the right of enforcing or realising that interest which she has in the whole and its parts.

This opinion was directed to answering the appellant's contention in that case, which was a revenue case, that the annuitant's right was limited to a right to have the estate administered and cannot, in my judgment, support the argument which counsel sought to base upon it. The reason why I come to that conclusion is that, although undoubtedly annuitants such as those entitled under Sir Ernest Cassel's will have an interest in the whole of the estate, until an appropriation has been made to answer them, the argument leaves out of account the relative rights and positions of the annuitants on the one hand and the residuary legatees on the other. Those interested in residue can take nothing until the annuitants are paid or provided for in full. On the other hand, the annuitants, once paid or satisfied, have no further interest in the rest of the estate, however much it may subsequently be impoverished or enriched. In the present case no appropriation has ever been made in respect of the now subsisting annuities, and inasmuch as all of the shares in the testator's residuary estate are settled and the whole of such estate is accordingly retained by the trustees, no such appropriation was necessary. Had such an appropriation as that authorised by the will been in fact effected, the annuitants would have thenceforward become, for all practical purposes, isolated from residue and from those interested in residue; and in such case I can see no ground on which it could be suggested that the surviving annuitants could be rendered liable to make any contribution towards the duty which would become exigible on the death of one of their number. It would appear remarkable that the liability, or freedom from liability, of an annuitant should depend upon a mere incident of administration, on whether the trustees do or do not think it right to make an appropriation, either under the general law (as to which see *Harbin* v. *Masterman* (6)), or under some express power contained in their testator's will. In my judgment, the question does not so depend. In the present case, where the value of the estate far exceeds the amount required to satisfy all the annuities, there is no difficulty in notionally doing what an appropriation would have done in fact, namely, dividing the estate into two proportionate parts, one representing that which is required to ensure payment of the annuities, and the other representing the testator's residuary estate. On the death of an annuitant an amount equal to the appropriate " slice " sinks from the first part into the second, and it is upon that amount that duty is payable. If in such circumstances the Revenue acquires a charge, under sect. 9 (1) of the 1894 Act, it is upon that part of the estate (namely residue) into which the slice falls, including the slice itself. No charge exists, in my judgment, on that proportion of the estate which is required to satisfy the annuities still outstanding. Similarly, and by parity of reasoning, the surviving annuitants are not persons who, within the purview of sect. 14 (1) of the Act, are entitled to any sum charged (whether as capital or as an annuity or otherwise) on property in respect of which duty has become payable or been paid. The property, the passing of which has given rise to a claim for duty, is in effect the notional slice required to produce the annuity which has determined; and, in my judgment, the other annuities cannot be regarded as charged upon that slice either before or after its passing, or upon the fund into which it falls.

I must now consider more fully *Re Palmer* (1), to which I have already referred. The headnote in that case is as follows:

> Testator, by his will made in 1910, bequeathed to trustees the sum of £25,000 upon trust during the life of his wife to pay the income to the person who would for the time being be entitled as tenant for life or tenant in tail to the rents of his settled hereditaments if his wife were then dead, and directed that after the death of his wife the said sum should fall into residue, and that all legacies thereinbefore given or which might be given by any codicil should be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees; and the testator thereby devised his settled hereditaments to his trustees upon trusts in favour of his wife during her life, and after her death to the use of his nephew A. for life, with remainder (in the events which happened) to his nephew B. for life, with remainder to the use of B.'s children in strict settlement; and the testator thereby gave his residuary real and personal estate to his trustees upon trust for sale and conversion, and out of the moneys so to arise to pay his funeral and testamentary expenses and legacies, and to make provision for the payment of all duties on any bequests thereinbefore made free from duties or deductions for duties, and to invest the residue upon trust out of the income thereof to pay an annual sum of £3,000 to the person who would be so entitled as tenant for life or in tail as aforesaid, and to hold the surplus income upon the trusts therein mentioned. The testator died in 1913. A. died a bachelor in 1915. Upon the question how as between the beneficiaries under the will the estate duty payable on the death of A. imposed since the testator's death by virtue of the Finance Act, 1914, s. 14, ought to be borne:—*Held*: (i) reversing the decision of YOUNGER, J.,

> that the duty on the settled legacy must be paid out of the investments representing the £25,000 and not out of the residue; and (ii), varying the order (as drawn up) of Younger, J., that inasmuch as the annuity of £3,000 was chargeable upon the whole estate, the residue, the whole of which benefited by the cesser of the annuity, must bear the duty, the annuitant being liable, however, to pay interest on a rateable proportion of the duty corresponding to the proportion which the notional sum required to produce the annuity bore to the whole residue.

In addition to the facts as so stated, the report discloses also that by cl. 12 of his will the testator bequeathed an annuity of £12,000 to his wife (who was the plaintiff in the proceedings) during her life, with power for his trustees to appropriate part of his estate to provide for the payment thereof, and by cl. 22 (which was the residuary disposition) the testator directed his trustees to provide for the said annuity and to make sundry other payments out of his residuary estate and to hold the residue of such estate (which he described as the "settled residue") upon trust, *inter alia*, to pay the £3,000 annuity mentioned in the headnote. For present purposes I need not concern myself with the question of the £25,000 settled legacy, as the only relevant part of the decision, is that which related to the £3,000 annuity. Duty had been paid in respect of this annuity on the death of Ronald Poulton (described as "A." in the headnote), upon the footing that there had been a cesser of interest; that is, it had been paid under sect. 2 (1) (*b*) of the 1894 Act, and the question argued before the Court of Appeal was whether Ronald's successor, who, on Ronald's death, came into possession of a new annuity of the same amount, was bound to pay the whole interest on the amount required for the duty, or whether the liability should be apportioned rateably between him and those interested in the settled residue, subject to the said annuity. It was not suggested that the annuitants should be wholly exempt from contributing to the duty. The notional "slice" of the testator's estate upon which duty was paid amounted to £75,000. This sum of £75,000 was, said Lord Cozens-Hardy, M.R. ([1916] 2 Ch. 391, at p. 399):

> . . . a purely fictitious sum, or a "notional sum." The annuity was chargeable upon the whole residue, and not upon any particular £75,000. No charge can be given under sect. 9 upon a non-existing fund. It is the whole residue which has derived benefit from the cessation of the annuity, and the burthen upon the income of the residue must be apportioned on the footing of sect. 14, or in accordance with general principles which lead to the same result. In my opinion there is no justification for throwing the whole duty upon an imaginary £75,000, with the consequence that the annuitant would have to pay the full interest on the amount paid. The annuitant must bear his rateable proportion only, in accordance with Kekewich, J.'s rule in *Re Parker-Jervis* (1).

Pickford, L.J., said (*ibid.*, at p. 402):

> The notional sum only comes into existence to ascertain under sect. 2 (1) (*b*), and sect. 7 (7) (*b*), the amount to which the estate has benefited by the cesser of Ronald Poulton's annuity, and it has no existence in fact as a separate fund, as is shown by its being called a notional sum. It cannot, therefore, be correct, in my opinion, as was argued by the respondents, that sect. 9 (1), charges the duty upon this notional sum of £75,000, with the result of making the annuitant bear the whole of the interest upon the amount paid. Sect. 9 is for the purpose of giving the Crown the benefit of a first charge upon the property liable to pay the duty, and it cannot be applied to give a charge only upon something which has no separate existence at all. The annuity was charged upon the whole estate, and the residue, the whole of which derives benefit from its cesser, must pay the duty, and it will be apportioned as described by the Master of the Rolls in accordance with *Re Parker-Jervis* (1).

So far as material, Neville, J., expressed himself as follows (*ibid.*, at p. 403):

> . . . we must consider both sect. 2 (1) (*b*), and sect. 7 (7) (*b*), with the result, in my opinion, that the recipient of the annual sum will have to pay interest upon such a sum as represents the proportion borne by the notional sum of £75,000 to the residuary estate of the testator. In my opinion sect. 9 (1), does not apply to the present case.

It seems to me that the principal element to be noted in that case, for present purposes, is that the "settled residue," out of which the £3,000 annuity was payable, was a true residue; that is to say, the fund which remained after payment or due provision had been made out of the estate for all prior interests.

The income of this residue, when so ascertained, was split up so that part of it became payable to the annuitant whilst the rest of it, together with the corpus, was to be dealt with for the benefit of other persons. In these circumstances, it is not surprising that no argument was addressed to the court with a view to exonerating the annuitant altogether. He was in effect a co-proprietor of the settled residue. Another point to be observed in the case is that apparently no suggestion was made that the testator's widow should make any contribution to the duty in respect of her £12,000 annuity. I do not, however, stress this too much, because it is possible that the trustees had already made an appropriation to answer this annuity and thus segregated it for all purposes from the rest of the testator's estate.

In my judgment, the consideration which mainly distinguishes *Re Palmer* (4) from the case before me is that in *Re Palmer* (4) the new £3,000 annuity was payable solely out of the fund which benefited by the cesser of the old annuity, namely, the "settled residue." That is not, in my opinion, the position here. The property which was deemed to pass on Mrs. Joshua's death was the notional sum which had produced her annuity. It cannot be, and was not suggested, that that sum, or any part of it, passed to the other annuitants "for any beneficial interest in possession" under sect. 8 (4) of the Act. On the other hand, it did so pass, in my judgment, to the residuary legatees; it sank into and formed thenceforward a part of the property settled upon them. On this view of the matter and apart from sect. 14 (1) no argument can be founded, adverse to the annuitants, on the charging provisions of sect. 9 (1). Can it be truly said, then, that the annuities are charged upon the residuary estate so as to bring the provisions of sect. 14 (1) into play? The answer, for the reasons which I have previously indicated, is "No." The annuities are charged on the general estate and there can be no residue until they have been provided for in full. As I have already said, the point could scarcely have been argued had an appropriation been made to answer the annuities and had a true residue thus been established; and the omission—I use the word in no derogatory sense—of the trustees to effect an appropriation in no sense prevents the recognition of an ascertainable annuity fund and an ascertainable residue.

In my judgment, accordingly, the annuitants cannot be called upon to make any contribution towards the duty in question; and in using the phrase "the annuitants" I intend to include Mrs. Joshua's children. As previously indicated, it was argued alternatively on behalf of the residuary beneficiaries that these children at all events ought to contribute, in the same way that the successor to Ronald Poulton had to contribute in *Re Palmer* (4). In my opinion, however, this is not so. The annuity bequeathed to Mrs. Joshua's children is no more payable out of residue than was Mrs. Joshua's own annuity. Their annuity, like hers, is payable out of the general estate and no residue can be said to exist until it has been provided for. So far as incidence of duty is concerned I cannot logically exempt the other annuities from contribution without exonerating this annuity as well.

I would add in conclusion on the main question that, had I felt myself constrained to adopt a view different from that which I have expressed, I should have done so with some regret. So far as I am aware, it has never been the practice to charge an annuitant with any part of the duty which becomes exigible by reason of the death of a fellow annuitant in such circumstances as exist in the present case. Were such a practice to become established, it is easy to imagine cases where great hardship might arise; for example, where a testator leaves as many perhaps as thirty or more annuities. In such cases, by the time the surviving annuitant had outlived all his fellows, there would be little left of his annuity, although he had never benefited to the smallest degree by the deaths of all or any of them. It is obvious, of course, that different considerations might arise in cases where, for example, funds set free by the death of an annuitant thenceforward enable the other annuities, previously abated, to be paid in full; but, beyond noting such difference, I need not enlarge upon it further.

I will accordingly declare that the estate duty which became payable in respect of the cesser of Mrs. Joshua's annuity ought to be paid out of the testator's estate, other than such part thereof as is required to secure the other subsisting annuities, including the £5,000 annuity which is now payable to Mrs. Joshua's daughters.

Declaration accordingly.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the trustees); *Lewis & Lewis and Gisborne & Co.* (for Mrs. Joshua's daughters); *Cooper, Bake, Fettes, Roche and Wade* (for the other annuitants); *Vertue, Son & Churcher* (for the residuary legatees).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

ed. H.L. [1948] 1 All E.R. 400.

NETHERSOLE *v.* WITHERS (H.M. INSPECTOR OF TAXES)

[COURT OF APPEAL (Lord Greene, M.R., Somervell and Cohen, L.JJ.), February 28, March 1, 4, 29, 1946.]

Income Tax—Capital or income—Isolated transaction—Grant of film and other rights in play for lump sum—Grant of licence for term of years—Whether related to "royalty" calculation—Whether casual profit of a revenue nature—Income Tax Act, 1918 (c. 40) *Sched.* D. *Case* VI.

Under a written agreement entered into in 1897, the appellant acquired, from its author, the exclusive right to dramatise a novel, with the exclusive right to produce the play to be based on the novel and full power to dispose of all her rights in respect of it. All monies which she might receive in respect of the play by way of royalties or on sales (exclusive of receipts from performances under her management) were to be divided between the parties in equal shares. In 1914 the question of a film version arose, and an agreement was entered into between the author and the appellant under which the exclusive control of the film and cinematograph rights of both the novel and the play in all countries was to be in the hands of the author of the novel. One third of the gross amount received by the author for these rights was to be paid to the appellant. Pursuant to the terms of this agreement, the widow of the author, in 1939, made an agreement with an American company under which she granted to the company for a period of ten years rights of a comprehensive nature including the sole and exclusive motion picture rights both in the story and in the play. The consideration for the assignment of these rights was £8,000, and, under the agreement of 1914, one third of this sum, *viz.*, £2,666 was paid to the appellant. The Special Commissioners found that the sum received by the appellant under the 1939 agreement was of a revenue nature, being paid to her and received by her on account of royalties, and such royalties, being income, were liable to assessment under the Income Tax Act, 1918, Sched. D. Case VI. The decision of the Commissioners was affirmed by the court below:—

HELD: (i) the agreement of 1939 operated as an assignment of the film rights of the play for a period of ten years for a lump sum which had no relation to any "royalty" calculation and could not be regarded as a receipt on revenue account.

(ii) in addition to the assignment the agreement operated as a partial realisation by the appellant of her capital asset, *viz.*, the copyright of the play; the rights assigned to the company, if exercised, could not fail to affect injuriously the value of her copyright, and any consideration referable to this could not, in any view, be anything but capital.

(iii) even if there were, in this case, nothing more than a grant of a licence for a period of ten years the sum received would still be a capital receipt.

[**EDITORIAL NOTE.** The claim of the Crown to tax in this case is based on the assertion that the sum accruing to the taxpayer was received "on account of royalties," and was, therefore, liable to taxation as revenue. The usual meaning of royalty, however, is a sum arrived at by reference to a number of copies or performances, and the agreement under consideration contained no such calculation. The rights granted, also, were wider than would be covered by a licence to perform, or by a partial assignment of copyright, and the rights conferred would injuriously affect the value of the "reversion" in the copyright, in the same way as the publication value of the diaries was affected in *Haig's Trustees* v. *I.R. Comrs.* (3). The question whether a licensor is realising part of the capital value of his copyright is to be answered, not by reference to what the licencee in fact does under the licence, but by reference to the powers which the licence confers upon him. In view of all these circumstances the court holds the payment to be capital and not revenue.

As to Casual Profits of a Revenue Nature Liable to Assessment under the Income Tax Act, 1918, Sched. D, Case VI, see HALSBURY, Hailsham Edn., Vol. 17, pp. 205, 206, paras. 422, 423; and for Cases, see DIGEST, Vol. 28, pp. 81, 82, Nos. 451-462.]

Cases referred to:

*(1) *Beare* v. *Carter*, [1940] 2 K.B. 187; Digest Supp.; 109 L.J.K.B. 701; 163 L.T. 269.

*(2) *Messager* v. *British Broadcasting Co., Ltd.*, [1929] A.C. 151; Digest Supp.; 98 L.J.K.B. 198; 140 L.T. 227.

*(3) *Haig's (Earl) Trustees* v. *Inland Revenue Comrs.*, [1939] S.C. 676; Digest Supp.; 22 Tax Cas. 725.

*(4) *Constantinesco* v. *R.* (1926), 42 T.L.R. 383; 28 Digest 19, *97*; *affd.* (1927), 43 T.L.R. 727; 11 Tax Cas. 730, H.L.

*(5) *Mills* v. *Jones* (1929), 142 L.T. 337; Digest Supp.

*(6) *Inland Revenue Comrs.* v. *British Salmson Aero Engines, Ltd., British Salmson Aero Engines, Ltd.* v. *Inland Revenue Comrs.*, [1938] 3 All E.R. 283; [1938] 2 K.B. 482; Digest Supp.; 107 L.J.K.B. 648; 159 L.T. 147; 22 Tax Cas. 29.

*(7) *Desoutter Bros., Ltd.* v. *Hanger & Co., Ltd.*, [1936] 1 All E.R. 535; Digest Supp.

Appeal by the taxpayer from an order of Macnaghten, J., dated Nov. 15, 1945. The facts are fully set out in the judgment of the court delivered by Lord Greene, M.R.

Heyworth Talbot for the appellant.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *Reginald P. Hills* for the respondent.

Cur. adv. vult.

Lord Greene, M.R. [delivering the judgment of the court]: Under a written agreement of June 15, 1897, the appellant acquired from the late Mr. Rudyard Kipling the exclusive right to dramatise his novel *The Light that Failed*, with the exclusive right to produce the play to be so based on the novel, and full power to dispose of all her rights in respect of it. All monies which she might receive in respect of the play by way of royalties or on sale (exclusive of receipts from performances under her management) were to be divided between the parties in equal shares. The case was conducted on the footing that the appellant was entitled to the copyright in the play which was duly written and produced. This copyright is, of course, distinct from the copyright in the novel itself which, subject to the rights acquired by the appellant under the agreement, remained vested in Mr. Kipling. In 1914 the question of a film version arose. In order to deal commercially with the film rights, it was obviously necessary to bring in both the copyright in the novel and the copyright in the play. Accordingly, an agreement was made between Mr. Kipling and the appellant under which "the entire and exclusive control of the film and cinematograph rights of *The Light that Failed* both the book and the play in all countries" was "to be in Mr. Kipling's hands." One third of the gross amount received by Mr. Kipling for these rights was to be paid to the appellant. This agreement, the terms of which are set out in a letter of June 10, 1914, from one Watt, who was Mr. Kipling's agent, was, we think, no more than an agency agreement under which the appellant appointed Mr. Kipling her sole agent to deal with her rights in the play in conjunction with Mr. Kipling's own rights in the novel. Pursuant to the terms of this agreement, Mrs. Kipling, the widow of Mr. Kipling, made an agreement dated June 27, 1939, with an American company, Paramount Pictures Incorporated, under which she granted to the company for a period of ten years from Jan. 27, 1940, the sole and exclusive motion picture rights in both the story and the play together with certain other rights which we will refer to presently. The consideration for the assignment of these rights was the sum of £8,000. Under the agreement of 1914 one third of this sum, namely, £2,666, was paid to the appellant, and it is in respect of this sum that the present question has arisen. The Crown maintain that this receipt was of a revenue nature, while the appellant contends that it was a capital receipt.

One ground upon which the Crown endeavoured to base its claim has disappeared from the case as a result of the finding by the Special Commissioners that the appellant was not at the material time carrying on a profession or vocation. The Special Commissioners, however, and on appeal from them MACNAGHTEN, J., held that the receipt was of a revenue nature and liable to assessment under Case VI of Sched. D.

The case on behalf of the appellant is put in two ways. The 1939 agreement, it is said, must be regarded either as a sale outright for a lump sum of a slice, so to speak, of the appellant's proprietary rights in the copyright of the play, or as the grant of a licence for a term of years for a capital sum not based on any calculation of a yearly or periodic nature, but arrived at merely as representing the agreed value of a ten year licence. In either case, it is argued, the sum received is capital.

The terms of the finding of the Special Commissioners are important. They found that the sum received by the appellant under the 1939 agreement was of a revenue nature being paid to her and received by her on account of royalties; and that on the authority of the judgment of MACNAGHTEN, J., in *Beare* (*H.M. Inspector of Taxes*) v. *Carter* (1), such royalties, being income, are liable to assessment under Case VI of Sched. D.

It was argued on behalf of the Crown that this was a finding of fact which we are bound to accept. We cannot agree. The reason given by the Commissioners for holding that the sum received was of a revenue nature is that it was paid and received "on account of royalties." A clue to the meaning which the Commissioners attached to the word "royalties" is to be found by referring to *Beare* v. *Carter* (1) to which they refer.

The word "royalty" in connection with a literary or dramatic work is defined in the SHORTER OXFORD ENGLISH DICTIONARY as:

> . . . a payment made to an author, editor or composer for each copy of a book, piece of music, etc., or for the representation of a play.

It is in the sense of so much per copy that the word "royalty" is used in the Copyright Act, 1911, itself—see *e.g.*, sects. 3 and 19 (3)—and this, in our opinion, is the ordinary meaning of the word. A sum paid "on account of royalties" would naturally mean one of two things—either (*a*) an advance against royalties to become payable in the future, or (*b*) a sum agreed upon as covering or as estimated to cover a defined or estimated number of copies, in the case of a book, or performances, in the case of a musical or dramatic work. In *Beare* v. *Carter* (1) the word "royalties" is used in the sense above mentioned. That the word "royalties" ordinarily means what we have said is apparent to anyone who takes the trouble to turn over the pages of such a text book as COPINGER ON COPYRIGHT. The use of the word to signify a percentage of box office receipts is to be found, for example, in the agreement dealt with in *Messager* v. *British Broadcasting Co., Ltd.* (2). If it is in either of the senses above mentioned that the Commissioners use the phrase "on account of royalties," there appears to us to be nothing whatever in the agreement, or in the evidence, to justify the finding. There is nothing to suggest that the sum of £8,000 was built up or arrived at on any such basis. If, on the other hand, the phrase as used by the Commissioners merely means that the sum was received in respect of the rights granted by the 1939 agreement, it leads nowhere at all. A statement that because the sum was so received it was therefore of a revenue nature is a mere assertion, and in fact begs the very question which falls to be decided. We are of opinion, therefore, that there is nothing in the findings of the Commissioners which prevents us from dealing at large with the whole mattter.

We may add that the Special Commissioners appear to have taken the phrase "on account of royalties" from a letter of June 20, 1944, from Watt, which was in evidence. In that letter he referred to an earlier agreement in 1916 with Pathé Fréres. That agreement, said Watt, provided for a "payment in advance and on account of royalties." From the account of the sums received over a period of some five years under that agreement, it appears that it was on a royalty basis in the sense given above, *i.e.*, either so much per performance or a percentage of receipts. It is not to be disputed that royalties in the above sense are income. Nor, we think, can it be disputed that a sum built up or arrived at by reference to a minimum or an estimated number of copies of a book or performances of a work is also income. The present case is not of that nature. Under the 1939 agreement the sum payable has no reference to, or connection with, any contemplated performances. All that appears is that the American company was paying a lump sum for certain rights. It may or may not have contemplated an exercise of those rights. Equally it may merely have wanted to prevent others from obtaining them, or to preserve the value of films already made under one of the two earlier agreements between the parties. We do not know. The only guidance to be obtained for the purpose of answering the question before us appears to us to be afforded by the language of the agreement itself, and in particular the nature of the rights which, on the appellant's behalf, was conferred by it upon the company.

Under the Copyright Act, 1911, s. 5 (2), the owner of copyright may assign the right :

> . . . either wholly or partially and either generally or subject to limitations . . . and either for the whole term of the copyright or for any part thereof . . .

This, it is said, was what the appellant did in the present case. She owned the copyright in the play (so the argument ran), and she assigned that copyright, in so far as was necessary, to give the rights granted to the company, and she did so, not for the whole term of her copyright, but for a part thereof. Accordingly, the transaction, it was said, was a sale by the appellant of a piece of property belonging to her for a lump sum which was not fixed by reference to periodic payments, or estimated periodic payments, in the shape of royalties, but was just a lump sum and nothing more. Such a lump sum could only be a capital receipt.

The nature of the rights for which a sum is paid is, of course, a factor, and often the deciding factor, in considering whether the sum is of a revenue or of a capital nature. The rights here in question are of a comprehensive character, and comprise a great deal more than would be covered by a licence, or even by a partial assignment of the appellant's copyright in the play. A short analysis will make this clear. For convenience we will use lettered paragraphs. By the second clause the seller " grants and assigns " for a period of ten years :

> (*a*) the sole and exclusive motion picture rights for the whole world in the story and the play together with the sole and exclusive right, (*b*) to adapt and change the story and the play or the title and to combine them with any other works, (*c*) to reproduce by cinematograph the story and the play both pictorially and audibly, (*d*) to exhibit by television or any other process of transmission known or to be devised hereafter, (*e*) to copyright vend licence and exhibit such motion pictures, (*f*) by mechanical or electrical means to record and reproduce dialogue from the story and the play, to change such dialogue and interpolate other dialogue and to sell such records.

The greater part of the rights enumerated above no doubt form part of the appellant's performing rights in the play. Two points, however, call for special attention. The rights to adapt the play, to combine it with other works, to interpolate dialogue, etc., go far beyond what an assignee or licensee of copyright would be entitled to do. The granting of them involves a surrender by the appellant of any rights she might have to complain, *e.g.*, in an action for libel, of damage done to her by presenting as a film version of her play something which might be a complete travesty of it, or a hotchpot of several works. It can scarcely be disputed that an extensive use of such rights by the company would injure, it may well be irretrievably, the reputation of the play, and thereby destroy, in whole or in part, the value of the appellant's copyright. She thought it worth while to submit to this, but her doing so formed part (and no doubt a valuable part from the company's point of view) of the consideration for the £8,000.

The other point arises under para. (*e*) above which confers on the company the right to the copyright in any motion picture it may make. It is unnecessary to decide whether this conferred any right to exhibit such a picture after the expiration of the ten years. We will assume, for the purpose of this judgment, that it gives no such right. But, in any event, its ownership of the copyright in it would amount to a subtraction from the appellant's own copyright.

A similar point to that last mentioned arises under the third clause whereby the company is granted the right to make and copyright synopses, scenarios or fictionised versions of the motion picture, provided they do not infringe the rights of publication of the story or the play. It is, however, not easy to understand how far this goes.

Under the fourth clause :

> (*a*) the company is granted the right to broadcast the motion picture or excerpts by radio, (*b*) the seller is not to exercise or authorise others to exercise any broadcasting rights in the story or the play until 18 months after the first general release in the U.S.A. of the first motion picture made or 42 months from the date of the agreement whichever period first expires subject to a limited right to broadcast excerpts for the purpose of advertising a legitimate stage production.

This clause, we think, operates as an assignment *pro tanto* of the appellant's broadcasting rights in the play.

By cl. 8 the consideration for the rights thereby granted and agreed to be granted is the sum of £8,000 payable on execution of the agreement. By cl. 9 the agreement is to bind the parties their successors and assigns and the company is empowered to assign the rights granted either in whole or in part.

In our opinion, the agreement operates as an assignment of what, for short, we will call the film rights of the play for a period of ten years. It cannot, we think, be construed as a mere licence, and, if we are right in this, the company acquired the rights conferred by the Copyright Act, 1911, s. 5 (3). That subsection provides as follows :

> Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright and the provisions of this Act shall have effect accordingly.

Besides being a partial assignment of the appellant's copyright in the play, the agreement, as we have pointed out, confers on the company certain rights which fall altogether outside copyright.

We will now consider the law to be applied to this subject-matter. We find it difficult to extract any clear principle from the decided cases, except that all relevant circumstances must be considered. which is not particularly helpful. One might perhaps have expected that where a piece of property, be it copyright or anything else, is turned to account in a way which leaves in the owner what we may call the reversion in the property so that upon the expiration of the rights conferred, whether they are to endure for a short or a long period, the property comes back to the owner intact, the sum paid as consideration for the grant of the rights, whether consisting of a lump sum or of periodical or royalty payments, should be regarded as of a revenue nature. We emphasise the word "intact"—*salva rei substantia*, to use the expression adopted by LORD FLEMING in *Trustees of Earl Haig* v. *C.I.R.* (3) (22 Tax Cas. 725, at p. 735)—since, save in the special cases of wasting property, if the property is permanently diminished or injuriously affected, it means that the owner has to that extent realised part of the capital of his property as distinct from merely exploiting its income-producing character.

A principle on some such lines as these would not, we think, be out of accord with the popular idea of the distinction between capital and income. But it is not, we think, open to this court to adopt it as in itself affording a sufficient test ; moreover we think that, on the facts of this case, even the adoption of such a test would not lead to a decision in favour of the Crown for a reason which we will explain later. Such a principle, if it had been the correct one, would by itself have afforded a simple answer in the *Constantinesco* case (4), where the inventor retained his patent. Although the fact that he retained it was regarded as a relevant consideration by the House of Lords, it was not, if we read the opinions correctly, regarded as sufficient. The decisive matter was, we think, that the compensation awarded was merely a lump sum payment in respect of a particular past user by the Crown on a royalty basis. The fact that the sum was fixed *ex post facto* by the Royal Commission instead of by agreement could not alter its character. In *Mills* v. *Jones* (5) an attempt was made to distinguish the *Constantinesco* case (4) on the ground that the award covered future as well as past user. The General Commissioners had held that the future user would be negligible, and on this ground the House of Lords held that the suggested distinction broke down. The case does not help us. We may refer to the judgment of SIR WILFRED GREENE, M.R., in *C.I.R.* v. *British Salmson Aero Engines, Ltd.* (6), for a discussion of these two cases.

But there is positive authority which makes it impossible to adopt so simple a principle. Even if in the present case there was nothing more than the grant of a licence for a period of ten years, the sum received by the appellant would, in our opinion, still be a capital receipt. We have already drawn attention to the fact that this sum had no relation whatever to any " royalty " calculation, and, this being so, we think that it cannot be regarded as a receipt on revenue account. The authorities are as follows : *Desoutter Bros., Ltd.* v. *J. E. Hanger & Co., Ltd.* (7), was a case of a five year licence for the use of a patent granted in consideration of a lump sum payment of £3,000. This sum had no reference to any particular contemplated production under the licence : it might have been large, or there might have been none at all. MacKinnon, J., quoted with approval ([1936] 1 All E.R. 535, at p. 536), the following passage from the judgment of Rowlatt, J., in the *Constantinesco* case (4) (11 Tax Cas. 30, at p. 740) :

> . . . I have not the least doubt that you may pay a lump capital sum in lieu of royalties, or to capitalise what is really a royalty, if you like to put it that way, for the use of a patent. Now has that been done ? Mr. Montgomery put a case to me—an obvious case. Supposing, before the user, it is said : " Now pay £25,000 "—or whatever sum the parties agree to—" and use it as much as you like, for a definite time or for the whole length of the patent." That will clearly be a lump sum. It would not be parting with the patent, because other people might use it, but it would be clearly a capital sum in my judgment.

MacKinnon, J., whose decision, of course, is not binding upon this court, then said that the case before him was precisely that contemplated by Rowlatt, J. It was not, he said, the case of an estimated sum after the patent had been used. We may add that it was not the case of an estimated sum before the patent had been used—it was a sum in gross having no reference to user, but paid merely for the purpose of acquiring the right to use as much or as little as the licensee might desire.

Commissioners of Inland Revenue v. *British Salmson Aero Engines, Ltd.* (6) was a decision of this court. There the agreement was for a ten year licence to use a patent. The consideration was a lump sum payment of £25,000 payable in three instalments, and a sum of £2,500 a year " as royalty." It was held by this court, affirming Finlay, J., who upheld the decision of the Special Commissioners, that the £25,000 was (but that the sums of £2,500 were not) a capital payment. This decision is a clear authority, so far as this court is concerned, that a lump sum payment received for the grant of a patent licence for a term of years may be a capital and not a revenue receipt ; whether or not it is so must depend on any particular facts which, in the particular case, may throw light upon its real character, including, of course, the terms of the agreement under which the licence is granted. If the lump sum is arrived at by reference to some anticipated quantum of user it will, we think, normally be income in the hands of the recipient. If it is not, and if there is nothing else in the case which points to an income character, it must, in our opinion, be regarded as capital. This distinction is in some respects analogous to the familiar and perhaps equally fine distinction between payments of a purchase price by instalments, and payment of a purchase price by way of an annuity over a period of years.

In the present case, whether the agreement operates, as we think, as an assignment or as a licence, the result is, in our opinion, the same. But, as we have indicated, there are other circumstances which in any event make it impossible to regard this sum as a revenue receipt. In addition to the assignment or licence, whichever it may be, the agreement operates as a partial realisation by the appellant of her capital asset, *viz.*, the copyright in the play. She confers rights upon the company which, as we have pointed out, cannot, if exercised, fail to affect injuriously the value of her copyright. Any consideration referable to this could not, we think, in any view be anything but capital. It is obviously impossible to split the sum received, and the Crown cannot in any event point to any part of that sum as being revenue.

We find support for this view of the case in the decision of the Court of Session in *Trustees of Earl Haig* v. *Commissioners of Inland Revenue* (3) already referred to. There the trustees put the testator's war diaries, the copyright in which belonged to them, at the disposal of a biographer who made full use of them in writing the biography. The profits to be derived from the sale of the biography were to be equally divided between the biographer and the trustees. It was held, reversing the decision of the Special Commissioners, that the sums received by the trustees under this agreement were capital payments. There, of course, the copyright in the diaries remained in the trustees, subject only to the licence granted to the biographer to make use of them for the purposes of his book. But as the LORD PRESIDENT (NORMAND) said (22 Tax Cas. 725, at p. 732):

> The result of the transaction is that to a large extent the publication value of the diaries is exhausted, because the author has in fact made full use of the material so far as the public interest permitted, though it may be that in future years further use of the diaries may be practicable or permissible . . . In the actual case the asset itself—the publication rights—has been diminished.

On p. 733 there is a passage which we find helpful on the general question in this case. It is as follows:

> But then it was said that the finding that the receipts were remuneration for the use of and access to the diaries necessarily means that they were something more than the receipt of the capital value of the asset. There was some discussion of the word remuneration, and the Solicitor-General, I think rightly, accepted the view that it meant merely consideration. I do not know that much hangs on the choice between these two words, for it seems to me that to say that what the appellants got was remuneration or consideration for the use of and access to the diaries is a colourless description of what was done and does not in itself advance the contentions of either side. The argument for the Inland Revenue was that payment for the use of a thing is of the nature of rent or royalty or the like and cannot be merely the price of the thing. But that only brings the argument back to a discussion of the nature of the thing and of the use made of it.

LORD FLEMING said (*ibid.*, at p. 735):

> . . . that the transaction . . . was not merely a use of the subject *salva rei substantia*, but necessarily involved the realisation of a considerable part of its capital value.

This conclusion was apparently based on the finding of the Commissioners that the biographer had made full use of the material contained in the diaries. We should have thought ourselves, with respect, that the question whether or not the trustees were realising part of the capital value of their copyright was to be answered, not by reference to what the licencee in fact did under the licence, but by reference to the powers which the licence conferred upon him. So here the appellant was being paid for, among other things, the right to cut her play to pieces and combine the story with other stories, a right which, whether it should be exercised or not, amounted to a right to diminish the value of the copyright in the play.

Having regard to all the circumstances of the case, and giving such weight to each of them as it appears to us to deserve, we have come to the conclusion that the appeal ought to be allowed. We should perhaps add that MACNAGHTEN, J., gave no reason for his opinion that the sum in question was of a revenue nature.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Laytons* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

Applied. *Re* STERN. [1950] 2 All E.R. 160.

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re QUESKEY, QUESKEY *v.* QUESKEY.

[CHANCERY DIVISION (Vaisey, J.), March 15, 1946.]

Infants—Marriage—Refusal of consent by justices—Appeal—No jurisdiction in High Court to hear appeal—Marriage Act, 1823 (c. 76)—*Guardianship of Infants Act,* 1886 (c. 27)—*Guardianship of Infants Act,* 1925 (c. 45), *ss.* 7 (3), 9 (1) (*a*), (4), 11 (2).

Owing to the refusal of her parents to consent to her marriage, an infant applied to the justices for their consent, under the Guardianship of Infants Act, 1925, s. 9 (1) (*b*). The justices, however, refused their consent and the infant appealed to the High Court:—

HELD: the High Court had no jurisdiction to hear the appeal because there was no provision in the Guardianship of Infants Act, 1925, for an appeal from a decision of justices on an application in respect of the marriage of an infant. In respect of that matter, the Act of 1925 operated by way of amendment of the Marriage Act, 1823, and not by way of amendment of the Guardianship of Infants Act, 1886. The only provision of the 1925 Act dealing with appeals (sect. 7 (3)) related solely to matters in regard to which the 1925 Act operated by way of amendment of the Guardianship of Infants Act, 1886.

[**EDITORIAL NOTE.** The only right of appeal arising under the Guardianship of Infants Act, 1925, is by virtue of reference back to the Guardianship of Infants Act, 1886, in regard to other matters than marriage, and it is accordingly held that the decision of the magistrates in a question of consent to marriage is final. A

AS TO MARRIAGE OF INFANTS, see HALSBURY, Hailsham Edn., Vol. 17, p. 597, para. 1283, note (*q*); and FOR CASES, see DIGEST, pp. 55, 56, Nos. 353-365, and p. 57, Nos. 382-387.]

APPEAL from an order of the justices for Kingston-upon-Hull, dated Jan. 17, 1946, refusing their consent to the marriage of an infant, on an application made under the Guardianship of Infants Act, 1925, s. 9 (1) (*b*). A preliminary objection was taken that no appeal lay from the order of the justices. B

A. W. Stephenson for the appellant.

M. O'C. Stranders for the respondents.

VAISEY, J.: This case comes before me on an appeal from an order of the magistrates of Kingston-upon-Hull, who on Jan. 17 refused their consent to the marriage of the appellant, a young lady of some 18 years of age. I am asked to reverse this decision on a variety of grounds, but the application is resisted on the preliminary ground that no appeal lies. C

The matter arises in this way. The Guardianship of Infants Act, 1925, is entitled:

> An Act to amend the law with respect to the guardianship, custody and marriage of infants.

In respect of two of these matters, guardianship and custody, it operates by way of amendment of the Guardianship of Infants Act, 1886. But the Act of 1886 did not in any way deal with the marriage of infants, a matter in respect of which provisions were contained in the Marriage Act, 1823, and in respect of that matter the Act of 1925 operates by way of amendment of the Act of 1823 and not by way of amendment of the Act of 1886. D

The Schedule to the 1925 Act is referred to in sect. 9 (1) of the Act, and contains a list of the persons whose consent to the marriage is required, and it empowers "the court" [by proviso (*b*)] to give its consent to a marriage in cases where such persons have withheld it. Sect. 9 (4) defines "the court" as having the same meaning as in the Act of 1886 [as amended by the Act of 1925], that is to say, either the High Court, or a county court, or a court of summary jurisdiction. In the present case the application was made to the justices owing to the refusal of consent by the appellant's parents. The only provision in the Act of 1925 which deals with appeals is sect. 7 (3) which provides: E F

> Where on an application to a court of summary jurisdiction under [the Act of 1886], as amended by this Act, the court makes or refuses to make an order, an appeal shall . . . lie to the High Court.

The difficulty in the appellant's way is that that from which she seeks to appeal is the making or refusal of an order, not on an application under the Act of 1886 as amended by the Act of 1925, but on an application under the Act of 1925 only. It seems to me plain that sect. 7 (3) relates solely to those matters of guardianship and custody to which both the Acts extend. This conclusion is confirmed by sect. 11 (2) of the Act of 1925 which says: G

> This Act shall (except so far as it amends the law relating to the marriage of infants) be construed as one with the Guardianship of Infants Act, 1886 . . . H

It does not appear that there has ever been any attempt to appeal from justices in such a case as the present one. I am satisfied that I have no jurisdiction to entertain this appeal, and I dismiss it with costs.

Appeal dismissed with costs.

Solicitors: *Richard Witty & Co.*, Hull (for the appellant); *Miller, Clayton and Co.*, agents for *Pearlman & Rosen*, Hull (for the respondents).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

EYRE *v.* JOHNSON.

[King's Bench Division (Denning, J.), April 8, 1946.]

Landlord and Tenant—Repair—Covenant to repair and yield up in repair—Whether breach excused by regulations prohibiting repair above certain cost without licence—Defence (General) Regulations, 1939, *reg.* 56A.

J. became the tenant of certain premises in 1931 and, under the terms of the lease, he determined the tenancy in Dec., 1944. By the repairing covenants in the lease, J. had covenanted to keep the premises in repair during the term and to yield them up in repair at the end of the term. Throughout the tenancy very little had been done in the way of repair. Towards the end of 1944, after J. had given notice determining the tenancy, he applied under the Defence (General) Regulations, 1939, reg. 56A, for a licence to do the necessary repairs, but his application was refused, and in Dec., 1944, the premises were given up unrepaired. The landlord brought an action for damages for breach of covenant to repair. It was contended by J. that he was not liable in damages because, under reg. 56A, it was illegal for him to perform the covenant :—

Held : (i) on the facts of the case, the condition of non-repair at the end of the term was the result of a series of breaches of the covenant to keep in repair. That J. was unable to obtain licences under the Defence (General) Regulations, 1939, reg. 56A to do the repairs necessary at the end of 1944 was no defence to the landlord's claim for damages for breach of covenant, because, if J. had duly performed his covenants to repair, such licences would not have been required. J. was, therefore, liable in damages for breach of covenant to repair.

(ii) illegality as to performance of one clause which did not amount to frustration of the contract did not necessarily absolve a covenantor from paying damages. Assuming that circumstances beyond J.'s control had prevented his compliance with the covenant, he was nevertheless liable for damages, because the landlord had performed his part of the contract, J. had had the premises all the time, and had bound himself to do definite acts.

Matthey v. *Curling* (2) *applied.*

[**EDITORIAL NOTE.** It is decided here that the condition of non-repair was due to the lessee's failure to keep in repair as required by his covenant, which he could have done before the building restrictions under the Defence Regulations made it impossible for him to carry out repairs. This, however, only affects one clause in the lease, and, notwithstanding the impossibility of legal performance, the tenant is still liable in damages.

As to Impossibility of Performance, see HALSBURY, Hailsham Edn., Vol. 7, pp. 208-210, paras. 292, 293, and pp. 218-220, paras. 297, 298, and Supplement ; and for Cases, see DIGEST, Vol. 12, pp. 371, 372, Nos. 3087-3094, pp. 373-375, Nos. 3099-3105. and p. 399, Nos. 3229-3231.]

Cases referred to :

*(1) *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180 ; 12 Digest 373, *3099* ; 10 B. & S. 1 ; 38 L.J.K.B. 98 ; 19 L.T. 681.

*(2) *Matthey* v. *Curling*, [1922] 2 A.C. 180 ; 12 Digest 399, *3231* ; 91 L.J.K.B. 593 ; 127 L.T. 247.

Action by a landlord against a tenant to recover damages for the tenant's breach of covenant to repair and to yield up in repair. The facts are fully set out in the judgment.

F. W. Beney, K.C., and *B. L. A. O'Malley* for the plaintiff.

H. G. Garland for the defendant.

Denning, J. : In this case the landlord claims damages for breaches of covenant to repair. The defence is that performance of those covenants became illegal under the Defence (General) Regulations, 1939, reg. 56A. The facts are that in 1931 the landlord let premises, 7, Lowden Road, St. John's Wood, to the tenant for 21 years, reserving to the tenant the right to determine at the seventh and fourteenth years. He duly did determine by notice at the end of the fourteenth year, so that the lease in fact came to an end in Dec., 1944. The repairing covenants were a covenant to paint inside and outside at certain specified times including, in particular, the last three months of the last year; there was a general covenant to keep in repair during the term, and also a covenant to yield up in repair at the end of the term.

The facts, as I find them, are that since the outbreak of the war there has been very little done to these premises by way of repair. In fact, I am not sure that anything was ever done to the premises. When the time came when the lease was going to be determined and notice was given, the question of repair was then considered by the tenant. There was at that time, the last six months of 1944, a regulation against doing repairs or decorations exceeding a certain amount without a licence, so he applied for licences to do the work. It is quite plain, on the correspondence, that his endeavours were unsuccessful. He did not obtain a licence to do the necessary work, with the result that he could not do it, and at Christmas, 1944, the premises were yielded up unrepaired. The landlord on that brings this action for damages.

The point which is taken by the defendant is : "It was illegal under the Defence (General) Regulations for me to perform the covenant, and, therefore, I could not perform it and I am not liable in damages." The first answer to that is that I think this condition of non-repair was really brought about by a series of breaches of the covenant to keep in repair. If the lessee had performed his covenants from 1939 to 1941 when there was no regulation on the matter, or even from 1941 to 1944 when there was a regulation but the limit was at first £500 and then £100, I do not think there would have been any difficulty in keeping these premises in proper repair and there would have been nothing to prevent him performing his covenant. He cannot rely as a defence in this action on a condition of things which his own breaches have brought about.

That really is a sufficient answer to this defence, but I go further. It seems to me that, although illegality which completely forbids the performance of a contract may give rise to frustration, in some cases illegality as to the performance of one clause which does not amount to frustration in any sense of the word does not carry with it the necessary consequence that the party is absolved from paying damages. Take this case. The landlord has performed all his part of the bargain. The tenant has had the premises all this time. The fact that it has become difficult, or even impossible, for the tenant to perform the covenant does not relieve him from the obligation of paying damages. *Bailey* v. *De Crespigny* (1) was cited to me on behalf of the tenant. When that case was considered by the House of Lords in *Matthey* v. *Curling* (2), LORD BUCKMASTER said ([1922] 2 A.C. 180, at p. 228) :

> I find myself unable to think that this has any application to a covenant entered into by a lessee, either to pay rent or to deliver up the premises. He has bound himself to do these definite acts, and it is no excuse that circumstances which he could not control have happened and have prevented his compliance.

In that case, the tenant was held liable on his repairing covenant although circumstances which he could not control had happened and prevented his compliance. So that here, even assuming circumstances beyond the tenant's control which prevented his compliance, I am satisfied that it is not a defence to this action for damages.

I hold in favour of the landlord and I award in this action the sum of £670 and I order the defendant to pay that amount with costs.

Judgment for the plaintiff for £670 *and costs.*

Solicitors : *Lee & Pembertons* (for the plaintiff) ; *Sydney Redfern & Co.* (for the defendant).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

EKER *v.* BECKER.

[KING'S BENCH DIVISION (Charles, J.), April 8, 1946.]

Landlord and Tenant—Recovery of possession—Lease continuing until cessation of hostilities—Actual day of cease fire order—Uncertainty—Validation of War-time Leases Act, 1944 (*c.* 34), *s.* 1.

The *habendum* clause in a lease provided that the lease should commence on June 3, 1941, and continue "until the cessation of the present hostilities between Great Britain and Germany, meaning thereby the actual day of the cease fire order and not the day whereon the peace terms are signed." In an action by the plaintiff for recovery of possession of the demised premises it was contended on behalf of the defendant that the tenancy came within the Validation of War-time Leases Act, 1944, or alternatively that it was void for uncertainty:

HELD: the lease clearly defined what was meant by cessation of hostilities; it did not fall within the Validation of War-time Leases Act, 1944, nor was it void for uncertainty; the plaintiff was, therefore, entitled to possession on May 8, 1945, the actual day of the cease fire order.

[**EDITORIAL NOTE.** This case is distinguishable from the circumstances in *Lace* v. *Chandler* (1), and from those contemplated by the validation of War-time Leases Act, by reason of the fact that the parties had defined the duration of the lease by an easily ascertainable fact, "the actual day of the cease fire order," which is not a vague period such as the "cessation of hostilities."

AS TO VALIDATION OF WAR-TIME LEASES ACT, 1944, s. 1, see HALSBURY'S STATUTES, Vol. 37, p. 341.]

Case referred to:

*(1) *Lace* v. *Chandler*, [1944] 1 All E.R. 305; [1944] 1 K.B. 368; 113 L.J.K.B. 282; 170 L.T. 185.

ACTION for the recovery of possession of demised premises. The facts are fully set out in the judgment.

D. Weitzman for the plaintiff.

W. J. M. Dennis (for *H. G. Garland*) for the defendant.

CHARLES, J.: In this case the plaintiff is claiming possession of premises under a lease which was granted upon June 3, 1941. It is a sub-lease between the plaintiff and the defendant, and the *habendum* clause is as follows:

> To hold the said demised premises unto the lessee, his executors administrators and assigns for a term commencing on the 3rd day of June, 1941, and continuing until the cessation of the present hostilities between Great Britain and Germany, meaning thereby the actual day of the cease fire order and not the day whereon peace terms are signed.

It is said on behalf of the defendant, firstly, that that tenancy is void for uncertainty, and, secondly, if it be not void for uncertainty it is within the terms of the Validation of War-time Leases Act, 1944; and if it be within the terms of the Validation of War-time Leases Act, 1944, then there is assumed to be a ten years' tenancy for certain subject to a month's notice on either side.

I have to consider whether that is a sound contention. It appears to me that it is not. The plaintiff succeeds in this case for this reason: the Validation of War-time Leases Act, 1944, refers to terms like "duration of the war" and "cessation of hostilities"—very vague terms, terms which are so vague that in *Lace* v. *Chandler* (1), which was the genesis of the Act to which I have referred, it was said that the lease was void, and so the Validation of War-time Leases Act was passed, saying (in effect) that where you get phrases such as "duration of the war" and "cessation of hostilities"—perfectly vague terms of that sort—the lease shall be for ten years certain, subject to one month's notice. But in this case one finds something quite different, and the Validation of War-time Leases Act in my view does not apply. The Validation of War-time Leases Act is very careful to define what "duration of the war" means in relation to any agreement. It means a period which, upon the proper construction of the words used in the agreement, whatever they may be, ends with or within a specified time after one of the following events—the end of the war or of hostilities, that is all, leaving it so vague that the Act is bound, if necessary, to establish what leases in those terms really meant.

It is to be observed that in these cases the court by whom such an agreement is construed may admit any evidence which in the opinion of the court may throw light on the intention of the parties as to the meaning of the said expression, and every such agreement shall be construed accordingly unless the context requires or it is shown by admissible evidence that it should be otherwise construed. What was the intention of the parties? The lease which was signed was very carefully drawn with the clear intention of avoiding the very uncertainty which is now set up by the defence. It does not say "the cessation of the present hostilities"; it is careful not to stop there, and it goes on to construe what "cessation of hostilities" in this particular agreement does mean—"meaning thereby the actual day of the cease fire order and not the day whereon peace terms are signed." It is very careful indeed to leave the matter not vague, but construed for the purpose of this agreement by the insertion of an actual day—"the actual day of the cease fire order." That is a matter which is easily ascertainable. The cease fire order, it is admitted by the defendants, in accordance with a command letter from the War Office, was at 23.01 hours Central European time on May 8, and that is confirmed by the announcement in Parliament, also accepted by the defendant, as shown in Hansard. That was a certain actual day, which construes that which had been too vague and held to be too vague—"the cessation of hostilities."

In my view, therefore, the Validation of War-time Leases Act, 1944, does not apply; and examining, as I am entitled by that Act to examine, any evidence which exhibits the intention of the parties, there appears to me to be sufficient certainty to entitle me to say that the plaintiff is entitled to possession, under this lease which I am now considering, on May 8, 1945. That was properly acted upon by the plaintiff; possession was claimed; possession has been refused, and the two points that have been set up are, (1) that it comes within the Validation of War-time Leases Act, 1944; (2) that if it does not come within that Act, it comes within *Lace* v. *Chandler* (1) and is void for uncertainty. In my view both those contentions fail, and there must be judgment for the plaintiff with costs.

Judgment for the plaintiff with costs.

Solicitors: *H. Fishman & Co.* (for the plaintiff); *M. & H. Shanson* (for the defendant).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

Re EARL OF CHICHESTER'S WILL TRUSTS, PELHAM AND OTHERS *v.* COUNTESS OF CHICHESTER AND OTHERS

[Chancery Division (Evershed, J.), April 3, 4, 1946.]

Powers—Special power over personalty—Power to appoint by deed or will—Whether special power exercisable by nuncupative will, made by soldier on active service and admitted to probate—Wills Act, 1837 (c. 26), *ss.* 9, 10, 11, 27—*Wills (Soldiers and Sailors) Act*, 1918 (c. 58), *s.* 3 (1).

Wills—Soldier's will—Note of oral instructions for will admitted to probate—Whether capable of exercising special power over personalty—Wills Act, 1837 (c. 26), *ss.* 9, 10, 11, 27—*Wills (Soldiers and Sailors) Act*, 1918 (c. 58), *s.* 3 (1).

Under the will of his father, Lord C. had special powers of appointment exercisable by deed or will over certain personalty, the powers being to jointure and raise portions. In Jan., 1944, when Lord C. was a soldier on active service, he gave oral instructions to his solicitors in regard to a will. At that time he had a wife and one daughter and his wife was *enceinte*. In Feb., 1944, Lord C. was killed. Under the provisions of the Wills Act, 1837, s. 11, and the Wills (Soldiers and Sailors) Act, 1918, the note made by the solicitor of Lord C.'s instructions was admitted to probate as Lord C.'s last will. The note stated that Lord C. wished to create a jointure of £1,000 in favour of his wife. It also stated that Lord C. wished to provide for his daughter to the best of his ability, and that, whether there was a son or not, the residue was to be divided equally amongst his children. After Lord C.'s death, a son was born. The questions to be determined were (i) whether, upon the true construction of the Wills Act, 1837, the grant of probate gave to the nuncupative will the capacity to exercise the special powers conferred on Lord C. by his father; (ii) if so, whether, upon the true construction of the document admitted to probate, the powers had been exercised. It was contended on behalf of Lord C.'s widow and daughter that the effect of the Wills Act, 1837, s. 11, properly construed, was to give a soldier power by nuncupative will not only to dispose of his own absolute personalty but also to exercise powers of appointment, whether general or special, over personal property. On behalf of Lord C.'s infant son, it was contended that sect. 11 did not apply to special powers and therefore, for a valid exercise of special powers by will, sect. 10 of the Act must be complied with :—

HELD : (i) upon the true construction of the Wills Act, 1837, the proviso contained in sect. 11, enabling soldiers in actual military service to make wills of their personal estate without compliance with the requirements of sects. 9 and 10 of the Act covered not only their own absolute personal property, but personal property over which they had powers of appointment, whether special or general. Lord C.'s nuncupative will was, therefore, capable of exercising the special powers if its language was appropriate for that purpose.

(ii) upon the true construction of Lord C.'s nuncupative will, he had exercised the power to jointure but had not exercised the power to raise portions.

[**EDITORIAL NOTE.** It is held in this case that a special power of appointment may be validly exercised by a nuncupative will made by a soldier under sect. 11 of the Wills Act, 1837. EVERSHED, J., reviews the judgments in *Re Wernher* (3) and *Godman* v. *Godman* (4), and finds that no intention to make a fine distinction between general and special powers can be deduced from them. Sect. 3 of the Wills (Soldiers and Sailors) Act, 1918, so far from being in conflict with this, is in support of the views expressed by the judges respectively deciding *Re Wernher* (3) and *Godman* v. *Godman* (4).

AS TO SOLDIERS' WILLS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 198-201, paras. 325-328 ; and FOR CASES, see DIGEST, Vol. 39, pp. 333-339, Nos. 193-252.]

Cases referred to :

(1) *Re Price, Tomlin* v. *Latter,* [1900] 1 Ch. 442 ; 11 Digest 383, *615* ; 69 L.J.Ch. 225 ; 82 L.T. 79.

(2) *D'Huart* v. *Harkness* (1865), 34 Beav. 324 ; 11 Digest 383, *611* ; 5 New Rep. 440 ; 34 L.J.Ch. 311.

(3) *Re Wernher, Wernher* v. *Beit,* [1918] 2 Ch. 82 ; 39 Digest 335, *222* ; 87 L.J.Ch. 372 ; 118 L.T. 388 ; *affg.*, [1918] 1 Ch. 339.

(4) *Godman* v. *Godman,* [1920] P. 261 ; 39 Digest 337, *240* ; 89 L.J.P. 193 ; 123 L.T. 274.

ADJOURNED SUMMONS to determine whether certain special powers of appointment conferred on the eighth Earl of Chichester by the will of his father, the sixth Earl, had been exercised by a nuncupative will made by the eighth Earl and admitted to probate under the provisions of the Wills Act, 1837, s. 11, and the Wills (Soldiers and Sailors) Act, 1918. The facts are fully set out in the judgment.

A. C. Nesbitt for the plaintiffs.

D. L. Jenkins, K.C., and *L. M. Jopling* for the widow and daughter of the eighth Earl.

J. Neville Gray, K.C., and *A. L. Ungoed-Thomas* for the ninth Earl (the eighth Earl's infant son).

EVERSHED, J. : By his will, dated June 16, 1908, the sixth Earl of Chichester settled his property which he called his Stanmer freeholds. The settlement followed the usual form and was a strict entailment and contained certain powers to jointure and to create portions exerciseable by his successors in title. It is not, I think, necessary to read the language of those powers. For present purposes, it is sufficient to state that the language employed was, in the case of the power to jointure, to this effect ; that subsequent holders of the title should have power, by deed or by will or codicil, to appoint for the remainder of the life of any surviving spouse a yearly rentcharge issuing out of the Stanmer freeholds to an amount there stated. By a codicil dated May 29, 1923, the sixth Earl recited that the Stanmer freeholds had become vested in a limited company called the Chichester Estates, Ltd., and that the property, therefore, which would pass under his will was not the freehold itself but the shares in that company, which the sixth Earl declared should be treated as an investment of capital moneys arising out of the sale of the Stanmer freeholds. By this codicil he made applicable to the shares in the estates company the provisions of his will, including the powers to jointure and raise portions which originally applied to the freehold.

The sixth Earl died on Nov. 14, 1926. He was succeeded by his elder son, the seventh Earl, who, however, survived his father for the space of 7 days only. Thereupon the eighth Earl became the tenant for life under the will and codicil and therefore became the person entitled to exercise the powers (to which I have referred) under his father's will and codicil. The eighth Earl unhappily lost his life in Feb., 1944, when serving in the Scots Guards. In Jan., 1944, when he was still a soldier on actual military service, he made what has been called a nuncupative will. The facts are that in Jan., 1944, he gave instructions for the making of a will, orally, to his solicitor, who recorded those instructions in brief form in a note. On July 25, 1945, probate was granted of that note which thereupon became treated as being the last will and testament of the eighth Earl of Chichester. Although the probate itself does not so state on the face of it, it is apparent from the order of the Probate Division of the High Court (and from an examination of the document itself, which bears neither the testator's signature nor the signatures of any attesting witnesses) that the grant of probate was made in exercise of the privileges granted or preserved to serving soldiers under the Wills Act, 1837, and the Wills (Soldiers and Sailors) Act, 1918.

The questions raised on the summons are whether, having regard to the language of that nuncupative will, there has been any exercise by the eighth Earl of any of the powers conferred upon him as such by the sixth Earl, and those questions involve two points. The first is whether the grant of probate under the statutes I have mentioned gives to the document so proved the capacity having regard to the terms of the Wills Act, 1837, s. 10, to exercise such powers on the footing—and I must treat the matter thus—that the subject-matter of the powers was personalty. If the document had the capacity by statute to exercise those powers, there then remains the second point, a point of construction: did it in fact do so ?

exercise those powers, there then remains the question of construction: did it in fact do so.

The first point was put in an attractively simple form by counsel on behalf of the widow of the eighth Earl and his daughter, the persons who claim that both the power to jointure and the power to raise portions were effectively exercised by the eighth Earl. Counsel for the widow and the daughter put the case thus: the instrument creating the powers says that they may be exercised by will or by codicil, meaning thereby any document which is admitted to probate as such; by virtue of the two statutes I have mentioned, the will of the eighth Earl was admitted to probate as a will and testament; therefore it follows that the document so proved was capable of exercising the powers. I confess that, at first blush, that simple and attractive formulation of the argument is one which appeals to me and seems, indeed, to be common sense. Were it not for the nice argument which has been raised on behalf of the son of the eighth Earl, I think I should have been content to decide the matter on that point, treating the language of the sixth Earl's will as meaning that these powers are exercisable by an instrument which has the quality of a will admitted to probate.

But, in case I am wrong, I must consider carefully the objections to that simple solution which have been raised by counsel for the son. Those objections rest upon this, that if you examine the language of the Wills Act, 1837, you find that the power or privilege preserved to soldiers on actual military service, though it extends to a disposition of their own personal property, does not in terms extend to appointments over other persons' personal property, and particularly appointments by special powers, and, therefore, that there is nothing in the enabling sect. 11 which qualifies, in the case of an English will, the necessity that an appointment by will should comply with the strict terms of sect. 10

of the 1837 Act. Had the matter been realty, one would have been thrown upon sect. 3 of the Act of 1918. As I have said, I am assuming it is right to treat the property here in question as personal property. But, for reasons which will become apparent later, it will be useful, and I think proper, to make hereafter some reference also to sect. 3 of the 1918 Act.

I must first refer to the material sections of the Wills Act, 1837. It is unnecessary for me to cite them in full but, for the purposes of this judgment, I note sects. 7, 9, 10 and 11. Sect. 7 provides :

> No will made by any person under the age of 21 years shall be valid.

Sect. 9 lays down the formal requirements of a will, which are so well known that it is unnecessary to read them. Sect. 10 provides :

> No appointment made by will, in exercise of any power shall be valid, unless the same be executed in manner hereinbefore required [*i.e.*, in accordance with sect. 9] . . .

Sect. 11 provides :

> . . . that any soldier . . . on actual military service . . . may dispose of his personal estate as he might have done before the making of this Act.

The burden of the argument of counsel for the son is this. Although (by virtue of sect. 27, in particular, of this same Act) property over which a person has a general power of appointment may properly be treated for practical purposes as his personal estate, that is not true of property over which a person has a special power ; and, although sect. 11 is undoubtedly a proviso to sects. 9 and 10, and perhaps also to sect. 7, there is nothing in sect. 11 which covers special powers of appointment, so that in the case of a special power of appointment, made by will, the obligation under sect. 10 remains, i.e., that it must, for validity, comply with all the formalities of sect. 9. It is said that the simple formulaton of the point by counsel for the widow and daughter ignores altogether the significance of the word " appoint," which means, where the appointment is to be by will, appointment by will or codicil made effective for that purpose, by compliance with sect. 10.

The answers which counsel for the widow and daughter had made to that point are really two-fold. The first is really a re-assertion of his original solution. It is this, that the will being a valid will, having been admitted to probate, sect. 10 need not be referred to : that, on the construction of the sixth Earl's will, all that was required for the document making the appointment was that it should be a valid will, viz., one admitted as such to probate. Alternatively, counsel for the widow and daughter puts his first answer thus, that sect. 10 is excluded because sect. 10 only applies to a will of an ordinary civilian Englishman. Once the will is, for any purpose, taken out of the requirements of sect. 9, it is also taken out of the requirements of sect. 10. On that part of his argument, counsel for the widow and daughter places some reliance on cases in regard to wills of personalty made by persons domiciled abroad ; he says that the effect of those cases is that the foreign will, although not complying with sect. 9, may be admitted to probate, and if the will is so admitted, the will is then treated as capable of exercising powers of appointment over personalty without any regard to sect. 10, or without the necessity of having to comply with sect. 10. The second answer of counsel for the widow and daughter to the objections raised is briefly this, that upon the true view of the Wills Act, 1837, s. 11, a soldier's will, properly so called, is as competent to exercise a power of appointment, whether general or special, over personal property as it is to dispose of the soldier's own absolute personalty, on the ground that the phrase " his personal estate " means really the personal estate of which he had any power to dispose.

I will return to that presently, but I must first say a word or two about the submission made in regard to sect. 10, and particularly in regard to the application to this case of the cases of foreign wills which I mentioned. There is no doubt, I think, that (in the case of personalty) a real distinction does exist between a foreign will, which is, *ex concessis*, wholly outside the law of England (since the proper law to determine its validity is the law of domicil) and a will which is the subject of English law, a serving soldier's will, which is only free from the requirements of particular sections of the Wills Act by the language of another section of that Act. That distinction is, I think, a proper one to make. Nevertheless, when one looks, for example, at *Re Price* (1) to which counsel for the widow and daughter referred, it is of some importance to note that the

French will which was there in question, and which did not comply with the requirements of sects. 9 and 10, was, according to the evidence, an effective disposition by French law of the lady's own property, but, as regards powers of appointment, it could not be said that by the law of France it was an effective instrument for that purpose, since the law of France does not recognise that type of disposition. The evidence stated that if a French court had to consider the effect of that will as regards the power of appointment, it would apply the English law. That statement of the evidence might well, so to speak, have brought sect. 10 again into operation, but STIRLING, J., in his judgment, did not treat that difficulty as affecting the competence of that lady's French will to exercise a special power of appointment in regard to English personalty.

STIRLING, J., quoted and approved a passage from LORD ROMILLY's judgment in *D'Huart* v. *Harkness* (2), which included the following passage (34 Beav, 324, at p. 328):

> When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognised by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute.

Counsel for the widow and daughter relied upon that passage, which is approved by STIRLING, J., for the proposition that once the will is admitted to probate as a valid will, that is all that is required; in other words, it really carries the matter back to his original formulation, that if the will is a valid will that is all that is required. Counsel for the widow and daughter relied upon this case as authority for the proposition that once the will is admitted to probate, notwithstanding that it does not comply with sect. 9, you are, so to speak, out of the difficulty of sect. 10 *quoad* an appointment. He also referred to the sentence of STIRLING, J., ([1900] 1 Ch. 442, at p. 451) which was directly in point in the judgment in *Re Price* (1):

> I fail to see why the provisions of sect. 10 of the Wills Act should apply to the will of Madame Forfillier any more than those of sect. 9.

There is great force in that argument of counsel for the widow and daughter, but, for my part, I prefer to answer the objection of counsel for the son by reference to the second answer of counsel for the widow and daughter to which I have referred, viz., that properly construed, the effect of sect. 11 is to give a soldier power by nuncupative will, not only to dispose of his own absolute personal property, but also to exercise powers of appointment, general or special, over personal property. I think that that emerges from the decisions of the Court of Appeal in *Re Wernher* (3) and *Godman* v. *Godman* (4). Since the matter is of some general importance, I think it may be of some assistance if I deal somewhat fully with this part of the case.

In *Re Wernher* (3) the question was whether a serving soldier, who was also an infant, validly by nuncupative will exercised a general power of appointment over a substantial sum of personalty. When the case came before YOUNGER, J., the Act of 1918 had not been passed, and the judge felt considerable doubt whether sect. 11 was a proviso to sect. 7, so as to enable a serving soldier, not only to disregard the form of sect. 9 (or sects. 9 and 10) but also to make a will when a minor. That point was set at rest before the case came to the Court of Appeal because the Act of 1918 had then been passed, which provided, by sect. 1, that a soldier on active service could make a will as provided by sect. 11, notwithstanding minority. The question therefore, as debated in the Court of Appeal, directly involved the point whether sect. 11 empowered a serving soldier by nuncupative will to exercise a general power of appointment. It is, of course, fairly said, that that is not the question in this case, because here the question is one of the exercise of a special power. It is no doubt true to say that there are observations in the Court of Appeal to the effect that the distinction between a man's own personal property and personal property over which he has a general power of appointment is one of no substance, whereas there is, as counsel for the son says, a real gulf between property over which you have a general power of appointment and property over which you have a special power of appointment. But, on the other hand, it seems to me equally true that the judges in *Re Wernher* (3) considered the history of this section, and based themselves, at least in part, upon the view that sect. 11 was designed to preserve a privilege which had existed since before the Statute of Frauds, and that it was a privilege which was not confined to disposing of a soldier's absolute property, but extended to any property over which he had a power of appointment, whether general or special. It is, after all, true that property over which one has a general power of appointment, though it becomes part of one's estate if one make a will, is not strictly and properly, for all purposes, described as one's own property.

The leading judgment in the Court of Appeal was delivered by SWINFEN EADY, L.J., who referred to the earlier history. That earlier history may be conveniently summarised thus, that, until the Statute of Frauds, it was competent to make a will of any property, real or personal, without any written form—indeed, orally. The requirements of the land law caused the passing of the relevant sections of the Statute of Frauds, which made it necessary that wills, both devises of land and wills of personalty, should follow certain forms, but sect. 23 of that Act provided that soldiers' wills, as regards their " moveables, wages and personal estates," might still be made as they had hitherto been made. At that point, SWINFEN EADY, L.J., observed ([1918] 2 Ch. 82, at p. 90) : that the expression " his moveables, wages, and personal estate " was directed to the distinction between personalty and land, and was :

> . . . not directed to any distinction between the soldier's own personal property and personal property over which he has a general power of appointment . . .

The reference to " general power " there was in my view, because that was the point in the action. I say that because, in other parts of his judgment, SWINFEN EADY, L.J., used the wider phrase " a power of appointment." I refer, for example, to a passage at the end of his judgment, which is as follows ([1918] 2 Ch. 82, at p. 92) :

> Again, if the contention of the appellants were correct, a soldier even of full age could not appoint personal property by an informal will. The Wills Act requires a will to be attested by two witnesses, and if the privileges of soldiers are only preserved with regard to their own personal property, an appointment by a soldier by an unattested will would fail, although the instrument creating the power only required an appointment " by will " and although an unattested will of a person domiciled abroad, and valid by the law of such person's domicil, would have been in such a case an effective appointment.

In the next short passage, in which SWINFEN EADY, L.J., dealt with sect. 3 of the Act of 1918, to which I shall refer presently, he said (*ibid.*, at p. 92) :

> Again, the new Act by sect. 3 extends the power of soldiers to dispose of real estate either by devise or appointment, although under 21 years of age, where the disposition would have been valid if of personal estate. It would be strange if in such circumstances an infant soldier could not validly appoint personal estate over which he had a general power of appointment.

Again, I think, the reference to " general " was used, because that was the particular point which was raised by the case.

BANKES, L.J., in his judgment used this phrase ([1918] 2 Ch. 82, at p. 93) :

> It seems to me that, by the use of the words " will or codicil " simply, he [*i.e.*, the person creating the power of appointment] intended nothing further than that the donee of the power should be of testamentary capacity, and that he should exercise the power by a testamentary instrument which complied with the requisites of the English law in reference to form and method of execution.

Then, after dealing with the facts of the case, BANKES, L.J., said (*ibid.*, at p. 93) :

> The argument for the appellants rests entirely upon the point that sect. 11 uses the expression " his personal estate," and great emphasis is laid upon the word " his " and it is suggested that, when the section uses the expression " his personal estate," it is intended to draw a distinction between personal estate which belonged to a soldier testator and personal estate over which he had only a general power of appointment. In my opinion that is not the true construction to be placed upon the section. It seems to me that the words " his personal estate " are there used without it being intended that any special significance should be attached to the word " his " and merely with the object of drawing a very necessary distinction between real estate and personal estate.

He then stated the reasons for coming to that conclusion.

The references in the judgment to a general power of appointment are, I think, clearly, to be attributed to the fact that that was the point in this action ;

there certainly was no intention to distinguish berween general powers of appointment and special powers of appointment, and the reasoning in the judgment does not in my judgment depend upon the approximation of property over which a testator has a general power of appointment (as opposed to property over which he has only a special power) to the testator's own absolute property. That is made clear also, I think, by a reference to the language of the third member of the court, NEVILLE, J., who said (*ibid*, at pp. 94, 95) :

> I think, however, that we may infer an intention on the part of the Legislature in that section to preserve the privileges of soldiers upon active service against the disabilities imposed by the Wills Act, and I say so because I think that, if there had been any real intention to distinguish between the personal estate of a soldier and the personal estate over which he had a power of appointment, there would inevitably have been found an express reference to such a distinction, and it would not have been left to be inferred from the character of the words used in sect. 11. The distinction between personal estate which a man can bequeath and personal estate which he can appoint by will as he pleases is an extremely subtle one, and, although for certain purposes it is necessary to bear the distinction between the two in mind, for practical purposes it does not seem an unlikely use of words that both classes of property should be referred to as " his personal estate." In the connection in which these words " his personal estate " are found in the Wills Act I think that they may well be construed as referring to both characters of property, both personal estate which a man may bequeath and personal estate which he may appoint, and I think that in giving that construction to the words used we are fulfilling the intention of the Legislature . . .

Godman v. *Godman* (4) was a probate case which arose in these circumstances. Before the Act of 1918 came into operation, a soldier made a will which purported to appoint or deal with real and personal estate in such a way that they were necessarily involved together. Such a will was incompetent to dispose of real estate (sect. 3 of the 1918 Act not having then been passed) and the question was whether the disposition had so involved personal with real estate that it could not be admitted to probate at all. On that point the Court of Appeal by a majority decided against the grant, but the significance of the case for present purposes is that the judges again considered the historical reasons for the material section of the Act of 1837, and, in my judgment, the observations which they make on that point are in line with what had been said in *Re Wernher* (3).

Referring to the position before the passing of the Statute of Frauds, LORD STERNDALE, M.R., said ([1920] P. 261, at p. 269) :

> The Wills Act, 1837, repealed the provisions of the Statute of Frauds as to nuncupative wills and required all wills to be in writing and attested with certain formalities mentioned therein, but by sect. 11 continued the privileges previously granted to soldiers on actual military service. The effect of this legislation in my opinion is to leave the wills of soldiers subject to the same principles as those relating to all wills of personalty before the passing of the Statute of Frauds and the Wills Act.

He then referred to the examination which SCRUTTON, L.J., had given to the earlier principles, and upon that all three members of the court were agreed. I therefore refer briefly to that part of the judgment of SCRUTTON, L.J. After referring to the Statute of Frauds, SCRUTTON, L.J., said (*ibid.*, at p. 280) :

> A soldier, therefore, after the Act [*i.e.*, the Statute of Frauds] (i) could not make a will as to land except in writing with three witnesses, (ii) could make a will as to personalty in writing without any particular formalities, none being then imposed on written wills, (iii) could still make an oral or nuncupative will with sufficient witnesses disposing of personalty, but not of realty, free from the restrictions of the Statute of Frauds.

Later, dealing with the Wills Act, SCRUTTON, L.J., said (*ibid.*, at p. 280) :

> When the Wills Act repealed the provisions of the Statute of Frauds as to nuncupative wills, and required all wills to be in writing attested with certain formalities, sect. 11 of the Wills Act still provided that any soldier being on actual military service might dispose of his personal estate as he might have done before the making of that Act. The soldier therefore remains at liberty to make an informal oral or written will of personalty, realty requiring the formalities of the Wills Act, 1837 and both are frequently described in the cases as " nuncupative," a term originally applied to oral wills only.

I have referred at some length to these judgments, and I venture to think it is reasonably clear that, whether or not that reasoning was essential on the facts of those cases, and although the question now before me differs from those which were before the courts in the two cases I have mentioned, nevertheless the observations cannot be regarded as merely *obiter dicta.* I regard those statements as authoritative views on the proper construction (based on the history of the matter) to be given to sect. 11, and I could not, even if I disagreed with them, which I do not, therefore express in this case a view which would really be in conflict with those statements, and, at best, would create an exceedingly fine distinction between the exercise of special powers of appointment and the exercise of general powers of appointment—which I cannot think would have been within the intention of the legislature.

I therefore reach the conclusion on this part of the case that the proviso contained in sect. 11, enabling soldiers in actual military service to make wills of personal estate without compliance with the requirements of sect. 9 and 10, covers not only their own absolute personal property, but personal property over which they have powers of appointment, whether special or general.

As the matter has been mentioned, I would like to say in conclusion a word about sect. 3 of the Act of 1918. The language of subsect. (1) is this :

> A testamentary disposition of any real estate in England or Ireland made by a person to whom the Wills Act, 1837, s. 11, applies, and who dies after the passing of this Act, shall, notwithstanding that the person making the disposition was at the time of making it under 21 years of age or that the disposition has not been made in such manner or form as was at the passing of this Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in England or Ireland it would have been valid.

It was suggested that that was a very elaborate form of words if all that was intended was to enable soldiers to dispose of realty as of personalty : it would have been simpler to amend sect. 11. But that answer plainly will not do. Such an amendment of sect. 11 would have been quite ineffective since, prior to the Act of 1837, soldiers had no special privileges as regards making wills of land. I therefore reject, on that and other grounds, the suggestion that this form of words is specially designed to limit, so to speak, the testamentary disposition of realty so as only to cover real estate which belonged absolutely to the testator. I think the meaning of that section is quite plainly to enable a soldier to make a will disposing of real estate, whether the real estate is wholly and absolutely his, or whether it is the real estate of another of which he has the power to dispose by any power of appointment.

If the argument of counsel for the son is right that would, of course, lead to the very strange result that a soldier would have power by nuncupative will to dispose of all kinds of property belonging to him or subject to powers of appointment vested in him, save only personal property in respect of which he had a special power of appointment. That is a conclusion at which the mind somewhat revolts, and it is a conclusion which I am happy to think is plainly in conflict with the view expressed by Stirling, J., in the passage at the close of his judgment in *Re Price* (1). I regard sect. 3 of the 1918 Act as being in support of the view expressed by the judges in *Re Wernher* (3) and *Godman* v. *Godman* (4), with which I respectfully agree, and I think that sect. 11 was intended to enable a soldier by these informal wills, to dispose of personalty either belonging to him or over which he had any power of appointment, general or special.

In these circumstances and for these reasons, I reach the conclusion that this informal will was capable of exercising powers to jointure and raise portions if its language was appropriate for that purpose.

Upon the first matter, whether there was an exercise of the power to jointure, I confess I feel no difficulty, and, indeed, counsel for the son has not contested the submission by counsel for the widow. The notes of the will contain this phrase :

> He, Lord C. wants create jointure of £1,000 p.a. in favour of his wife, but this could only be £500 during his mother's life as she [the mother] has £1,000 charged (maximum £1,500).

Then, in the summary at the end, there is the phrase ;

> Jointure £1,000 to wife.

It would, I think, in a document of this character, be difficult to imagine any stronger expression of an intention to exercise the power. I therefore come to the conclusion without any hesitation that this document records the eighth Earl's intention to exercise the power to jointure to the full extent.

Then comes the question of the daughter in whose favour the power to raise portions runs. At the time when this document came into existence the eighth Earl had one daughter, then aged about 2 years. She is the second defendant, Lady Georgiana Jocelyn Pelham. His wife was *enceinte* at the time, and after her husband lost his life on service she gave birth to the defendant, John Nicholas ninth Earl of Chichester. At the time, therefore, when these instructions were given it was known that another child would be born, but of course the sex of that child was not known. The material parts of the document which are relied upon are two. After providing for this jointure in the way I have indicated, the will goes on :

> Out of parents' marriage settlement moneys and late Earl's residue and his free moneys he wishes his two sisters to have [certain annuities, and against that appears the words " whether a son or not," meaning whether he and his wife have a son or do not.] The residue whether there is a son or not he wishes to go to his children equally his idea being that his daughter shall be provided for to the best of his ability.

Then, after a reference to the son, if there was a son, inheriting Stanmer, the document goes on :

> Lord Chichester feels strongly that his two sisters and his daughters should as far as possible be provided for by him.

Then at the end of the will, there is a summary :

> Residue equally amongst his children.

Now, it is said that the expression of an intention that his daughters should be provided for to the best of Lord Chichester's ability must be an oblique reference to the powers to raise portions because, on the footing that there was a son and daughter, that would be the best way of giving the maximum to the daughter. It is a somewhat far-fetched argument, and I think it is fallacious. If he wanted to do his best, according to his ability, for his daughters, he should have excluded the son altogether. The testator here is dealing with residue. He has disposed of the Stanmer estate, and one would have expected that if he was going to make any reference to the portions clause, he would have done it then, when he was dealing with the Stanmer estate, because that is the property in respect of which his power arises. It is, I think, to be noted that this was not a will drawn on the assumption that there would necessarily be no more children than the one the testator already had and the one about to be born, and it seems to me impossible to say that the provision that daughters should be provided for meant anything more than this : that Lord Chichester was expressing the point that, in the distribution of the estate generally, he did not want to give sons a preference over daughters—they were all to share equally.

In order that there should be a valid exercise of the special power there must be, by necessary inference, either some reference to the power in respect of which it is operative, or at least something indicating an intention to exercise all possible powers. I think that, giving, as one must, the most liberal construction to this document, it is quite impossible to derive from those phrases any such intention. Indeed, as I have said, it seems to me that the intention is really negatived by this phraseology, which is designed to provide equality between sons and daughters—and that is quite a different thing from giving to this one daughter the best she could get by exercising the power to raise portions in respect of the Stanmer estate.

The result, therefore, is that I hold that the will did not exercise the power to raise portions, but did, as I have said, exercise the power to jointure.

Declaration accordingly. Costs to be taxed as between solicitor and client and paid out of the estate in due course of administration.

Solicitors : *Markby, Stewart & Wadesons* (for all parties).

[*Reported by* B. ASHKENAZI, Esq., *Barrister-at-Law.*]

LIDDIATT *v.* GREAT WESTERN RAILWAY CO.

[COURT OF APPEAL (Scott, Tucker and Cohen, L.JJ., March 25, 26, April 9, 1946.]

Railways and Canals—Railways—Accommodation crossing—Duties of railway company—No obligation to employ watchman or keeper—Effect of propinquity to level crossing—Railway Clauses Consolidation Act, 1845 (c. 29), *s.* 47.

The respondent's husband, as the agent of the respondent, was driving cattle across a private accommodation crossing over a single track of a branch line of the appellants' railway, when one of them was knocked down by a goods train of the appellants which was travelling from west to east. The operation would normally take about fifteen minutes. The accommodation crossing was situated 160 yards to the east of a level crossing with the usual level crossing gates operated by an employee of the appellants. The gates at the accommodation crossing never obstructed the line but were placed some yards to the north and south of the line, opened outwards and were unlocked, opened and shut by hand. From the level crossing to the nearest signal box to the west was 1,030 yards, and to the distant signal 700 yards. The distant signal, which was not visible from the accommodation crossing, was operated by the level crossing keeper. One only of the accommodation crossing gates, *viz.*, that on the south side, was visible from the level crossing. In an action for damages for negligence the county court judge held that the level crossing keeper was under an obligation not to open the level crossing gates and pull off the distant signal until she had taken care to ascertain that the accommodation crossing was free of traffic, not only in the sense that the track itself was unobstructed, but that there was no indication that the accommodation crossing was in use or likely shortly to be used. He found that the level crossing keeper was guilty of negligence in failing to observe that the south gate of the accommodation crossing was open; that cattle were collected on the track leading up to the gate and that two of them had got across to the north. The judge made the assumption, which was not challenged, that the appellants had given no instructions to the level crossing keeper to make sure that the accommodation crossing was free of traffic before she opened the level crossing gates. The appellants contended that they were under no obligation to give such instructions and relied on the Railway Clauses Consolidation Act, 1845, s. 47, which prescribed the duties of the level crossing keeper:—

HELD: (1) the appellants were under no duty to place a watchman or keeper at the accommodation crossing, nor was there evidence that the crossing was so placed as to impose on the appellants the duty to take some greater precaution at this spot than was usual in the normal working of a railway.

(ii) mere propinquity of the two crossings could not enlarge the obligations of the appellants or extend the scope of the duties of the keeper at the level crossing.

(iii) the appellants were under no obligation to instruct all signalmen, whose boxes were within sight of an accommodation crossing, that they must not give the signal to proceed to any train unless and until they had ascertained that there was nothing to indicate that such crossing was in use or about to be used.

[**EDITORIAL NOTE.** The duty of a railway company in respect of an accommodation crossing is, as expressed by MELLOR, J., in *Cliff* v. *Midland Ry. Co.* (2), "to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway." This is implied from the authority given by the legislature to construct a railway, and the duty cannot be extended to imply a duty to keep a watch upon the persons using an accommodation crossing, even though the crossing is within sight of a level crossing having a keeper as required by the Railways Clauses Consolidation Act, 1845, s. 47.

AS TO DUTIES OF RAILWAY COMPANIES IN CONNECTION WITH LEVEL CROSSINGS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 86-89, paras. 172-176; and FOR CASES, see DIGEST, Vol. 38, pp. 307-318, Nos. 322-366.]

Cases referred to:

(1) *Ellis* v. *Great Western Ry. Co.* (1874), L.R. 9 C.P. 551; 38 Digest 313, *351*; 43 L.J.C.P. 304; 30 L.T. 874.

*(2) *Cliff* v. *Midland Ry. Co.* (1870), L.R. 5 Q.B. 258; 38 Digest, 313, *347*; 22 L.T. 382.

*(3) *Stubley* v. *London & North Western Ry. Co.* (1865), L.R. 1 Exch. 13; 38 Digest, 312, *345*; 4 H. & C. 83; 35 L.J.Ex. 3; 13 L.T. 376.

APPEAL from an order of His Honour JUDGE WETHERED made at Thornbury County Court, and dated Dec. 6, 1945. The facts are fully set out in the judgment of the court read by TUCKER, L.J.

Valentine Holmes, K.C., and *Harold Paton* for the appellants.

W. Maitland Walker for the respondent.

Cur. adv. vult.

TUCKER, L.J. [delivering the judgment of the court]: The plaintiff's husband as her agent was driving eight cattle across a private accommodation crossing over a single track of a branch line of the defendants' railway near Severn Beach, in Gloucestershire, when one of them—an in-calf heifer—was knocked down and killed by a goods train of the defendants. The plaintiff claimed damages for negligence, which were agreed at £50 and the county court judge, having held that the loss of the heifer was due to the negligence of the defendants and having rejected an allegation of contributory negligence, entered judgment for the plaintiff for this sum with costs.

The accommodation crossing is situate 160 yds. to the east of a level crossing known as Green Lane where a public carriageway crosses the line. At the level crossing there are gates which, when closed to railway traffic, block the line and, when open to railway traffic, close the carriageway. They were operated at the material time by an employee of the defendants who had been employed as a crossing keeper for 22 years. The gates at the accommodation crossing never obstruct the railway line, but are placed some yards to the north and south of the line and open outwards. They are unlocked and open and shut by hand. Post and rail fencing on both sides extends from the gates right up to the edge of the ballast forming a sort of droveway some 12 ft. in width. On the south side the droveway extended to the south of the gate.

From the level crossing known as Green Lane to the Severn Beach signal box to the west is 1,030yds., and to the distant signal 700yds. The distant signal is not visible from the accommodation crossing. The train came from west to east. As no negligence was alleged against the driver of the train it is not necessary to set out the evidence or the judge's findings as to speed, warning or the like. The plaintiff's husband was a platelayer employed by the defendants and was helping his wife in his spare time. The operation of getting the eight beasts across the line from the time when he opened the gate on the north side of the line would occupy about a quarter of an hour.

The crossing keeper also operated the distant signal which was necessitated by reason of the existence of the level crossing of the highway. What she is required to do in her dual role of crossing keeper and signalman is well illustrated by what took place on the occasion in question. She received a telephone call from the signal box at Severn Beach that a train was coming. She thereupon opened the level crossing gates for the oncoming train, locked them and pulled the distant signal off to indicate to the driver of the oncoming train that the gates were open and it was accordingly safe for him to proceed. She, no doubt, would not and should not have opened the gates until any traffic at her crossing had got safely across, nor should she have done so if she had observed any obstruction on the line. But it is said—and the judge has so held—that she was under a further obligation, namely, not to open the gates and pull off the distant signal until she had taken care to ascertain that the accommodation crossing, 160yds. distant to the east, was free of traffic, and by "free of traffic" it is clear from the judge's findings that he does not mean merely that the track itself was unobstructed but that there was no indication that the accommodation crossing was in use or likely shortly to be used. The judge has found that one only of the accommodation crossing gates, namely, that on the south side, was visible from the level crossing and that the crossing keeper was guilty of negligence in failing to observe that this gate was open; that cattle were collected on the track leading up to the gate, and that two of them had got across to the north. The cattle collected on the track on the south would not, of course, have indicated any danger unless the gate had been open, and the evidence for the plaintiff was that they were in fact in that position before the gate was opened, so that the really vital matter was the open gate. In this connection it is not without importance to observe that the judge has found that the gate on the north side was not visible to her. It was, therefore, always impossible for her to ascertain that the crossing was free of danger from the north side and she would have to judge solely from the position of the southern gate.

The judge has made the assumption—the correctness of which is not challenged by the defendants—that the railway company had given no instructions to the crossing keeper to make sure the accommodation crossing was free of traffic before she opened the level crossing gates. The defendants contended that they were under no obligation to give her any such instructions. They say she was stationed at the level crossing pursuant to the Railways Clauses Consolidation Act, 1845, s. 47, and her duties are as therein prescribed. Sect. 47 reads as follows:

> Provision in cases where roads are crossed on a level.—If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway; and the person entrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts or carriages shall have passed through the same, under a penalty of forty shillings for every default therein: Provided always, that it shall be lawful for the Board of Trade, in any case in which they are satisfied that it will be more conducive to the public safety that the gates on any level crossing over any such road should be kept closed across the railway, to order that such gates shall be kept so closed, instead of across the road, and in such case such gates shall be kept constantly closed across the railway, except when engines or carriages passing along the railway shall have occasion to cross such road, in the same manner and under the like penalty as above directed with respect to the gates being kept closed across the road.

In addition to her duties as crossing keeper she was required to put the distant signal—which existed by reason of the level crossing—into the proper position after opening or shutting the gates. With regard to the line within her vision on each side of the crossing, it is contended her duty was no different from that of any other servant of the company who might in the course of his duty observe some obstruction likely to endanger traffic on the line.

The nature of the duty owed by a railway company in connection with crossings has from time to time received consideration in the courts. It is to be remembered that railway companies operate under statutory powers, and, as was pointed out by Cockburn, C.J., in *Ellis* v. *Great Western Ry.* (1) (L.R. 9 C.P. 551, at p. 555) there is no analogy to be derived from ordinary road traffic cases. It has been generally accepted that the duty was correctly laid down by Mellor, J., and Lush, J., in *Cliff* v. *Midland Ry. Co.* (2). Mellor, J., used these words (L.R. 5 Q.B. 258, at p. 261):

> . . . when Parliament authorises a company to construct a railway and to work it, it is implied in that that the company are to work it in a reasonably proper manner, in the usual way in which railways are worked; and in crossing a footway on a level the company are bound, as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway.

Lush, J., while expressly agreeing with this general statement, said (*ibid.*, at p. 264):

> I think that where the Legislature authorises a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the Legislature intends that the persons who have to cross that line should take the risk incident to that state of things. But it may be, and I am inclined to think that it is, a

> sound principle that if the railway company, in the construction of the works so authorised—in the exercise of the discretion which the Legislature has vested in them—do anything which prevents persons passing over the line from taking care of themselves, and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there, and, as it we to make up to the public for that which they have taken away from them.

In that case the court were agreed that there had been misdirection by the trial judge. One of the misdirections alleged was that the omission to provide a gatekeeper at an accommodation crossing was left to the jury as fit for their consideration as a possible ground for finding negligence. As to this Mellor, J., said (*ibid.*, at p. 262):

> With reference also to the gatekeeper, I am inclined to think the direction was wrong.

Lush, J., said (*ibid.*, at p. 264):

> Now, it seems to me that the company would have no obligation to do either the one thing or the other—no obligation to divert the road . . . or to employ anyone there to warn persons coming on the road, because no such obligation is imposed by the Legislature . . .

It had been previously held in *Stubley* v. *London & North Western Ry. Co.* (3) that there is no general duty on railway companies to place watchmen at public footways crossing the railway on the level.

In our view, the railway company was under no duty to place a watchman or keeper at the accommodation crossing, nor was there any evidence that the crossing was so placed as to impose upon the railway company the duty to take some greater precaution at this spot than is usual in the normal working of a railway. Why then should the persons using this accommodation crossing be entitled to expect any greater consideration than the users of any of the other thousands of accommodation crossings on railway lines throughout the country? The only answer we can think of is that it happens to be situate 160 yds. from a level crossing where the line is crossed by a public carriageway and at which the company are under a statutory duty to provide a crossing keeper. We cannot see that the mere propinquity of the two crossings can enlarge the obligations of the company or extend the scope of the duties of the keeper at the level crossing. It appears to us that the duty which the county court judge has placed upon the company is tantamount to requiring them to instruct all signalmen, whose boxes are within sight of an accommodation crossing, that they must not give the signal to proceed to any train unless and until they have ascertained that there is nothing to indicate that such crossing is in use or about to be used. We are assuming a case where the whole of the accommodation crossing and both its gates are in view of the signalman, unlike the present where only one gate was visible.

In our view, a railway company is under no such obligation and so to require would be a considerable extension of the duty laid down by Mellor, J., in *Cliff* v. *Midland Ry. Co.* (2), which, it may be observed, concerned a public footpath in contrast to the private accommodation crossing in the present case where the duty can, at most, be no greater than at the former.

We have not thought it necessary to refer to the question of contributory negligence. The plaintiff's agent embarked upon an operation which would require a quarter of an hour to complete at a time when he knew a goods train might be expected, without ascertaining whether it had passed and relying only on the fact that the level crossing gates were closed when he began the operation. This would, we think, require careful consideration if there had been any evidence of negligence on the part of the company. As, in our view, there was no such evidence, the question does not arise.

The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors: *M. H. B. Gilmour* (for the appellants); *Robbins, Olivey & Lake*, agents for *Salmon, Cumberland & Evans*, Bristol (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re LANE'S ESTATE, MEAGHER AND ANOTHER *v.* GOVERNORS AND GUARDIANS OF THE NATIONAL GALLERY OF IRELAND AND AUGUSTA RUTH HEAVEN.

[CHANCERY DIVISION (Roxburgh, J.), April 15, 1946.]

Wills—Construction—Gift to sister of legacy "for life use, to revert to estate if she does not remarry"—Absolute gift to be implied on sister's remarriage.

By his will, the testator gave a legacy of £2,000 to his sister, a widow, "for life use, to revert to estate if she does not remarry." The testator had not attempted to dispose in any other way of the beneficial interest in the legacy after his sister's death. Some years after the testator's death his sister remarried. The question to be determined was whether, on her remarriage, the sister was absolutely entitled to the legacy:—

HELD: upon the true construction of the will, on the sister's remarriage there was, by implication, an absolute gift to her of the legacy.

[**EDITORIAL NOTE.** This is a home-made will, and the strong probability, to use the expression in *Wilkinson* v. *Adam* ((1813) 1 Ves. & B. 422), is that the testator intended the legatee to take something more than a life interest. The clause providing for reversion to his estate on death of the legatee unmarried would otherwise be unnecessary since it would so revert in any event.

AS TO GIFTS BY IMPLICATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 427-433, paras. 473-481; and FOR CASES, see DIGEST, Vol. 44, pp. 1250, 1251, Nos. 10777-10790, pp. 1258, 1259, Nos. 10864-10869.]

Cases referred to:

*(1) *Mellor* v. *Daintree* (1886), 33 Ch.D. 198; 44 Digest 599, *4242*; 56 L.J.Ch. 33; 55 L.T. 175.

*(2) *Re Redfern, Redfern* v. *Bryning* (1877), 6 Ch.D. 133; 44 Digest 564, *3816*; *sub nom. Redfern* v. *Hall*, 37 L.T. 241.

*(3) *Sweeting* v. *Prideaux* (1876), 2 Ch.D. 413; 44 Digest 1258, *10864*; 45 L.J.Ch. 378; 34 L.T. 240.

*(4) *Ralph* v. *Carrick* (1879), 11 Ch.D. 873; 44 Digest 1254, *10819*; 48 L.J.Ch. 801; 40 L.T. 505.

PETITION for payment out of court of a sum of £2,112 3½ per cent. war stock, representing a legacy of £2,000 bequeathed under the will of Sir Hugh Percy Lane and lodged in court pursuant to an administration order made after the testator's death. The facts and the relevant clause of the will are fully set out in the judgment.

Wilfrid Hunt for the petitioner, Mrs. Heaven (the testator's sister).

E. J. T. G. Bagshawe for the plaintiffs, trustees of the will.

H. O. Danckwerts for the Governors and Guardians of the National Gallery of Ireland (the residuary legatees).

ROXBURGH, J.: This petition raises a short but by no means easy point of construction. The testator, Sir Hugh Percy Lane, while he reproved somebody else for not relying upon expert assistance, did not himself do so in the preparation of his will. He made his will on Oct. 11, 1913, and he died on May 7, 1915. After his death an administration order was made and in pursuance of that order a lodgment of £2,000 was made to the credit of the account in respect of £2,000 bequeathed to the testator's sister, the defendant Ruth Shine, as she then was, with remainder over, free of legacy duty. That lodgment is now represented by a sum of £2,112 3½ per cent. war stock, and this is a petition for payment out of court of that sum.

The testator's sister, Ruth Shine, was at the date of his will and at the date of his death a widow, but on July 15, 1943, she remarried, and her name is now Augusta Ruth Heaven. The question which I have to determine is whether in the event of her remarriage, which has happened, she has under the will of the testator an absolute interest in the stock in court, or whether her interest is for life only. The actual words of the will are these:

> I give and bequeath . . . to my sister Ruth Shine £2,000 for life use, to revert to estate if she does not remarry. If either of my brothers or sisters predecease me [there had been gifts also to brothers] without leaving children, the sums mentioned shall revert to my estate.

There is, I think, no doubt as to the law by which I am guided. The difficulty, as usual, is its application to the particular will. I think that I can best state the law by which I am myself guided by referring to the judgment of NORTH, J., in *Mellor* v. *Daintree* (1). With regard to the will there before him, which was quite different from the present will, NORTH J., said (33 Ch.D. 198, at p. 205):

> In my opinion, I can find in the will itself (not, of course, in so many words) enough to shew that that is the true meaning of the words which have been used. I decline altogether to decide the case on any mere conjecture of what the testator intended. It is unnecessary for me to refer to any authorities other than two which have been mentioned.

He then mentioned some cases, and cited the following passage from *Re Redfern* (2), the observations being those of BACON, V.-C. (6 Ch.D. 133, at pp. 137, 138):

> I think that upon a reasonable construction of the words which the testator has used, the words which are suggested by the statement of claim ought to be read as if they were inserted in the will. If I were to do otherwise I should be going against the canon of construction, that I am to gather the meaning of the testator from the words in which he has expressed his meaning. I am not to be deterred by any accidental omission from putting the true significance on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will [that is not so in the case before me, because clearly the testator himself did this] and treat that blunder as if it was the intention of the testator. I do not hesitate in the slightest degree, therefore, to adopt the rule which HALL, V.-C., expressed in *Sweeting* v. *Prideaux* (3), that the testator must necessarily have meant what the mere letter of the will does not express.

If I am to apply that doctrine to this will I must, of course, be satisfied that the implication which I make is:

> . . . not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed.

See HAWKINS ON WILLS, 3rd Edn., p. 8 [citing *Wilkinson* v. *Adam* (1 Ves. & B.)]. As counsel for the residuary legatees, in a very forcible argument, reminded me, I must not allow myself to be guided by conjecture. Counsel for the residuary legatees cited a passage from HAWKINS ON WILLS, 3rd Edn., pp. 2, 3, which is a citation from the judgment of COTTON, L.J. (11 Ch.D. 873, at p. 878), in *Ralph* v. *Carrick* (4):

> Even very intelligent persons whose minds are not so trained are accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's mind, as regards the attention to be paid to the claims of the different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they.

As I have already said, the difficulty is to apply these doctrines to the particular will. Looking at this bequest, I am satisfied that the testator contemplated that Mrs. Shine would have something more than a life interest, because if she was to have only a life interest he would have seen that the whole beneficial interest after her death would fall into his estate unless he disposed of it otherwise, which he has not attempted to do. Therefore, when he says, " to revert to estate if she does not remarry," he must have contemplated that at her death she might have some interest beyond her life; otherwise it would have reverted to his estate in any event. If once I arrive at that conclusion, which I do, it seems to me that the necessary implication follows. If she is to have some greater interest than a life interest, and the direction is merely that the sum in question is to revert to his estate if she does not remarry, it seems to me to follow by necessary implication that it is to be hers absolutely if she does remarry. I feel no doubt that if the testator had been asked that particular question he would have said: " Of course." Therefore, in my judgment, Mrs. Heaven, who was Mrs. Shine, is, in the event which has happened, namely, her remarriage, absolutely entitled to the stock in question.

Declaration accordingly. Costs of the plaintiffs and the defendant Mrs. Heaven to be taxed and paid out of the fund in court. The defendants, the Governors and Guardians of the National Gallery of Ireland, to pay their own costs.

Solicitors: *Bird & Bird* (for the plaintiffs and the testator's sister); *J. H. Milner & Son* (for the residuary legatees).

[*Reported by* B. ASHKENAZI, ESQ., *Barrister-at-Law.*]

END OF VOLUME 1.

BIBL.
LONDIN.
UNIV.

I T - 2 FEB 1979